SHIP ARRESTED.COM

8th Members´ Meeting

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Athens, June 2-4 2011

Conference Papers

EIGHT MEMBERS' MEETING OF SHIPARRESTED.COM

ATHENS, 2-4 JUNE 2011

Hosted by Christos Th. Vardikos from Vardikos & Vardikos

Under the auspices of the Government of the Commonwealth of Dominica

Thursday 2 June

20h30 – Welcome Party
Conference Hotel Loutraki, Private beach.

Friday 3 June

09:00 – Registration

09:30 - Opening address by Valentine de Callatay, shiparrested.com network

09:45 – Morning session one

Dominica/ Ship Registry and arrest in Dominica

France / War, Sea and Cargo / Henri Najjar - Richemont, Nicolas & Associés

Denmark / Choice of law in ship arrest matters / Mathias Steinø - Hafnia Law firm

London Arbitration / Part 1 - appointment of the tribunal

11:30 – Coffee Break

12:00 –Morning session two

Nigeria / Ship Arrest – Recent Developments in Nigerian Arrest Law / AELEX

Cameroon / One country, two arrest procedures / Feh Henry - Henry, Samuelson & Co

London Arbitration /Part 2 - submissions

13:15 – Conference Lunch

14:45– Afternoon session one

China / How to secure claims in China / Weidong Cheng – Dacheng Law Offices LLP

India / The maritime jurisdiction exercised by the Courts in India / V.K. Ramabhadran

Peru / Maritime Law in Peru and South America in general / Sandro Monteblanco

16:15 – Coffee Break

16:45 – Afternoon session two

Morocco / Ship Arrest in Morocco / Hakim Lahlou – Lahlou, Zioui & Associés

Italy / Latest developments of Italian case-law on ship arrests / Claudio Perrella – AS&T

UAE / Ship Arrest in UAE / Alessandro Tricoli – Fichte & Co

London Arbitration /Part 3 – the award

18:15 – Closure of the conference.

21:00 – Conference dinner

Saturday 4 June

09:00 – guided tour of the Ancient City of Epidaurus

14:00 – lunch in Mycenae at a typical Greek restaurant

17:00 – end of the visit

The choice of law in ship arrest

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A. Introduction

When an attorney in a given country is approached with an instruction for a possible ship arrest the attorney will invariably initially refer to the law of his/her own country. The attorney will carry out an analysis of whether the conditions for conducting an arrest are fulfilled pursuant to the local law and will in most cases base the advice to the client on the applicable local law. Both the attorney involved and the local courts receiving a petition for arrest will instinctively base their evaluations and decision relative to an arrest on the local law in which they are trained.

Recent international practice has however revealed that it may not be sufficient only to undertake an analysis of the local law in order to determine whether an arrest is possible. Any ship travels around and visits many jurisdictions and the law applicable to a particular arrest is not necessarily just the law of the place where the vessel is found. A choice of law carried out in connection to an arrest might require to take into account the (a) law of the flag of the vessel, (b) the law of the relevant contract or (c) law of the place of performance of a particular contract in which the vessel has been involved.

B. The mortgagees

A ship arrest attorney will obviously be familiar with the differences between maritime claims and maritime liens; the latter establishing a property right which may rank ahead of mortgagees on the vessel whilst the former is merely giving a right to arrest but does not in itself provide for priority of the claim.

A supplier who is chasing a claim against a vessel which is heavily mortgaged will be interested in pursuing the claim in a jurisdiction which will grant priority to the supplier's claim over mortgages. A claim arising from a contract with a charterer who has folded can in certain jurisdictions be pursued directly against the ship irrespective of the fact that the contract was made with the charterer of the ship and not the owners. Also in such cases, a mortgagee will have to accept that the trade of the ship is interrupted by the supplier chasing the claim and arresting the ship. The mortgagee will have to either bail out the vessel or put it on auction provided the mortgagee finds a forced sale attractive in the relevant port and provided the supplier will not enjoy priority over the mortgagee in the event of a forced sale.

The mortgagees will prefer that the priority of the encumbrances over the ship is foreseeable at the time of providing financing and obtaining mortgage as security for the obligations of the borrower. But the mortgagee cannot be certain of his position given that the vessel is constantly moving from port to port and jurisdiction to jurisdiction. Only if the law of the flag of the vessel would be the only determinant factor for the priorities can the mortgagee obtain certainty and foreseeability. But as mentioned above, most courts and attorneys will recognise the law of the place where the vessel is found as the law governing the possibility of arrest and the priorities of the claims.

Suppliers may even have it in their power to advance their priority in a vessel by formulating their supply terms to the effect that a certain law applies or that the claim shall enjoy priority. It seems

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somewhat odd that a private agreement between a supplier and a shipowner can affect the position of the mortgagee bank who has done a perfect job in obtaining a registered valid mortgage over a vessel; but it is nonetheless the case.

Three court decisions from different jurisdictions are set out below. In each case the courts have entertained into an analysis of the proper law to apply in respect of a ship arrest and the priority of claims. The results vary and show that a supplier will have strong possibilities of enjoying a high priority in a vessel if the vessel is arrested in the right place and if the supplier has formulated his delivery terms carefully.

C. Canada – Kent Trade and Finance Inc v JP Morgan Chase Bank (the Lanner)

The m/v Lanner case concerned the forced sale of the m/v Lanner in Canada. The m/v Lanner was a Liberian registered panama tanker owned by a Liberian company and managed by Greek managers.

In August 2000 the vessel's owners borrowed US$27.5 million from JP Morgan and executed an assignment of all profits or revenues and a first preferred mortgage on the vessel and two sister ships in favour of the bank. The mortgage was registered against the ship's title in the Liberia ships register. It was undisputed in the matter that the mortgage was properly recorded.

In 2002 the borrowers faced difficulties in servicing the facility provided by JP Morgan. In 2003 the ship was arrested in Halifax and sold by the Federal Court of Canada at the request of JP Morgan. The proceeds were insufficient to cover the ship's debts. The bank was not the only creditor; a number of necessaries suppliers claimed maritime liens with priority over the bank's mortgage claim.

None of the three suppliers in the matter were domiciled or otherwise related to the US and none of their services was provided in a US port. However, pursuant to the terms and conditions of each supply contract the supply contracts were subject of US law.

Under Canadian law, a supplier of necessaries to ships is accorded a statutory right in rem and the ranking of claims to the proceeds of a sale is decided by the law of the forum (lex fori). A statutory right in rem ranks below a mortgage, which, in turn, ranks below a maritime lien. Under US law, a necessaries supplier is afforded a maritime lien by statute and thus enjoy priority over registered mortgages.

The Federal Court was asked to assess the priority of claims by deter-mining the appropriate choice of law and whether the foreign suppliers could assert maritime liens in the circumstances, simply by having made their contracts subject to US law.

At first instance, the judicial officer appointed by the Federal Court decided that the suppliers did not have maritime liens and ranked their claims below the mortgage. The judicial officer decided that because the bank was not a party to the supply contracts, the choice of law clauses did not dictate which jurisdiction's substantive law applied.

The judicial officer conducted an analysis on the proper law to apply to the distribution of proceeds using the test of the closest connecting factor. The officer examined factors such as the vessel's flag state, the place of supply and the operations (trading pattern) of the vessel. The analysis led to the conclusion that it was impossible to establish a firm link to any particular jurisdiction and since no other law had been proven, Canadian law was applied as the lex fori. It was then concluded that under Canadian law the supplies only gave rise to a statutory right in rem, which ranked below the mortgage in the vessel.

The suppliers appealed the decision. The review judge followed the first instance decision and also concluded that the suppliers had only statutory rights in rem and not maritime liens. The review judge also held that the choice of law clauses would be determinative only if the vessel's owner was personally liable under the contracts which had been contracted with the managers. The judge found insufficient evidence that the vessel's manager had authority to bind the owner to the supply con-tracts, since the management agreement was not before the court. The result of the applicable law was also found using the closest connecting factor test which could not point to US law.

The judge also considered whether maritime liens could arise in the circumstances. The judge held that maritime liens would not arise, on the basis of expert evidence which showed that US law would not provide a lien where the necessaries were supplied by a foreign supplier to a foreign ship in a foreign country.

A majority of the Federal Court of Appeal allowed the appeal on the basis that US law did apply and that it would recognize maritime liens in the circumstances. The court ordered that the suppliers'

claims be paid from the proceeds of sale of the Lanner.

Despite the fact that maritime liens arise by operation of law, the court's analysis led to the conclusion that the appropriate conflict rules to be applied were those of contract. The chief justice decided that, although maritime liens are in rem rights, a choice of law clause in a supply con-tract should govern maritime transactions and the rights which arise therefrom.

The express choice of law provision was held to govern the contract, al-though the court acknowledged that, given the extra-contractual nature of maritime liens, it remained possible that where a maritime transaction is so closely connected to a jurisdiction, that jurisdiction's substantive law may be held to apply rather than the choice of law in the con-tract. In a case cited by the Federal Court of Appeal a US choice of law clause was held not to apply as the vessel registration, the residences of the shipowner and charterer, and the place of supply delivery were all in Canada. However, in the Lanner case, no substantial connection was established to override the choice of law clause in the supply contracts.

The court then considered whether US law operated to establish maritime liens where a non-US supplier provided necessaries to a foreign vessel in a foreign port. Upon review of a number of cases from US courts the court found that under US law a US choice of law clause would afford a maritime lien to a supplier of necessaries irrespective of whether there was any connection to the US. The court concluded that the suppliers held maritime liens against the ship.

The m/v Lanner case shows that it can be pivotal to the suppliers' priority whether the terms and conditions of the supply contract point to the law of a country where the supplier enjoys a maritime lien. Under US law the supplies attach to the vessel as maritime liens and the Canadian courts found the mere insertion of a US law clause in a contract other-wise unrelated to the US gave the suppliers priority over the registered mortgage. It should be borne in mind that even under Canadian law the supplies would rank below the mortgage.

D. USA – Trans-Tec Asia v m/v Harmony Container (the Trans-Tec)

In the Trans-Tec a supplier sought to arrest the vessel m/v Harmony Container in Long Beach, California. The vessel was Malaysian flagged and Malaysian owned. At the time of the supply the vessel was engaged in a ten year charter to Kien Hung Shiping Company (Kien Hung) and it operated in a loop from ports in North and South America to ports in Japan, China, and Korea. The vessel made regular stops in Mazanillo, Mexico and Long Beach, California.

In February 2003 the managers of Kien Hung sought a quote for delivery of fuel with Trans-Tec Asia (Trans-Tec) being a Singaporean entity. An order confirmation for the supply of 1150 metric tons of bunkers was circulated to the managers who forwarded it to Kien Hung. The bunker confirmation was a one-page document which was issued to "Kien Hung Shipping Co. Ltd." and "The Vsl, Her Master and Owners" as "Buyer," and Trans-Tec as "Seller". The order confirmation incorporated Seller's standard terms and conditions dated 3 January 2000 and stated "Pls in-form us if you require a copy." Kien Hung did not request a copy.

The terms and conditions of Trans-Tec referred to US law under a clause which read the following:

Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the United States and the State of Florida, with-out reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which Seller takes legal action.

The bunkers were delivered to the ship in Busan, Korea by Trans-Tec in late February 2003. In March 2003 Kien Hung went bankrupt and Trans-Tec was left with an unpaid supply. Hamburg Süd took over the activities and continued the operations of the vessel. Trans-Tec in-formed that it would arrest the vessel in Long Beach unless security was posted for the supply and when such security was not given it moved on to arrest the vessel in Long Beach.

The first instance court did not recognize that the choice of law contained in the contract would have the effect that a maritime lien would come to exist and it thus decided in favour of the owners. Upon appeal, the appeal court entered into a close analysis of the choice of law and it concluded that the parties to the contract had validly agreed to apply US law to the contract although none of the parties or the performance of the contract was in any way related to the US. Having determined that the choice of law clause was validly agreed, the court held that a maritime lien emanated from the supply and reversed the decision in favour of the suppliers. The US Supreme Court denied certiorari.

E. Sweden – Cester Entreprises Corporation v Nortoil & Ship-ping Ltd (the Stormy Annie)

The Stormy Annie matter concerned an arrest of the m/v Stormy Annie in Gothenburg, Sweden at the request of a bunker supplier, Nortoil & Shipping Ltd (Nortoil). The vessel was Panama flagged and owned by Cester Entreprises Corporation (Cester).

Nortoil was an Isle of Man registered company in the business of sup-plying bunkers. Nortoil delivered bunkers to the m/v Stormy Annie in Port Said in late January 1994 delivered by Copetroll acting a subcontractor for Nortoil.

The oil was delivered at the request of the Slovenian company Finmar S A who were time charterers of the vessel at the time. Despite several re-minders for payment, Finmar S A failed to pay for the supply and Nor-toil moved on to arrest the ship in the port of Gothenburg in the fall of 1994.

Pursuant to Swedish law a supply of bunkers does not establish a maritime lien in a vessel. Cester thus moved to have the arrest lifted arguing that Nortoil had contracted with Finmar S A and that Cester did not carry any liability for the debts of its former time charterer with whom Nortoil had contracted.

Nortoil argued that the question of whether a maritime lien existed in respect of the supply should not be determined according to Swedish law but rather by reference to the law of the flag of the vessel being Panamanian law. Under Panamanian law supplies to a vessel attach as maritime liens on the vessel.

The first instance court in Sweden held that the relevant law to apply was that of the flag and it thus concluded that a maritime lien existed. On this background the supplier was entitled to arrest the vessel al-though there was no contract with the owner and irrespective of the fact that Swedish law would not give rise to a maritime lien. The matter was a appealed and the appeal court affirmed the decision.

F. Conclusion

The cases reviewed above shows that it may not be sufficient merely to look to the law of the place of an arrest in order to determine whether the conditions for performing an arrest are fulfilled and to determine the priority of claims.

Suppliers to ships can greatly advance their priority by drafting terms that refer to the laws of a country that recognize maritime liens for ships supplies. Such clauses can at least be expected to be upheld in the US and Canada.

London Arbitration

A presentation by Dick faint (Charter Wise Ltd), Russell Kelly (LA Marine) and Brian Taylor (Ashfords)

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Richard FAINT, LLM MBA FCIArb MIEx - Chartered Arbitrator, took in 1963 his 1st Trip to sea - Ex - seagoing deck officer (Deckboy to 1st Mate). In the seventies, he worked in London and got experience of Lloyd's and Companies Insurance market as a claims broker and for a major East European fleet (P&I placing & claims handling). From 1981to1995, he was in Switzerland, trouble-shooting for ANDRÉ & CIE Switzerland – dealing with all problems related to the International Sale of Goods Carried by Sea including Insurance, Litigation, Sale Contracts, Charterparties, Bills of Lading, Letters of Credit and Arbitration in various formats. In 1995 he sets up CHARTER WISE LTD. as a Shipping & Trade Consultancy Advising on and handling claims, arbitrations and problems for various companies.
Richard has special interests in: The Buyers position in the International Sale of Goods Carried By Sea; Sub - standard ships, particularly S.32 (2) SOGA 1979. Discrepant documents. E-Commerce in International Trade; Master's responsibility in modern day contracts; Author 'Marine Law' & 'Marine Insurance' for International Institute of Marine Surveyors; Guest lecturer at Institute of Maritime Law, Southampton & speaker at Trade Conferences and Seminars; Writer and commentator in trade journals.

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Russell Kelly – LA Marine. After training with and subsequently becoming a partner at one of the oldest established shipping law firms in London, Russell relocated to Southampton and was instrumental in setting up LA Marine, the shipping law team at Lester Aldridge LLP in 2000. Ten years on and the team now operates out of offices in London and Southampton, is one of the larger regional specialist shipping law practices in the UK and boasts a client base spanning the globe.

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Brian Taylor, LLM, is a solicitor in the marine team of Ashfords LLP, who have offices in the UK at Bristol, Exeter, London, Plymouth, Tiverton and Taunton. Prior to becoming a solicitor he was, for seventeen years, an engineer with the Royal Navy, serving on a variety of ships ranging from Aircraft Carriers to Frigates, and ashore in the Falklands during the conflict of 1982. His two previous employed positions have been with marine solicitors. He then had his own marine practice, based in Bournemouth.
Brian undertakes a variety of commercial marine work including FD&D claims, Admiralty work, yacht claims and vessel sale and purchase. He acts for legal expenses insurers, P&I Clubs, ship owners, charterers individuals, port and marina operators. He has extensive experience of vessel arrest and judicial sale and can be easily contacted out of office hours.
Brian also has a particular interest in defendant personal injury work and has handled cases involving, deaths, slipping and tripping, disease, hand, eye, arm and leg injuries, amputations, passenger claims and stress.
Brian aims to minimize litigation risks and costs exposure by thorough investigation, collection of evidence and early risk assessment of claims. He advises on a realistic litigation reserve, promotes mediation or negotiated settlement whenever possible but will firmly and robustly defend matters if they proceed to trial.

It is always interesting to hear at the Shiparrested.com Conferences how arrest can be achieved in many and various jurisdictions around the world.

However, it is important to consider the "why" behind all this? What is the purpose of arresting a vessel, wherever it may be and however that the arrest is effected? What are we doing it for?

The "Why?"

1. To found jurisdiction for a claim and/or
    a. Maritime Liens
    b. Security for a claim
    c. Security against an Arbitration Award in your favour.

2. The principal reason for an arrest is invariably to obtain security for a marine claim.

3. The very fact of an arrest [on a source of income] often leads the parties to swift and conclusive negotiations. It can generate a prompt settlement of the claim and the release of the vessel [but not always]

4. Where there is no quick settlement of the claim the arresting party will require security to be provided before the vessel is released.
So, before the arrest can be lifted acceptable [to the arrestor] security must be provided.

5. This can be:-
    a. A bank guarantee
    b. A P&I Club "Letter of Undertaking"
    c. Gold bars

    Whatever form of security is accepted by the arresting party care needs to be taken over the wording and the amount of the security provided.

    The value of security needs to be agreed and acceptable to the arresting party.
    It must take account not only of the sum claimed but also interest on that sum for the likely duration of the litigation and the legal costs likely to be incurred.

    The wording of the guarantee given must specify the basis upon which the guarantor will release funds to the claimant [usually upon confirmation of settlement being reached on the presentation of a court judgment or arbitration award}.

The purpose of this presentation

If we accept that not all arrests lead will lead to a fabled "quick settlement" and that parties do get entrenched ideas about claims, then we can see the need for obtaining an arbitration award.

An arbitration award is not a solution to the problem – it is a resolution decided not by a judge but by an independent person [or persons] who will, generally, issue an award in favour of one party.

So today we will look at and consider how to go about obtaining an arbitration award [it being understood that most countries[1] have agreed that such awards will be enforceable].

An arbitration award is therefore the "trigger" required to enable a party to obtain the funds which were provided by way of security when they took action to arrest a ship.

1. Which Jurisdiction?

- The first consideration. Where should the claim be pursued?

The arrest may have been effected in one country BUT the underlying contract [out of which the claim arises] may include a law and jurisdiction clause providing for disputes to be determined by way of arbitration in or by the courts of another country.

2. What does the contract say?

- Have the parties agreed between themselves what jurisdiction will apply?
- Charterparties, for example, often have a London or New York arbitration clause.

[1] New York Convention on Enforcement

- Does the contract specify the jurisdiction and the forum for the arbitration? [e.g. Arbitration as per English law with the forum for the Arbitration being Athens].

In such circumstances the claim [under English law] needs to be pursued in the appropriate forum.

3. What if the contract says nothing?

- The English Arbitration Act 1996 requires the agreement to Arbitrate to be in writing[2].

- Trade contracts [such as GAFTA or FOSFA] get around this by having standard terms that refer to an agreement to arbitrate according to published rules. [It is always better to specifically incorporate an arbitration clause into the contract].

- Even if there is no such arbitration clause specifically incorporated into the contract the parties can always agree to refer the matter to arbitration if they are so minded and can agree terms for such an ad hoc arbitration.

4. What if one party contests jurisdiction?

- Perhaps one party contests the validity of the arbitration clause or the appointment of an arbitrator,
- In such cases the tribunal has power to determine such issues without the need to resort to the courts.

Depending upon the nature of the contract out of which the dispute arises, the matter may be referred to arbitration pursuant to the rules of a certain trade association, such as GAFTA or FOSFA for example, or quite commonly in charter agreements to the London Maritime Arbitrators Association (LMAA)[3].

All arbitrations conducted pursuant to English law, whether they also be conducted in accordance with the rules of the LMAA, GAFTA, FOSFA or any other body, will be governed by the provisions of the Arbitration Act 1996.

5. Procedure

- Having determined that a dispute is to be resolved by way of arbitration a claimant must then proceed to appoint the tribunal.

- The contractual arbitration clause in the contract may specify how the tribunal is to be made up.

- It could be a sole arbitrator[4] or provide for each party to appoint an arbitrator, with the two so appointed then appointing a third or an umpire.

- If you, as the claimant, feel happy with a sole arbitrator remember this can only be done with the agreement of the respondent and the arbitrator.

- Where the parties cannot agree on who shall be the sole arbitrator the claimant can apply to the court to make an appropriate appointment.

- In GAFTA once then parties have agreed in principle to a sole arbitrator that arbitrator is appointed by GAFTA

- Where the arbitration clause requires each party to appoint an arbitrator and one party fails to do so the other party can, after giving appropriate notice, have his arbitrator appointed as sole arbitrator and the award of that sole arbitrator will be binding on both parties as if he had been appointed by agreement.

- If this happens in GAFTA arbitrations the claimant applies to GAFTA who will, after payment of a fee, appoint an arbitrator on behalf of the respondent.

- Certain trade associations require the appointment of the arbitrator to be made by or through the association.

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[2] See s5 Arbitration Act 1996

[3] Not a Trade Association but a "club of practising arbitrators"

[4] A contract calling just for "London Arbitration" is an agreement to refer the matter to a sole arbitrator.

During our presentation we will go through a worked example, using brief details of an actual reported case, of the process of

- appointing the tribunal and agreeing directions for the conduct of the reference,
- the exchanging of submissions and
- the publication of the award.

6. Can you Appeal against the findings of an arbitration award?

- Once published there is limited scope for appeal to the courts on a question of law arising out of an award.

- This is a matter of public policy – arbitration is to be encouraged and not take up valuable Court time.

- The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed beforehand that the tribunal is not required to give reasons for its decision[5].

- An appeal can only be pursued (unless the other party agrees to the appeal – which is unlikely) with leave of the court.

- Leave to appeal will only be granted in limited circumstances and there are strict time limits.

- The application for leave to appeal must be made within 28 days of the date of the publication of the award. Note however that the award is published when the tribunal give notice to the parties that it is available. It may not actually be read by the parties for some time after that, when one of them has paid the costs of the award, so the time for lodging an application for leave to appeal may already have been severely reduced by the time the parties get to consider the award.

7. Enforcement

- Once the award is final and all rights of appeal have been exhausted the successful party will want to enforce it.

- If security was obtained at the outset it should be a simple matter of presenting the award to the guarantor and collecting the funds.

- Where there is no security and the losing party does not honour the award voluntarily it may be necessary to take enforcement action through the courts of the country in which the defendant resides or has assets located.

- This where the fun begins.

[5] See S52 (4) of the Arbitration Act 1966

Ship Arrest – Recent Developments in Nigerian Arrest Law

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INTRODUCTION

This paper considers the recent developments in Nigerian Ship Arrest Law – the Admiralty Jurisdiction Procedure Rules (AJPR) 2011 for the Federal High Court of Nigeria (FHC), and its effect on ship arrest practice.

The new AJPR 2011 (the New Rules) was made by the Chief Judge of the FHC (CJF)[2] on 1st March 2011 and came into force on 14th March 2011. This is pursuant to section 254 of the Constitution of the Federal Republic of Nigeria 1999[3] and section 21 of the Admiralty Jurisdiction Act (AJA) 1991[4] which empower the CJF to make rules of practice and procedure for the FHC and to carry into effect the objects of the AJA. Together, the AJA and the AJPR govern admiralty matters in Nigeria, with the FHC as the court of first instance. The admiralty jurisdiction of the FHC is well stated in the AJA[5], whilst the AJPR provides the procedure for the exercise of its jurisdiction. Appeals from the FHC lie to the Court of Appeal and the Supreme Court.

The New Rules are the result of the review of AJPR 1993 (Old Rules), which became necessary to keep up with the demands in shipping practice; noting the dynamic nature of the shipping industry. Various issues have been addressed in the AJPR 2011, with new rules added to bring the AJPR in line with modern shipping practices. There is in total, 23 Orders in the New Rules, amounting to an increase from the 17 Orders in the Old Rules.

I shall briefly highlight the criteria for arresting a ship in Nigeria before discussing the provisions of the New Rules as it affects ship arrest.

CRITERIA FOR ARRESTING A SHIP IN NIGERIA

The process of applying for the arrest of a ship requires that the claimant possesses a 'Maritime Claim' as defined in Section 2 AJA and reproduced in Appendix 1 to this paper. This generally means that the claim must be a *'proprietary maritime claim'* or a *'general maritime claim'* as follows:

1. Proprietary maritime claims include claims relating to the possession of a ship, title to or ownership of a ship or a share in a ship, mortgage of a ship or of a share in a ship, mortgage of a ship's freight or claims between co-owners of a ship relating to the possession, ownership, operation or earning of a ship. Also claims for the satisfaction or enforcement of a judgment given by the Court or a court (including a court of a foreign country) against a ship or other property in an admiralty proceeding *in rem*.

2. General maritime claims include claims for damage done or received by a ship (whether by collision or otherwise), claims for loss of life, or for personal injury, sustained in consequence

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Adedoyin's practice is in maritime, aviation, banking, finance and insurance. He appears as counsel before all courts in Nigeria and has assisted in presenting claims before the High Court of Justice Ghana. His clients include P&I Clubs, banks, shipowners, offshore and marine companies, oil and gas production, marketing and distribution companies. Mr. Afun is recognised as one of the 'bright stars' in the Nigerian maritime law and has authored articles on maritime law in international publications.

[2] Justice Daniel Dantsoho Abutu, FCI Arb. (as he then was)
[3] Cap. C23, Laws of the Federation of Nigeria (LFN) 2004
[4] Cap. A5, Laws of the Federation of Nigeria (LFN) 2004
[5] Sections 1, 3 and 5 AJA

of a defect in a ship or in the apparel or equipment of a ship as well as arising out of an act or omission of the owners or characters of a ship.

Once the claimant has ascertained that his claim falls within the meaning of a Maritime Claim as listed above, he may shall commence proceedings against the ship at the FHC (in the judicial division covering the port or area where the ship is located). The procedure for applying for the arrest for a ship shall be discussed later under the New Rules.

SHIP ARREST DEVELOPMENTS IN NIGERIA

The New Rules in its bid to update the AJPR has provided new provisions, thus changing the face of ship arrest in Nigeria. Some of the important provisions are discussed below:

1. Application for the Arrest of a Ship

The new procedure for applying for the arrest for a ship is set out in Order 7, Rule 1 (1) AJPR 2011 and reproduced in Appendix 2 to this paper. With this, a claimant with a Maritime Claim may now commence *in rem* proceedings against the ship once the ship is within jurisdiction **or expected to arrive jurisdiction within three days** *(Emphasis mine)*, at the time of filing the application.

This amounts to a major improvement as the Old Rules (Order VII) failed to state whether a ship must be within the jurisdiction of the court or not, before an application for the arrest of the ship can be made to the FHC. The practice therefore was for a ship to be within the jurisdiction of the court (and no more) before an application for the arrest of the ship can be brought made. This was premised on the fact that the FHC cannot arrest a ship[6] not within its jurisdiction (.i.e. every open sea within twelve (12) nautical miles of the coast of Nigeria (measured from the low water mark) or of the seaward limits of inland waters[7]); and that the grant of an order otherwise, would amount to an order in futility.

The documents required to be filed for the warrant of arrest of a ship remains the same as under the Old Rules: Writ of summons; statement of claim; motion exparte disclosing a strong prima facie case for the arrest of the ship; supporting affidavit stating the nature of the claim, that the ship is within the jurisdiction of the court or is expected to arrive jurisdiction within three days, and that the ship may leave the jurisdiction of the court at anytime. The claimant is also required to provide an Affidavit of Urgency; Indemnity in favour of the Admiralty Marshall for his expenses in effecting the arrest order; and an undertaking as to damages in favour of the Defendants.

The new procedure for applying for a warrant of arrest of a ship deals with the lacuna in the Old Rules which allowed claimants to lose their window of opportunity to arrest a ship for a claim, simply because they have to wait for the ship to be within jurisdiction before applying a warrant of arrest.

2. Caveats

As part of the new procedure for obtaining a warrant of arrest for a ship, the New Rules clearly state that the Claimant shall be responsible for conducting a search of the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that ship.[8] This puts an end to a lacunae in the Old Rules that allowed a claimant obtain an arrest order for a ship, knowing fully well that a caveat against arrest exists. This was the practice simply because the Old Rules did not require the Claimant to search the caveat register before applying for a warrant of arrest of a ship and where such a caveat exists, inform the court accordingly.

Although the Praecipe for Caveat against Arrest – Form C in the Schedule to the Old Rules provides that the Caveator undertakes to appear with 14 days of service of a writ commencing action against a ship, the Caveat against Arrest issued in practice and accepted by the Registrar/Admiralty Marshal provides that the caveator shall in a suit involving the ship within 3 days of been served. The New Rules have amended (Form 8 in the Schedule to the AJPR 2011) and brought the rules in line with practice.

Finally, a Praecipe for Caveat against Release of a Ship is provided for the first time in Form 10 to the Schedule to the New Rules.

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[6] Section 7, AJA provides that the service and arrest of a ship shall take place within the limits of the territorial waters of Nigeria.
[7] Section 1(1) Territorial Waters Act, Cap. T5, Laws of the Federation of Nigeria (LFN) 2004
[8] Order 7 Rule 1(2) AJPR 2011

3. Change in Beneficial Ownership

The provisions of the New Rules provide that a warrant of arrest of a ship may not be issued where the beneficial ownership of the ship has, since the issuance of the writ of summons, changed as a result of a sale or disposal by any court exercising admiralty jurisdiction[9]. It is however the duty of the new owner to inform the FHC of his ownership of the ship to prevent the arrest of his ship.

4. Custody and Sale of Ship Under Arrest

As you would recall, the application for a warrant of arrest constitutes an undertaking from the Claimant to the Court to pay the Admiralty Marshal, on demand, an amount equal to the expenses of the Admiralty Marshal in relation to the arrest. As such the Admiralty Marshal was allowed under the Old Rules to accept from the Claimant, an amount not exceeding ₦5,000.00 (USD$32.30) as deposit towards discharging its liability and the Admiralty Marshall may make more demands for interim payments on account of those fees and expense. This amount is clearly not commensurate to the demands of the time.

Whilst advising claimant's on the ship arrest practice in Nigeria, we estimate the Admiralty Marshal's weekly cost as ₦100,000.00 (USD$645.15). Taking note of the current realities, the New Rules now provided that the *"Admiralty Marshall may accept an amount of money not less than ₦100,000.00 and not more than ₦500,000.00 as deposit towards discharging the liability; and make more demands fortnightly for payment on account of those expenses*."[10]
The Admiralty Marshall is also required to file a return or receipts and expenditures to the Court within 7 working days of the release of the ship[11]

5. Judicial Sale of a Ship

In light of the various ships that litter the waterways of Nigeria as a result of ship owners failing to provide bail for the release of vessels under arrest or entering appearance in a suit, Order 6, Rule 2 of the New Rules now empowers the court on the application of the arrestor or other interested party order the sale of the ship where the bail or sufficient security has not been provided 6 months after the date of arrest.
The ship is to be sold by the Admiralty Marshal and the proceeds of sale paid into an interest yielding fixed deposit account in the name of the Admiralty Marshal pending further orders of the court.

6. Reparation For Needless Arrest

One of the most notable changes to ship arrest practice under the New Rules is the issue of reasonable compensation for needless arrest. This is addressed under Order 11, Rule 2 AJPR and reproduced in Appendix 3 to this paper the New Rules.

Under the Old Rules, if it appears to the Court that the arrest of any defendant, or any order of attachment, sale, or injunction, or any warrant to stop clearance of, or to arrest any ship was applied for on insufficient grounds; or if the suit in which any such application was made is dismissed, or judgement is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting such suit, the court may **(on the application of the defendant made at any time before the expiration of 3 months from the termination of the suit) award against the plaintiff such amount, not exceeding the sum of ₦20,000.00 (USD$129.00 Approximately)** *(Emphasis mine)*, as it may deem a reasonable compensation to the defendant for any loss, injury, or expenses which he may have sustained as a result of such arrest, attachment, order of sale or injunction , as aforesaid.

The maximum sum of ₦20,000.00 for compensation for needless arrest of a ship has been highly criticised over few years. The frivolous and/or vindictive arrest orders obtained over the years by various claimants has been blamed on this provision as it does not serve as a deterrent. The New Rules, understanding the economic importance of a ship arrest to a ship owner has provided the Court with the power to "award against the plaintiff **such amount as it may deem reasonable compensation** *(Emphasis mine)* to the defendant for any loss, injury, or expenses which he may have sustained as a result of such arrest, attachment, order of sale or injunction."

Order 11, Rule 2 AJPR would definitely serve as a deterrent to false applications for arrest orders and prevent an abuse of the court process.

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[9] Order 7 Rule 1(4) AJPR 2011
[10] Order 9, Rule 2 (2(a and b) AJPR 2011
[11] Order 9, Rule 2 (2d) AJPR 2011

CONCLUSION

It is believed that the AJPR 2011 would improve maritime practice in the Nigeria as well as help in mitigating cost of doing business in the country. The above rules mirror current realities in the industry and closely modelled in line with notable Maritime Jurisdictions of the world like, England & Wales.

Although the implementation of some the provisions of the New Rules might not be clear, I believe this would be "ironed out" with practice as Nigeria remains a significant shipping nation and the largest in cargo volume in the West African sub-region. Nigeria therefore remains a favourable jurisdiction for ship arrests and an enviable investment destination.

One Country, Two Ship Arrest Procedures

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1) The Cameroon Bijural System

The rule is for a country to have one system of laws.

But Cameroon is an exceptional bijural system with the English Common Law operating in the two Anglophone regions of North West and South West and the French Civil Law operating in the eight francophone regions of Adamaoua, Centre, East, Far North, Littoral, North, West and South. These systems of law expanded to Cameroon through colonisation by conquest.

1.1 The Common Law System

The Common Law family embraces the law of England and legal systems of the English type. It has certain features which make it peculiar.

First, it is basically a judge made law. The Common Law was formed primarily by judges who had to resolve individual disputes.

Second, the legal rule in the Common Law system is one which seeks to provide the solution to the case in hand. It does not seek to formulate a general rule of conduct for the future.

Three, rules relating to the administration of justice, procedure, evidence and execution of judicial decisions have, for Common Law jurist, an interest equal, or even superior, to substantive rules of law. Common Law attaches a lot of importance to adjectival law. English Law was conceived essentially in the light of litigation and so is more concerned with the administration of justice.

This is why guiding principles such as "fair trial" and "due process of law" are central to English Law.

Four, and finally, the Common Law procedure is accusatorial and is essentially oral.

In Cameroon the received English Law consists of:
- The Common Law;
- The doctrines of equity; and
- The statutes of general application in force in England as of January 1, 1900.

The current general law of Anglophone Cameroon comprises:
- Received extraneous basic law;
- Enactments by the English Colonial Legislative Authority; and
- Enactments by the national legislative authority since independence;
- International treaties.

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Besides his day to day general practice, he is specialized in International Commercial and Corporate Law. His involvement in Maritime transactions has enable him to obtain more than fifty ship arrest orders (some from the French Civil Law jurisdiction and others from the English Common Law jurisdiction of Cameroon).
It is interesting to note that a considerable number of these arrest orders have been used only as a negotiation strategy to obtain letters of understanding from the P & I clubs.
Bilingual in English and French, Barrister Feh is also an OAPI Licensed Industrial Property Attorney.

1.2 The Civil Law System

The French Civil Law was inspired by the Roman Law of old. It has certain special marks which make it stand out as a system of law in its own right.

One, the French Civil Law procedure is inquisitorial and is essentially written.

Two, in the French Civil Law the rule of law is elaborated by legal scholars and not judges.

Three, the French Civil Law has evolved as an essentially private law, i.e., as a means of regulating private relationships between individual citizens.
Four, the legal rule is much more abstract than in Common Law.

Five, and finally, all Civil Law jurisdictions have adopted the legal technique of codification. French law stands out as the prototype of the Civil Law system of laws because the Napoleonic codes have served as model codes for other countries.

The current general law of Francophone Cameroon comprises:
- The received French Civil Law;
- Enactments by the French Colonial Legislative Authority; and
- Enactments by the national legislative authority since independence;
- International treaties.

The translocation of the Common Law and the Civil Law to Cameroon earlier last century has created differences between the legal traditions of England and France where they originated and that of Cameroon into which they were imported. Today, modern Cameroon municipal law is a hybrid, indeed a modified version of the received laws, peculiarly adapted to its Cameroon environment. Moreover, it is, also a novel blend of local and imported laws and international treaties, harmonised and integrated together. In other words, we are witnessing the emergence of a new species of Common plus Civil Law, a specifically Cameroonian Common/Civil law defined, fortified and elaborated by local legislation and decisions of Cameroonian courts.

From the foregoing it can be seen that, the substantive laws being virtually the same in essence (received laws from colonial masters, enactments by the colonial legislative authorities, enactments by the national legislative authority since independence and international treaties) the main difference between the Cameroon English Common Law and Cameroon French Civil Law is procedural

2) The Law Governing Ship Arrest in Cameroon

The law governing ship arrest as a conservatory measure is the CEMAC Merchant Shipping Community Code of 03/08/2001 (the code). This international treaty was inspired chiefly by the International Convention of 1999 on the Arrest of Ships and the Brussels Convention of 1952 on the Unification of Certain Rules on the Arrest of Ships.

The code defines ship arrest (as a conservatory measure) as, arrest for security pending a substantive matter or the procurement of the executory formulae. It is the temporary immobilisation of a ship by a claimant (presumed creditor) following a court order to that effect.

2.1 Object of arrest

According to the code, the object of arrest shall either be:
- The ship which caused the maritime claim to arise or
- A sister ship, meaning any other ship belonging to the person who was owner of the ship which caused the maritime claim to arise at the time the maritime claim arose. That is, if the ship which caused the maritime claim is not available (destroyed, sold out or missing in the high seas) any other ship belonging to the maritime debtor at the time of the arrest procedure would be arrested.

The only exception to the object of arrest is a ship belonging to a state or exploited by a state, which cannot be arrested if, at the time the maritime claim arose, it was doing exclusively a government (and not commercial) service.

2.2 Procedure

Ship arrest in Cameroon is done by way of petition ("requête" in French or motion ex parte in English) to the president of the competent court who decides on the same in the form of a court order ("Ordonnance" in French or Ruling in English) after seeking the opinion of the Competent

Maritime Authority (the Department of Merchant Shipping and Inland Waterways of the Ministry of Transport). The schedule to this petition are (of course) justifying documents, one of which shall be a notice to pay, addressed by the claimant to the debtor, which notice was either simply ignored or, the claimant was not satisfied with any reaction the debtor might have shown. The other justifying documents would include, but not limited to, and not exclusively, the bill of lading and the marine survey report.

As soon as the maritime debt appears justified (if only in principle) the ruling is granted. In practice though, the opinion of the maritime authority (being of a consultative character) is not binding on the judge.

Petitions in view of ship arrest are filed on clear days (Mondays-Fridays) during working hours (7.30a.m.-3.30p.m or, so long as the private secretariat of the president of the competent court is open).

If allowed to move naturally (depending upon the number of petitions pending the president's attention) it could take up to two weeks for the petition to be granted (or rejected). But if you see the private secretary (and talk convincingly) your petition would be put on top for the urgent attention of the president, who may also be interested in such a file. In effect, we have often put pressure and obtained arrest orders within hours of receiving instruction.

2.3 Jurisdiction (ratione materiae)

According to section 120 of the code, ship arrest as a conservatory measure is ordered by the competent court in the form of a ruling upon a motion ex-parte. Which is this competent court? The code does not specify. This is the more reason recourse most be made to section 15(2) of law n° 2006/015 of 29/12/2006 on Judicial Organisation in Cameroon which provides that the President of the Court of First Instance (meaning Magistrates Court) or a judicial officer designated by him shall have jurisdiction to rule on motions ex-parte (or ordonnances sur requêtes in French).

There are five sea ports (Douala, Kribi, Limbe, Idenau and Tiko) and one river port (Garoua) in Cameroon. All these ports fall within the territorial jurisdiction of respective Courts of First Instance.

In the spirit of the code however any Court of First Instance in Cameroon is competent to issue an arrest order against any ship within Cameroon territorial waters. I think in practice we only seize the port-town courts of Douala, Tiko, Limbe, Buea, Kribi and Garoua for purposes of convenience, especially if a visit to the locus in quo has to be made.

While some of these courts are in the civil law jurisdiction, others are in the common law jurisdiction.

3) The ship arrest procedure of "ordonnances sur requête"

"Requête" in etymological French is "petition" in English. In the French civil law jurisdiction the petitioner prepares the petition which is essentially a narrative of the facts of the claim and the law. Attached to this petition are documents to justify the maritime claim (bill of lading, maritime survey report, and formal notice to pay, in a typical case). These documents must either be original or certified true copies. To the petition must be affixed a fiscal stamp upon filing. To the "ordonnance" is also affixed a fiscal stamp. Although no filing fee is charged categorically, a refundable "ordonnance" fee is deposited always. Of course being a non-disputable procedure, the adverse party is not put on notice. The applicant also proposes (the wordings of) the "ordonnance" for the judge to simply append his signature thereto if, from the petition and justifying documents the maritime claim appears justified in principle pursuant to article 120 of the code. Here it is purely a documentary procedure.

If the petition is rejected, the judge would not sign the "ordonnance" and usually gives a reason on a small note written in red attached to the petition as a rule of thumb. The "ordonnance" fee is refunded, but the applicant loses the fiscal stamps.

Once he signs the "ordonnance" it is dated and formalized, and a fiscal stamp affixed thereto when the petitioner comes to collect ("expeditions") copies thereof. While the original "ordonnance" signed by the President remains in the courts file, the "expéditions" are signed and issued by the registrar-in-chief.

At the bottom of the ordonnance is written "cette ordonnance sera executé par provision sur minute avant enregistrement" which when loosely translated into English reads "this order shall be executed forthwith before registration". With this the applicant moves straight to the sheriff/bailiff for him to execute the "ordonnance".

Indeed the civil law procedure of "ordonnance sur requête" is designed to move quickly in a veritable attempt to be expeditious and expedient. With a ready-made "ordonnance", an applicant could even meet the judge anywhere (along the corridors) to sign for the former to proceed to the court registry only for formalization.

4) <u>The ship arrest procedure of motion ex-parte</u>

In the English Common Law jurisdiction of Cameroon, the applicant prepares a motion paper notifying a hearing date (to be confirmed by the registrar-in-chief) and his prayer(s) numbered in Arabic numerals. Attached to the motion paper is an affidavit in support thereof.

This affidavit is made up of statements of fact (and facts only) numbered (in Arabic numerals) in paragraphs deposed to by the applicant and sworn to before the Commissioner of oaths - the registrar-in-chef of the Court. Attached to the affidavit are documents (mere photocopies are allowed) in support of the maritime claim, numbered alphabetically. Upon filing, a non-refundable filing fee is payable and the amount depends on the number of exhibits as numbered. Being a motion ex-parte, the adverse party is not put on notice.

On the date of hearing the applicant moves the court and the matter is adjourned for ruling to any near future date or the same day depending upon the pressure put on the judge by the applicant.

The judge drafts the ruling before handing it down. If the arrest is ordered, the applicant has to follow up for the ruling to be typed and signed by the judge and the registrar-in-chief.

At the bottom of the ruling may (or may not) be written "this order shall be executed forthwith". "May (or may not)" because, unlike in the French civil law procedure wherein the "ordonnance" by dint of practice is drafted by the applicant in a given format, neither practice nor procedure has provided a particular content for the ruling to have in the English Common Law system. The registrar-in-chief would usually insist that the ruling must be registered. A ruling fee is payable.

Indeed the Common Law procedure of ex-parte motions is designated to achieve delay. There are cases where the hearing of an ex-parte proceeding has been adjourned many times and the applicant is forced to relax unduly (out of sheer frustration) in the face of an otherwise urgent situation.

5) <u>Biased nature of the maritime code</u>

The Merchant Shipping Community Code of 03/08/2001 is applicable to the CEMAC region comprising: Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea and Tchad. With the exception of the two Anglophone regions of Cameroon, this whole community in French-speaking. So the code, initially conceived in French, remains in French. I do not know anybody who has ever seen an English version. Indeed some of the courts in the English- speaking regions of Cameroon are not even aware of its existence. In effect, in matters of ship arrest, they still apply the Supreme Court (civil procedure) Rules, Cap 211, 1948 Edition, of the Laws of Nigeria. Order 34 of these rules empowers the High Court to entertain motions (on notice and ex-parte). Its order 22 (on Detention of Ships) empowers the High Court to order the arrest and detention of any ship about to leave the jurisdiction.

In 2007 in the matter of M/V Nadine Corlett vs Col. Eyong Tabong the Court of First Instance, Tiko, ordered the arrest of the ship in ignorance of the Merchant Shipping Community Code and when I filed a motion under the code to discharge the order, the court disregarded the code and my application was dismissed. So each time we have to apply for the arrest of a ship before a court in the English Common Law jurisdiction we start by providing the court a copy of the code. Yet there is sometimes a problem of translation into English which bedevils interpretation.

From the foregoing it can be seen that in purely Private International Law terms (where a legal system is said to coincide with a country) Cameroon is made up of two countries, to wit:

- The Cameroon English Common Law jurisdiction and
- The Cameroon French Civil Law jurisdiction.

6) <u>Graphic dissimilarities of the one procedure to the other.</u>

	Cameroon English Common Law	**Cameroon French Civil Law**
1	Procedure is commenced by motion ex-parte.	Procedure is commenced by "Ordonnance sur requête."
2	The motion paper and affidavit are made of facts and facts alone.	The "requête aux fins de saisie" comprises facts and an admixture of law.
3	The exhibits may be mere photocopies.	The "pièces jointes" must be either originals or certified copies.
4	The motion paper does not have to have a fiscal stamp.	The "requête aux fins de saisie" must have a fiscal stamp.
5	A non refundable filing fee is payable.	There is no categorical filing fee. There is rather a refundable deposit for the "ordonnance."
6	A hearing date is fixed with possible adjournments.	No hearing date is fixed
7	Matter may (sometimes) be heard in open Court and decision rendered in open court.	The ordonnance is always signed in chambers.
8	The applicant moves the court.	The applicant does not need to be heard.
9	The ruling is drafted by the judge.	The ordonnance is ready made by the applicant and presented to the judge for signature.
10	The ruling is signed by both the judge and registrar-in-chief.	The ordonnance is signed by the judge alone and the registrar-in-chief only signs copies (expéditions in French) thereof.
11	The word "forthwith" may not even appear at the bottom of the ruling. The registrar-in-chief generally insists the ruling must be registered for him to affix the executory formulae on it.	At the bottom of the "ordonnance" is written "… execution par provision sur minute avant enregistrement" meaning "execution forthwith before registration."
12	The ruling is sometimes registered.	The ordonnance is never registered.
13	The sheriff/bailiff wants to see the executory formulae before proceeding with execution.	The sheriff/bailiff does not need to see the executory formulae before proceeding with execution.
14	When an application is made under the Supreme Court (civil procedure) rules, in ignorance of the Merchant Shipping Community Code, the opinion of the maritime authority is not required.	The opinion of the Maritime Authority is always sought.
15	The procedure to have the court discharge its ruling is by way of motion on notice which does not require leave of court.	The procedure for the court to set aside its ordonnance is by way of "référé d'heure à heure" which requires leave of court.
16	The arrest order is within the jurisdiction of the President of the Court of First Instance. Yet the President of the High Courts have been seen to entertain motions ex-parte and motions on notice on matters of ship arrest.	The arrest order is the exclusive jurisdiction of the President of the Court of First Instance being the "juge des requêtes" (or petition judge).
17	The ruling, although an interlocutory measure, is rendered in the name of the people of Cameroon.	The ordonnance being a provisional measure, is not considered a judgment, so not rendered in the name of the people of Cameroon.
18	The language of the procedure is English.	The language of the procedure is French

How to Secure Maritime Claims in China

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Introduction

1. It is important to get a claim secured in advance. It is especially so in a depression when many people tend to be less willing to honor their payment obligations. Sometimes, the seeking of security is strategically used as a means of oppressing the opponents to achieve a good settlement, but more frequently, it is due to the genuine concern that the claim will not eventually be paid even a favorable judgment or arbitral award would be obtained.

2. What then one can do to secure a claim which concerns China in one way or another e.g. where the discharge port is in China or where the opposite party is a Chinese entity etc.? There are quite a few measures that one may take outside China, e.g. a freezing order to be issued by the English court, or the Rule B attachment in New York, or the arrest of a ship in South Africa, or in India as it has recently become popular. These measures are however beyond the scope of this paper. What are here discussed are the actions that one may take in China to protect its claims.

3. There are various options. Whilst the arrest of ships remains the most popular method of securing a maritime claim, there are other less known but equally effective preservative measures that can be used, including the freezing of bank accounts and the attachment of receivables etc. The following is a review of the preservative measures that are available within the Chinese jurisdiction for securing maritime claims.

Arrest of ships

The law on arrest of ships

4. The law governing the arrest of ships is mainly the Maritime Procedure Law ("MPL") which came into force in 2000. Although China has not ratified any arrest conventions, the MPL has adopted, in all material respects, the International Convention on Arrest of Ships, 1999.

Jurisdiction

5. For the purpose of obtaining security for a maritime claim, an application for the arrest of a ship should be made to a competent maritime court. There are currently 10 maritime courts in China; they are Tianjin, Dalian, Qingdao, Wuhan, Shanghai, Ningbo, Xiamen, Guangzhou, Haikou and Beihai. The jurisdiction of each court extends to the port where it is resided and the area that is adjacent to the particular port. For convenience, all of the courts have set up their own dispatch tribunals in nearby ports to deal with claims arising in those areas, e.g. Shanghai Maritime Court has set up dispatch tribunals in Lianyungang, Yangkou (near Nantong) and the Yangshan Islands.

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Mr. Chen specializes in bill of lading, charterparty, ship sale & purchase, shipbuilding, collision, personal injury, commodities, and insurance matters. Mr. Chen has been working for the world's major shipowners, charterers, P&I clubs, insurance companies and traders for more than 10 years and is one of the most highly recommeded shipping lawyers in China.
Mr. Chen has represented interntoinal clients in numerous court actions before all maritime courts as well as the appellate courts and the Supreme Court. Mr. Chen is also experienced in maritime and commercial arbitration before CIETAC and CMAC. Mr. Chen is a supporting member of the London Maritime Arbitrators Association

6. An application for arrest of ships can be made to a Chinese maritime court in order to secure a claim that is subject to foreign arbitration proceedings, e.g. London arbitration as frequently seen in charterparty disputes. The application can be made before or after the arbitration proceedings have been commenced.

7. If the application for arrest is made before the substantive proceeding has been commenced, it shall be filed with the maritime court where the ship is located; on the other hand, if the substantive proceeding has already been underway, the application shall be filed with the court where the claim is lodged. However, if the existing court or arbitration proceeding is not within China, the competent court for arrest is nevertheless that of the place where the ship is located.

Ships subject to arrest

8. Basically, a ship can only be arrested if her owner is the debtor of a maritime claim. There are two exceptions:

(1) In relation to a ship under a bareboat charter, she can be arrested if the bareboat charterer of the ship is liable for the maritime claim and remains as the bareboat charterer of the ship when the arrest is effected; and

(2) In respect of claims which enjoy maritime liens, e.g. claims for crew wages, port charges, salvage, loss of life or personal injury or other claims in tort (e.g. loss of or damage to property arising from a ship collision), the ship which gave rise to the maritime liens can be arrested even if she has changed hands.

9. Sister ships can also be arrested. A "sister ship" means any ship (other than the particular ship giving rise to the maritime claim) which is owned by the shipowner, bareboat charterer, time charterer or voyage charterer who is liable for the maritime claim. However, the arrest of sister ships is not available to claims with respect to ownership or possession of a ship.

Documentary requirements

10. A written application for arrest need be filed together with supporting documents. The claimant is obliged to make out a prima facie maritime claim. Original copies of the supporting documents are usually not required for the purpose of the arrest; however, the claimant is normally required to submit an original copy of the application which should be properly executed by an authorized director of the claimant ("legal representative").

11. When a lawyer is involved in the arrest (which usually is the case) a set of power of attorney documentation (incl. a power of attorney, a certificate of the identity of the legal representative and a certificate of incorporation of the claimant) should also be submitted. These documents, if issued by a foreign company, should be notarised and legalised at the place of incorporation of the claimant and/or where its authorized director resides. Normally, the court will accept an un-notarised copy of the power of attorney documentation for the arrest application but will set a time limit within which the original copies of the notarised and legalised documents should be submitted to the court.

Counter security

12. In practice, the most important document required for the arrest is the security that the claimant should provide when filing the application documentation ("counter security"). The MPL provides that the courts may request the claimant to provide counter security for the arrest application. In practical terms, however, the courts almost invariably require a proper counter security to be submitted for the application (counter security may be dispensed with in some exceptional cases, e.g. in claims for crew wages or death/ personal injury).

13. The widely accepted forms of counter security include letters of undertaking issued by first class local insurance companies (such as PICC or China Re), cash deposit, and letters of guarantee issued by first class local banks. A letter of undertaking of the China P&I Club is also acceptable but not those issued by foreign P&I clubs. If the claimant is a domestic company, it is also possible that the courts will accept a letter of guarantee issued by its parent company or associated company provided such company is sufficiently substantial (like Cosco or China Shipping).

14. As to the amount of the counter security, the MPL provides that the amount should be determined by the courts on the basis of the loss that the application may cause to the respondent. Such loss may include maintenance expenses during the detention of the ship, loss of earning and the expenses incurred for obtaining an alternative security to release the ship etc. Frequently, the

courts adopt the "30-day hires" formula in the determination of the amount of counter security — the amount required is the daily hire of the ship to be arrested multiplied by 30 days (the statutory arrest period) plus reasonable maintenance expenses to be incurred. The rationale appears to be that 30 days is a sufficiently long period within which the respondent should be able to post an alternative security to have the ship released: any more delay should probably not be considered as being caused by the application, rather it should be deemed as due to the failure of the respondent promptly to arrange for the alternative security.

15. The "30-day hires" formula is not a uniform method used in the determination of counter security. On some occasions, the courts are prepared to be more flexible by accepting more or less 15 days hires as the basis for calculating the amount of counter security. On some other occasions, the courts would require an amount that is equal to the claim amount or a certain percentage of it. The courts have the discretion to decide the exact amount, and it would be wise for one to consult with the relevant court before any step is taken to obtain the counter security.

Order of arrest

16. The law requires the court with which the arrest application is filed to make a decision as to whether the arrest should be granted within 48 hours after it has received the application documentation. The order will be served by the judges on board the ship. The harbor master will also be notified of the arrest order immediately which will ensure that the ship does not leave the port.

17. There are reported cases in which the courts were to be commended for their prompt response when the urgency of the cases has required quick action, e.g., some judges were able to arrest a ship during weekend or holiday. There is no guarantee, however, that a particular court or judge(s) will be prepared to accept or deal with an application for arrest beyond the working hours.

Challenging the order

18. If the respondent is of the view that the claimant was not entitled to arrest the ship or that the security sought was excessive, it may within 5 days of the arrest file a challenge with the court. The court shall make a decision within 5 days upon receipt of the challenge application. The court may deal with the challenge on documents only, or if necessary, a hearing may be arranged at which the parties have the chance to discuss about the subject of the challenge.

19. It should be noted that the applicant is obliged to commence legal actions in relation to the substantive claim within 30 days of the arrest order failing that the court may vacate the order or order return of any security that has been obtained through the arrest.

Attachment of cargo or bunkers etc.

20. Analogous to the arrest of ships, cargoes that are in the custody of a carrier including those which have been received for shipment or those which have been discharged may, under the MPL, be attached to secure a maritime claim. Bunkers or provisions on board a ship can similarly be attached. The cargo or bunkers or provisions must be owned by the debtor, and the burden of proof as to the ownership is on the applicant.

21. Like the arrest of a ship, the attachment of the above categories of assets can be used to secure claims which are subject to foreign arbitration. Further, the application for attachment may be made before the arbitral proceedings have been commenced.

22. Unlike the arrest of a ship, however, the counter security required for the attachment of cargoes or bunkers or provisions on board a ship is normally equal to the amount of the claim to be secured. Further, it should be noted that the substantive legal actions must be started within 15 days after the attachment order has been made or else the applicant will run the risk that the attachment will be released forthwith.

Attachment of other assets

23. Other than ships, cargoes carried by ships, bunkers and provisions on board the ships, the MPL has not expressly referred to any other assets that may be attached as security for a maritime claim. Despite this, however, as a matter of statutory interpretation, it is submitted that an application may be made to attach other assets in accordance with the MPL for securing a maritime claim.

24. However, the Supreme Court has in one of its judicial guidance purported to restrict the scope of property preservation for maritime claims under the MPL only to ships, cargoes carried by ships, bunkers and provisions on board the ships. The guidance provides that the preservation of other assets, e.g. bank accounts, should be subject to the Civil Procedure Law ("CPL"). This guidance had caused some confusion in judicial practice which is explained in more details below.

Freezing bank accounts

25. Under Chinese law, deposits in a bank are considered as property which is subject to attachment for security or enforcement purposes. The freezing of bank accounts is not a preservative measure unique to the protection of maritime claims. It is open to all types of claims e.g. those arising under international sale contacts or agreements of foreign investment etc.

26. There is some uncertainty as to whether the MPL shall govern the freezing of bank accounts in maritime claims, or rather the more general law, i.e. the CPL, shall apply. The differences between the application of these two laws are mainly in two respects:

(1) It is generally considered that under the CPL property preservation is not available to support foreign arbitration proceedings. Thus, if the CPL would be applicable, the courts would probably be unable to make an order to freeze the bank accounts to secure a maritime claim which is subject to foreign arbitration. On the other hand, the MPL is clear that an application can be made to preserve maritime claims whether or not the substantive claims are subject to court or arbitral proceedings, and no distinction has been drawn as to whether the proceedings have to be within China.

(2) In relation to the amount of counter security required, according to the MPL, it should be determined by the courts on the basis of the loss that the application may cause to the respondent. In comparison, under the CPL, the amount required is in general equal to the amount of the claim for which the application for freezing is applied.

27. In consequence, where an application is made before a maritime court to freeze the bank accounts in order to secure a maritime claim which is subject to arbitration in London or another foreign country, some of the maritime courts will be reluctant to grant the order on the grounds that they do not have jurisdiction to deal with the application under the applicable laws, i.e. the CPL. However, the other maritime courts may well hold different views and are generally prepared to freeze bank accounts in line with the MPL to support a foreign arbitration.

28. In practice, the courts which are amenable to freezing applications are prepared to accept a sum up to 30% of the claim amount as sufficient counter security for the application. This is because, unlike the attachment of some other assets e.g. a ship, the freezing of accounts tends to cause less severe loss. The counter security can be in the form of payment into court or a bank guarantee. Certainly, the court has the discretion and in any specific case, it is advisable that the particular court should be consulted with as to what will be required in all the circumstances of the case.

29. In the application for freezing bank accounts, the applicant is obliged to provide the bank account information, including the name of the bank and the account number. Without this information, the court will be unable to freeze the accounts. Sometimes, the court will be able to make an investigation on its own to locate (more) bank accounts of the respondent, but usually, the courts will not bother to make such investigations and they will only freeze the accounts as disclosed by the applicant. Normally, the bank account information will be collected by the applicant in its previous business dealings with the respondent or through independent investigations.

30. After the freezing order has been granted, the relevant banks will be served with the order. The banks as garnishees shall, in compliance with the order, freeze the accounts to the extent of the claim amount. It is notable that the respondent is not allowed to make any use of the frozen sum.

31. It is also to be remembered that the applicant has an obligation to renew the freezing order in six months of the order failing which the order will be vacated.

Attachment of receivables

32. In addition to bank accounts, other assets may also be attached, e.g. land, offices premises, equipment (like machines) or vehicles. Similarly, ownership must be proved. The information of any assets e.g. their whereabouts, is usually collected through a company or assets search or through separate investigations conducted before any application is considered.

33. Receivables are also subject to attachment. Receivables in the particular context means chose in action enjoyed by the respondent against a third party. For example, the charterers (respondent) owed some unpaid hires to the owners (applicant). At the same time, the charterers are sellers of a shipment of iron ores the buyers of which (third party) shall pay certain sum to the charterers. In the circumstances, the owners may apply to attach the sums due under the sale contract between the charterers and the third party (the receivables) as security for the unpaid hires. As can be seen in this example, however, it will be practically difficult to prove that certain amount is due under another contract to which the applicant is not a party. It may be fair to say that the attachment of receivables is not an ideal measure of protection; nevertheless, it remains an option at a time when a claimant is eager to grasp whatever opportunity that is available to secure its claims.

The Maritime Jurisdiction exercised by the Courts in India

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Introduction:

India is a country of continental size. It is surrounded by the seas the Bay of Bengal from the East to South-East, to the Indian Ocean to the South and the Arabian Sea to the West – and has a long coast line of over 7500 Kms. India has a long tradition of ship building and maritime trade.

Origin of Admiralty Jurisdiction

For the first time, Admiralty jurisdiction came to be invested in the recorder's Court at Bombay which was established by a Royal charter dated 20th February, 1978. The recorder's Court was substituted by the Supreme Court of Judicature at Bombay which was established by Letters Patent issued under the charter of 1823. This Court exercised four jurisdictions viz. Civil, Criminal, Ecclesiastical and Admiralty jurisdiction. Clause 53 of the said Letters Patent inter alia provided that in respect of certain territories the Supreme Court of Judicature at Bombay shall be the Court of Admiralty which would exercise the same jurisdiction as was used and exercised in that part of Great Britain called England. Thus the Supreme Court at Bombay was invested the same jurisdiction on its Admiralty side such jurisdiction exercised by the High Court of Admiralty in England. The Supreme Court of Judicature at Bombay established in 1823 was replaced by the High Court of Judicature at Bombay established in 1862. The Letters Patent of 1962 was once again replaced by Letters Patent of 1865.

In the year 1890 British Parliament passed an Act called Colonial Courts of Admiralty Act 1890 providing that the legislature of British India may declare certain courts to be Colonial Courts of Admiralty and the Courts so declared shall have the Admiralty jurisdiction declared under the Act. In exercise of powers conferred by this Act, the Indian legislature passed the Colonial Courts of Admiralty Act, 1891 under which, the High Courts at Calcutta, Madras and Bombay and some other High Courts (which are not now part of the territory of India) to be Colonial Courts of Admiralty and these Courts were invested with such Admiralty jurisdiction as was exercised by the High Court of Admiralty in England under "any statute or otherwise".

At the relevant time the jurisdiction of High Court of Admiralty in England had considerably expanded under the Act of 1840 and Act of 1861. Thus as on the year 1891 three of the High Courts in India exercised Admiralty jurisdiction over the territorial waters of India and such jurisdiction was exercised in respect of and/or claims arising out of the title, possession of a vessel, salvage, damages, wages, bottomry, service and necessaries, building, equipping or repairing of ship provided at the time of institution of cause the ship or the proceeds thereof were under the arrest of the Court, disbursement made by the Master of a ship, claims for damages to the cargo imported and any claim in respect of any mortgage duly registered according to the provisions of Merchant Shipping Act, 1854.

India became independent on 15th August, 1947. By Sections 18 (1) and 18 (3) of the Indian Independence Act, 1947 the existing laws were continued in force until other provisions were made by the legislature of India. Article 372 of the Constitution of India provided that all the laws in force in India immediately before the commencement of the Constitution would continue in force until

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altered or repelled or amended by a competent legislature or other competent authority. As a result thereof the High Court of Judicature at Bombay, Calcutta and Madras continued to exercise the same jurisdiction that was vested upon it by the Colonial Courts of Admiralty Act, 1890 over the territorial waters of India. This is so because the jurisdiction conferred on these three Courts under the Colonial Courts of Admiralty (India) Act, 1891 was not limited by the territory. By the Colonial Courts of Admiralty (India) Act, 1891 statement of objects and reasons of the bill, pursuant to which the Colonial Courts of Admiralty (India) Act, 1891 was enacted inter alia provided that the Governor General has accepted the opinion of the Governor of Bombay and the unanimous opinion of the Hon'ble Chief Justice of Calcutta High Court to the fact that the jurisdiction of Colonial Courts of Admiralty in India should not be limited territorially or otherwise. Thus the Act of 1891 did not impose any territorial limitation geographically and it extended to the entire territorial waters of India.

For the first time in the year 1961 the High Court of Bombay in the **Kamalakar** (1) case had to consider whether the suit for collision could be filed in a Court other than a High Court. While tracing the history of Admiralty Courts in India, at the relevant time the High Court of Bombay took cognizance of the provisions of the Colonial Court of Admiralty Act, 1890 and the Colonial Court of Admiralty Act, 1891 under which certain High Courts were declared Courts of Admiralty and were vested with only such jurisdiction as the High Court of Admiralty in England under any statute or otherwise. The High Court while giving a narrow interpretation to the words "under any statute or otherwise" concluded that the Admiralty Courts in India could then exercise only such jurisdiction which was exercised by the Courts in England when the Colonial Court of Admiralty Act, 1890 was passed. The High Court therefore held that Indian Admiralty Court could exercise the power of arrest against the vessel only in respect of such claims which were enumerated by the Admiralty Court Act, 1840 and the Admiralty Court Act, 1861. It may be at once noted herein that in England the British Parliament had conferred far wider admiralty jurisdiction by enacting the Supreme Court of Judicature (Consolidation) Act, 1925 which was repelled by the Administration of Justice Act, 1956 which was also repelled by enacting the Supreme Court Act of 1981. Thus until the year 1992 the Indian Admiralty Courts exercised jurisdiction only over few heads of claims enumerated in the Admiralty Court Act, 1840 and the Admiralty Court Act, 1861.

In the year 1992 the Supreme Court of India in the case of **m. v. Elisabeth v/s. Harwan Investment & Trading** (2) had an occasion to consider an issue as to whether the Admiralty Courts in India would have power to arrest a foreign vessel in respect of non-delivery of cargo in a Port outside India. Section 6 of the Admiralty Court Act, 1861 had vested power upon the Admiralty Court only in regard to any claim by the owner or the consignee or assignee of any Bill of Lading in respect of **goods carried into India**. It was then sought to be argued that no High Courts in India was vested with Admiralty jurisdiction to arrest the vessel in respect of a cause of action relating to outward cargo. The Supreme Court of India after scanning through the entire source of Admiralty jurisdiction, for the first time laid down that the view adopted by the Bombay High Court in the Kamalakar case (Supra) that the jurisdiction of the Admiralty Court in India stood frozen as on date of the enactment of the Colonial Courts of Admiralty Act, 1890 was held to be incorrect. The Supreme Court held that while conferring Admiralty jurisdiction on certain High Courts in India by the Act of 1890, it did not incorporate any English statute into Indian law, but to equate the Admiralty jurisdiction of Indian High Courts over places, persons, matters and things to that of the English High Court. The Court further held as the Admiralty jurisdiction of the English High Court expanded with the progress of legislation, by repelling the earlier statutes including the Admiralty Court Act of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts a corresponding growth and expansion of Admiralty jurisdiction during pre-independence era. The Supreme Court of India gave wider interpretation of the words "by virtue of any statute or otherwise" appearing in sub-section 2 of the Colonial Courts of Admiralty Act, 1890. The Supreme Court held that the expression "by statute or otherwise" was required to give a liberal interpretation and held that Admiralty jurisdiction of High Court would in any case have been considered to have progressed at least upoto the level of the English Administration of Justice Act, 1928 which was the last of the series of enactments in England on the subject prior to 1947 (when India became independent) and consequently Indian Courts would exercise identical and unlimited jurisdiction.

The Supreme Court took note of the fact that Indian statutes lagged behind the development of international law in comparison contemporaneous statues in England and other maritime countries. The Court noted that India had also not adopted the International Convention relating to the arrest of sea going ships Brussels 1952 as India seemed to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate International trade. The Court held that "although these conventions have not been adopted by legislation, the principles incorporated in the convention are themselves derived from the common law of nations as embodying the felt necessities of International trade and held that they are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships". Thus the Supreme Court of India gave not only a far wider interpretation for the expression "by

statute or otherwise" appearing in the Colonial Admiralty Court Act, 1890 but also held that the Arrest Convention 1952 could be pressed into service for enforcement of maritime claims against foreign ships though, India had neither adopted nor ratified the Arrest Convention.

Thus the failure on the part of the legislature to enact any law on Admiralty and not keeping pace with the development which was taking place globally; it is the Supreme Court of India which is vested with extraordinary jurisdiction in one stroke expanded the scope of power of the Admiralty Courts in India to exercise in respect of all claims which are set out under the International Convention relating to arrest of seagoing ships Brussels 1952. As on date though the Indian parliament has not enacted any legislation in respect of Admiralty jurisdiction every claim set out under the concept of maritime claim as deemed under the Arrest Convention is exercised by the Admiralty Courts in India.

What then is the test laid down for the purpose of obtaining security by arrest of ships:

In the year 1995 Videsh Sanchar Nigam Limited a Government Telecom Company had filed an Admiralty action in the High Court of Bombay and had sought arrest of a foreign flag vessel by claiming that the vessel had damaged its cables and claimed a security a sum exceeding Rs. 280 million. The High Court of Bombay after ordering the arrest of the vessel initially, based on the report of the surveyors directed release of the vessel without ordering any security whatsoever. The Supreme Court of India considered whether the Claimants had made out a prima facie case and whether they were entitled to obtain security for their entire claim. The Court held that at the time of application seeking arrest it is sufficient if the Claimants has even an arguable case even though a difficult case. The Court held that security should be to the extent that the amount should be sufficient to cover the Plaintiffs claim together with interest and costs on the basis of reasonably arguable best case. (Ref. **Videsh Sanchar Nigam Ltd. v/s. m. v. Kapitan Kud & Ors**.) (3)

Despite the Supreme Court holding that the Admiralty Courts in India exercised far and wider jurisdiction, what was still not settled was whether the High Court in its Admiralty jurisdiction exercised power over the territorial waters of India or the power of the High Court is circumscribed by the territory of the respective State. In the year 1997 the legal heirs of one Kamlakanth Dube who died on board a vessel named m. v. Umang filed an Admiralty suit seeking compensation in the High Court of Bombay. The vessel was then lying in the port of Kandla which was part of the State of Gujarat. The jurisdiction of the High Court of Bombay was questioned in regard to its power of arrest over a vessel which was anchored in a Port which is part of the State of Gujarat. The High Court of Bombay relying upon the Colonial Admiralty Court Act of 1891 held that the jurisdiction of the High Court of Bombay is not circumscribed territorially. The Court held that notwithstanding the fact that the Port of Kandla is part of the newly carved State of Gujarat, the jurisdiction of the High Court of Bombay is over the territorial waters of India. Its view was enforced by the Admiralty Act of 1890 by which the High Court of Bombay is declared to be a Court of original unlimited Civil jurisdiction. (Ref. **Kamala Kant Dube & Anr. v/s. m. v. Umang & Ors**.) (4)

A claim in the nature of Insurance premium of P & I Club has been held to come within the preview of the expression of "necessaries supplied" to any ship – Ref. **Liverpool London Association Ltd. v/s. m. v. Sea Success & Anr**. (5) The Indian Supreme Court did not follow the law laid down in England and took a departure and held that an unpaid insurance premium to the P & I Club falls within the definition of maritime claim. Thus the jurisdiction of the Indian Admiralty Courts is widened beyond the scope and limit of the arrest Convention of 1952.

Normally in most of the Admiralty matter the claims do not exceed the value of the res viz. the vessel. However, in one of those rate collision claims, a vessel named **m. v. Atair** was sought to be arrested and the security was sought which exceeded the value of the vessel itself. The owners of m v. Atair sought release of the vessel by claiming that the vessel should be permitted to be released upon furnishing security limited to the value of the vessel. The High Court of Bombay negatived the contention advanced on behalf of the owners of the vessel. The court rook cognizance of the rules framed by the High Court of Bombay and also relied upon the commentaries by Marsdel on collision and also certain English cases and held that the vessel cannot be released unless security is furnished for the entire claim made by the Claimants even though it far exceeded the value of the vessel itself. (Ref. **Unigem Traders Ltd. Inc. v/s. m. v. Atair & Ors. Unreported**)(6)

In every action in rem it is a rule of law that arrest could be maintained only if there is a privity of contract established against the owner of the vessel in regard to the relevant claim. It was so held by the High Court of Bombay when an arrest was sought in respect of a vessel towards supply of bunkers at the behest of the charterers and not the owners of the vessel. (Re. **Raj Shipping Agencies v/s. m. v. Bunga Mas Tiga & Anr.)** (7) However, the Court took a departure in respect of a claim towards "use or hire" of a ship. This was a case in which the owner of a vessel entered into a bareboat charter who in turn entered a sub-charter agreement with the Claimant for use or

hire of the vessel. The bareboat charterer committed breach of contract by failing to provide the vessel to the Claimants. In the meanwhile based on the contract with the bareboat charterer the Claimants entered into a sub-charter. The Claimants therefore sought arrest of the vessel for breach of contract by the bareboat charterer. It is sought to be contended that the registered owner did not have privity of contract with the Claimant. The High Court however, held that in regard to a claim relating to "use or hire" of ship privity of contract with the owner need not exist and as such the vessel was held to be liable and the same ws ordered to be arrested. (Ref: **Flotec Maritime S. de. R. L m., v. Nuevik unreported**).(8)

In almost every charter-party agreement invariably there is a provision to refer the disputes to Arbitration. Very often by the time the Arbitration process is completed and Award is obtained, a successful Claimant might not be in a position to enforce and realize the amounts under the Award since by that time it is very likely that the Defendants could have sold his vessel. The Indian Arbitration Conciliation Act, 1996 mandates the Courts to refer the parties to Arbitration if a suit is filed in the Civil Court and permits a Claimant to secure interim relief for obtaining security provided the cause of action has arisen in India. However, in Admiralty action, most often the cause of action would have arisen in a foreign country though the vessel might have called in a Port in India. Further there is no express provision for arrest of the vessel under the Arbitration and Conciliation Act, 1996 apart from the fact that only the High Court in India has Admiralty jurisdiction. The High Court of Bombay was faced with a vexed question as to whether the arrest of the vessel could be granted pending the disputes between the parties is being referred to Arbitration in a foreign country. In the case in question an Admiralty Suit was filed by the charterers of a vessel against the owners claiming damages towards breach of the terms and conditions of the charter-party which in turn had a provision to refer the disputes to Arbitration. It was sought to be argued on behalf of the owners of the vessel that the Court is mandatorily required to refer the parties to Arbitration and in the interim is not entitled to direct the owners to provide security pending the outcome of the Arbitration. After extensive arguments the Court took cognizance of the decision of the English Court case in the case of **Rena K** and also the Arrest Convention 1999 which permitted arrest of the ships pending the outcome of the Arbitration. Thus in an landmark decision the Division Bench of the Bombay High Court held that notwithstanding the agreement to refer the disputes to Arbitration, an action in rem for recovery of the claim pending the disputes to refer to Arbitration, as an interim measure is maintainable. The Court however clarified if an application is made for release of the vessel by the owners it would be a matter of discretion left to the Court to either retain the security pending Arbitration or release the vessel unconditionally. (Re: **J. S Ocean Liner LLC v/s. Golden Progress & Anr.**) (9)

Is an action in rem and in personam are one and the same? Is it possible to obtain a decree against the owners of a vessel in a foreign country and enforce the decree in India by arresting the vessel owned by the owner. The Supreme Court of India has answered this question in the affirmative. This was a case in which the Claimants had obtained decree against the owners of the vessel m .v. AL Quamar in London and enforced the decree by arresting the vessel in an Admiralty proceeding in India. Several questions were raised by the owners challenging the Court's jurisdiction. All the contentions raised on behalf of the owners were negative and the Supreme Court upheld the High Court order of arrest of the vessel to enforce the foreign judgment against the owners. (Ref. **M. V. A. L. Quamar v/s. Tsavliris Salvage (International) Ltd. & Ors.**).(10)

It would be thus noticed that though the Indian parliament has lagged behind in the legislation providing for wider Admiralty jurisdiction, both the High Court and the Hon'ble Supreme Court of India has widened the horizon of the Admiralty jurisdiction by judicial activism. Undoubtedly both the High Court and the Supreme Court are the Superior Courts and have ample power under the Constitution of India to fill the gaps and provide suitable remedy when the legislation has lagged behind in keeping pace with progress made by the developed countries in widening the jurisdiction of maritime claims.

List of cases:

1) Kamalakar Mahadev v/s. s. s. Navigation Co. Ltd. AIR 1961 BOM 186
2) M. v. Elisabeth & Anr. v/s. Harwan Investment & Trading (1993) Supp (2) SCC 433
3) Videsh Sanchar Nigam Ltd. v/s. m. v. Kapitan Kud & Ors. (1996) 7 SCC 127
4) Kamala Kanth Dube & Anr. v/s. m. v. Umang & Ors (2002 suppl.2) BOM.CR.864
5) Liverpool & London S.P. & I Asson. Ltd. v/s. m. v. Success 1 & Anr. JT 2003 (9) SC 218
6) Unigem Traders Ltd. Inc. v/s. m. v. Atair & Ors
7) Raj Shipping Agents v/s. m. v. Bunga Mas Taga (2001) VOL 1 103 (4) BOM LR124.
8) Flotech Maritime S.D.R.L v/s. m. v. Nuevik
9) J S Ocean Liner LLC v/s. m. v. Golden Progress 2007(2)ARBLR104 BOM
10) M. V.A.L. Quamar v/s. Tsavliris Salvage (International) Ltd. & Ors. JT 2000 (9) SC 184 .

Ship Arrest in Morocco

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INTRODUCTION

I - SHIP ARREST CONDITIONS

1. As per the conditions regarding the claim

1.1 As regards vessels flying the flag of a non-contracting state
1.2 As regards the concept of allegation of claim

a. The scope of the concept of "Allegation of maritime claim"
b. The limits of the concept of "Allegation of maritime claim"

2. As per the conditions regarding the vessel

2.1 The possibility to arrest the vessel in respect of which the maritime claim arose

a. The situation of the vessel chartered
b. The situation of the vessel sold

2.2 The possibility to arrest any other ship in the same ownership than the vessel to which the claim is related

a. The situation of sister-ship vessels
b. The situation of associated vessels

II - SHIP ARREST PROCEDURES

1. How the vessel can be arrested

a. Arrest application
b. Arrest order
c. Execution of the arrest order

2. How the vessel can be released

a. The challenge of arrest order before the court
b. The security

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INTRODUCTION

Given the geographical, economical and legal situation of Morocco, it is certainly one of the most attractive forums for vessel arrests:

- Geographically speaking :

- Morocco is located at one of the most important strategic points in the planet being situated at the crossroads of Europe and Africa, East and West,
- Morocco has two maritime facades with a coastline of about 3.500 km on both the Atlantic Ocean and the Mediterranean Sea. Bordered in the North by the Gibraltar Straight and the Mediterranean Sea and in the West by the Atlantic Ocean.

- Economically speaking:

- Morocco has some dozen port along its lengthy coastline,
- In particular, Tanger Med, a new ultra modern port operational since 2007 is expected to become on 2012 the first port in the Mediterranean and in Africa

- Legally speaking:

- Arrest procedure is simple, fast and flexible: no power of attorney required, application is heard under summary and non adversary procedure, no original documents required,
- An alleged maritime claim is sufficient,
- A vessel can be arrested whoever is the debtor (even if Owner is not the debtor),
- No counter security is required
- No preliminary claim on the merits required and no obligation to start legal procedure on the merits
- No impact on jurisdiction

The legal regime applicable to the arrest of vessels in Morocco is 1952 Brussels convention which was ratified on 11 July 1990 and published on March, the 1st 2001. The procedural aspects are determined by the civil procedural rules.

During the present talk, I shall discuss:

- on the one hand, the substantive conditions under which arrest orders can be issued by Moroccan courts,
- on the other hand, the process we should go through in order to carry out an arrest

I - SHIP ARREST CONDITIONS

The main question is what Applicants need to prove in order to get an arrest order delivered by Moroccan courts.

In summary there are two main conditions:

- a condition regarding the claim in relation of which a vessel can be arrested,
- a condition regarding the vessel that can be arrested

1. As per the conditions regarding the claim

The general rule is provided by article 2 of Brussels conventions under which vessels can be arrested in respect of any of the maritime claims as enumerated in article 1.1.

There is no need to remind the 17 cases listed in Brussels convention.

I shall call to your attention to specificities related to Morocco:

1.1 As regards vessels flying the flag of a non-contracting state

Article 8.2 provides that "ships flying the flag of a non-Contracting State may be arrested:

- in respect of any of the maritime claims enumerated in Article 1
- or of any other claim for which the law of the Contracting State permits arrest "

Yet, Moroccan law does not provide any restriction as per the nature of claims in relation of which arrests can be granted (article 110 of Moroccan Martime Code).

Accordingly, a vessel flying the flag of non contracting party can be arrested in Morocco in respect of any kind of claim.

1.2 As regards the concept of allegation of claim

Under Brussels convention Maritime Claim" means a claim arising out of the cases enumerated in article 1.1.

The French and Arabic version of the text use in this respect the expression "allégation d'un droit ou d'une créance" i.e an allegation of right or of a debt.

Thus, we shall see how this concept is applied by Moroccan courts.

a. The scope of the concept of "Allegation of martime claim"

Moroccan courts apply this expression literally. In other words, it is not necessary to prove at the arrest stage that Arrestor has a valid claim which is bound to succeed on the substantive merits. It is sufficient to prove an alleged maritime claim. Therefore a mere prima facie evidence of a claim is enough.

This rule is well established under Moroccan court precedents:

- " Article 1 of Brussels conventions and articles 452 of Civil procedural rules do not require a debt certain in order to get an arrest order " [Casablanca Commercial appeal court judgment dated 24/10/1997 in the file No. 1761/97]
- The Commercial Court of Rabat held also in this respect that "it is commonly accepted by the maritime doctrine that it is not required for the arrest of a ship, that the claim to be certain, an allegation of a right or claim is sufficient" [Order of Rabat commercial court dated 17/09/1999 file n° 99/4580/1]
- The Commercial Court of Casablanca specified: "Under Brussels convention … a ship can be arrested in respect of a maritime claim and it is meant by maritime claim under article 1 of Brussels convention an allegation of right or claim based on one of the 17 causes listed in the same article and it is sufficient under this convention to allege a right or a maritime claim, no condition of certainty of the debt is required" [Casablanca commercial court order dated 06/01/2000- File No. 99/1/3139]

That being so, in some cases, arrest orders are obtained even if the claim in question is very slim. For instance, I can refer to an arrest order we got in our firm very recently on 02.05.11

The situation was the following:

- Owners chartered a vessel,
- Charterers subchartered the vessel,
- Subcharterers carried out a transport to an Australian port,
- Receivers alleged that cargo was damaged and initiated a claim against Subcharterers,

In anticipation of a possible recourse to be filed by Subcharterers against Charterers, the latter wanted to secure the recourse they would have themselves against Owners.

Therefore, we filed on behalf of Charterers an application seeking an arrest of one of Owners vessels as security of this possible claim.

Even though no recourse was filed yet again Charterers, court considered that Charterers have an allegation of claim against Owners and delivered an arrest order for the amount of the claim Charterers may have against Owners. [Commercial court of Tangiers - Court order n° 1185/4/2011]

b. The limits of the concept of "Allegation of maritime claim"

In order to avoid an endless extension of this concept which can lead to abusive arrests based on mere allegations without any acceptable basis, court introduced court created the concept of "contestation sérieuse" i.e "serious challenge".

- Commercial Appeal Court of Casablanca judged thus that "even if Articles 1 and 2 of Brussels Convention are applicable, a mere allegation cannot be sufficient in order to grant arrests in any cases, especially since the documents disclosed indicate a serious challenge regarding the claim" [Judgment of the Court of Appeal of Commerce in Casablanca on April 12, 2002 in File No. 1/2002/1496]
- In another decision, the Court stated that: "If Brussels convention … allows a person alleging a maritime claim to arrest the vessel … it seems, according to the documents disclosed, that there is a serious challenge regarding the alleged claim and the basis on which the arrest was granted" [Casablanca Commercial appeal court March 3, 2006 in File No. 4/2006/878]

However, the scope of this restriction is very limited because such control is not carried out a priori i.e before arrest order to be delivered but a postriori i.e only in case Owners challenge the validity of the arrest.

Thus, it is only in case Owners dispute the grounds of the arrest and initiate proceedings seeking a judgment of release that the court checks whether there is a serious dispute regarding the claim in relation of which the arrest was granted.

2. As per the conditions regarding the vessel

Article 3.1 of Brussels convention provides that: « a claimant may arrest either:
- the particular ship in respect of which the maritime claim arose, or
- any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship"

I shall therefore highlight the way Moroccan court appreciate these two possibilities in light of concrete situations.

2.1 The possibility to arrest the vessel in respect of which the maritime claim arose

Moroccan court applies strictly this possibility. Thus, in so far as the claim is related to a specific vessel, court considers that said vessel can be arrested whoever is the debtor.
We shall appreciate how Moroccan courts deals with two specific situations:

a. *The situation of the vessel chartered*

As long as Brussels convention provides the possibility to arrest the vessel in respect of which the claim arose, Moroccan courts accept to grant arrest on the ship to which the claim is related without regard to the ownership and even if the vessel was chartered.

Therefore, Moroccan courts accept to grant arrest:
- on a vessel under charterpary even if the claim is related to Owners,
- on a vessel that was redelivered to Owners even if the claim is related to previous Charterers

This extensive construction can lead some time to extreme situations.

Thus, I can mention a case under which:
- Charterers ordered bunkers to a company "A",
- Bunker company "A" outsourced the order to subcontractor "B"
- Charterers paid the bunker to company A
- Company A did not pay subcontractor B
- meanwhile, the vessel was redelivered to Owners
- Company B arrested the vessel whilst operated by Owners

Owners filed proceedings seeking a judgment of release arguing :
- that they have no contractual relation with Arrestor,
- that bunkers have been paid to the company to which Charterers made an order

Commercial court held that:
"Under article 3 of Brussels convention of 10.05.1952, the party that invokes a maritime claim is entitled to arrest … the particular ship in respect of which the maritime close arose …; that Arrestor relies on a claim related to the vessel to which bunkers were provided so that he is entitled to arrest said vessel " [Commercial court of Casablanca of 08/05/2000 – file n° 2000/1/991]

b. *The situation of the vessel sold*

The question is whether a party who has a claim towards a vessel that was sold after the claim arose, is entitled to arrest her in the hands of new owners.

Article 9 of Brussels convention provides that "nothing in this convention shall be construed … as creating any maritime liens …"

Therefore, in principle, unless the claim amounts to maritime lien, it should not possible to arrest the vessel in the hands of new owners.

Moroccan courts adopted in respect of that issue a pertinent stance providing other criteria of appreciation.

Thus, Casablanca Commercial appeal court held: « it appeared to the court, in light of the documents disclosed, that the ownership of the vessel …was transferred to the appellant [new Owner].. that had no relation with the appellee [Arrestor] ..; that the latter did not adduce the proof that the transfer of ownership was made in bad faith under a collusion between both companies" [Casablanca Commercial appeal court of June, the 1st 2000 File 200/4/244]

By contrast, Claimants would be entitled to arrest the vessel in the hands of new Owners if they adduce the proof that the vessel was sold in bad faith in order to enable the previous Owners to escape from their debtors.

2.2 The possibility to arrest any other ship in the same ownership than the vessel to which the claim is related

a. *The situation of sister-ship vessels*

The situation does not raise any difficulty. Indeed, as per the text of Brussels convention, it is perfectly possible to arrest a vessel in respect of a maritime claim that arose in relation with another vessel in the same ownership.

However, over the years, single ship companies became a standard practice in shipping industry. This practice raised the issue of associated vessels.

b. *The situation of associated vessels*

In order to avoid the single ship company model becomes an "escape-route" for certain bad faith debtors", Moroccan courts accept in certain circumstances to pierce the corporate veil. To do so, court rely on the concept of "community of interest" and/or "legal fiction"

Thus, court refers to the economical reality rather than sticking to the legal appearance.
Court refers thus to a series of clues proving the existence of common interests such as: same manager, same address of head office, same shareholders …

In this respect, I shall mention a very specific case we handled regarding a vessel named AYANA.
The situation was as follows:

- we were acting for 5 different parties who had claims against Cuban Owners,
- a Cuban vessel belonging to another Cuban company called Casablanca port,
- we filed several application (one per client) seeking the arrest of the vessel on the grounds that Cuban state, as communist, does not recognize private property right so that both companies belong in fact to Cuban state and thereby we are entitled to arrest the said vessel
- court complied with our request and delivered five arrest orders
- we executed a first arrest order
- owners filed proceedings seeking release of the vessel
- court refused to lift the arrest
- Owners put up security
- then, we executed the second arrest order … and so on ….
- eventually, as per the last arrest order, Owners appealed the decision refusing to lift the arrest and the appeal court accepted to release the arrest order on the following ground:

"Appellant [Owners] that justified that the vessel is duly registered on their name, disclosed the articles of corporation of Owners, the activity reports and documents proving that vessel is insured, have proved that it is not a fictitious company" [Commercial appeal court 25/12/2000 - File n°4/2000/2125]

It emerges from the above that the Appeal Court hold that arrest of the vessel in the hands of a fictitious company is valid. However, in the present case, it considered that it was not the case.

II - SHIP ARREST PROCEDURES

1. How the vessel can be arrested

a. Arrest application

The applicant files an ex-parte application before the commercial court within the province of which is the port where vessel is berthing.

The application should contain:

- a brief explanation of the claim,
- arguments regarding the fact that the claim came within "maritime claims" as defined in 1952 Brussels convention,
- proof that the vessel is the ship in respect of which the claim arose or a vessel in the same ownership or associated to debtor
- the amount of the security sought.

The application must be supported with relevant documents.
There is no need for the documents to be originals.
However, as a general rule, court requires documents to be translated into Arabic or French.

b. Arrest order

Given the urgency the arrest order is delivered within the same day or the day after.

Even though Moroccan law provides possibility for the court to require a counter security, practically speaking, it is never required.

The arrest is ordered in the hands of Harbor master.

A couple of years ago, court used to request Arrestor to file proceedings on the substantive merits within a specific period of time, generally 30 days. However, this requirement is not any more fixed.

c. Execution of the arrest order

The arrest order should be notified through bailiff on port authorities who then execute the order.

The arrest entails the immobilization of the vessel.

There is however some exceptions regarding Moroccan fishing vessels. As a general rule, port authorities refuse to immobilize them on the grounds that they have no control upon their movement. Besides, some courts (such as Agadir court) used to specify in the arrest orders delivered against Moroccan fishing vessels that the arrest is issued without detention.

In any case, vessels under arrest can notwithstanding carry out loading/discharging operations.

2. How the vessel can be released

Once the arrest order is granted, Owners have two possibilities in order to get the vessel released, either:

- to challenge the arrest order before the court, or
- to provide security

a. The challenge of arrest order before the court

Basically, in order to do so, Owners should substantiate either:

- that the claim does not come within maritime claims, or that
- the vessel arrested is neither the vessel in respect of which the claim arose nor a vessel in the same ownership than the vessel to which the claim is related

The problem for Owners is that such proceedings should be filed under adversary procedure which is time consuming:

- a writ of summons should be filed,
- a date of hearing is set before the court,
- Arresting party's lawyer should be convoked to the hearing
- Pleadings take place,
- Judgment is delivered

This process requires at least 3 days.

This is the reason why, Owners are often obliged to put up security even if they consider the arrest ungrounded in order to avoid the vessel to remain under arrest the time of the procedure.

b. The security

As a general rule, security should be put up in a form of a bank guarantee or cash deposit before the court.

In the meantime, it is common to accept P&I club LOU to be replaced by a bank guarantee within 8 or 15 days.

Once security is provided, the release procedure depends of the usages and customs of port in which the vessel was arrested.

For instance, in Casablanca, the procedure of release is very quick and flexible because port authorities accept to lift the arrest on the sole basis of a release issued by Arrestors' lawyer.

In Tangiers, port authorities tend to demand a release order issued by the court which makes necessary to file proceedings. If security was provided and Arrestors are willing to lift the arrest, release judgment can be obtained within one or two days.

Latest developments in Italian case-law on ship arrests

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Recent years have seen quite a few decisions handed down by Italian Courts covering some of the most controversial and disputed areas of ship arrests.

Virtually all the main Courts regularly involved in ship arrest proceedings (Genoa, Naples, Venice, Ravenna among others) have issued decisions which have sometimes contributed to reinforce settled positions, sometimes blurred distinctions which seemed more or less clear-cut.

The overview which will follow contains the indication of the position reached by Italian case-law over the last decades, but particular attention will be paid to the most recent developments.

Procedure and maritime claims

Arrest of ships is available in a wide variety of situations, including claim for damage done by or suffered to a vessel, claims for goods, bunker or materials supplied to a vessel for its operation or maintenance; the actions can be taken by a bank that has terminated the loan facility and wishes to draw on its mortgage, crew members that have outstanding wages, cargo interests and insurers for claims for loss of - or damage to - the goods.

An issue which has frequently proven controversial is whether claims arising from a contract of agency give rise to a "maritime claim" pursuant to Article 1.1. n) Brussels Convention 1952, especially in case the claim is for unpaid indemnity arising from termination of the contract or unpaid agency fees and not for "disbursements".

The nature of maritime claim for unpaid agency fees has been held by the Court of Genoa a few years ago [2] and recently confirmed by the Court of Bari.[3]

Arrest is admitted regardless of the fact that Italian Courts have jurisdiction for the merit of the case: the Court having jurisdiction is the Court of the port of call, and the application is subject to condition that the vessel is within Italian territorial waters.[4]

Italian Courts normally grant the arrest of ships *ex parte* (provided they are satisfied with the prima facie evidence of the ground of the claim) upon presentation of the application, setting the hearing for the appearance of the parties (normally within a short term).

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Fluent in English and French, he assists some among the major traders, marine insurers, carriers and freight forwarders in Italy and Europe, and has represented clients in court proceedings and arbitrations in several jurisdictions; he is an accomplished and well-known lecturer, both nationally and internationally, on the legal aspects of shipping and trading, and has conducted frequent workshops with ANIA (the Italian Association of Insurers).
Claudio is the author of two widely used handbooks on cargo insurance and cargo recovery actions, and is a regular contributor of *Il Diritto Marittimo,* is member of the Editorial Board of *Diritto e Trasporti* and *Marine Aviation & Transport Insurance Review*, and is IUMI Professional Partner for Italy

2 Court of Genoa 20 May 1995, *Transnautic c. Baltic Shipping*
3 Court of Bari 19 July 2002, *Morfimare c. Poseidon*
4 Court of Venice, 25 August 2001, *El Sayed Aly Alla c. Sayed Nasr Navigation Lines*

In non maritime arrest proceedings the judge summarily examines the request and grants the measure if the claim brought is *prima facie* well grounded ("*fumus boni iuris*") and the applicant proves that it is exposed to damages beyond repair during the course of the ordinary proceedings ("*periculum in mora*").

The requirement of the *periculum in mora* is generally not requested for maritime arrest, though, at least in case the arrest is sought pursuant to Brussels Convention 1952, on the ground that the Convention does not contemplate such a requisite.

A very recent decision of the Court of Appeal of Cagliari [5] however has held that an action based on Article 47.1 Regulation 44/2001/CE (i.e. a protective measure pending the declaration of enforceability of a foreign judgment, in the case at hands a judgment handed down by the Court of Hamburg) is subject to the provisions of Italian law and claimant must prove therefore the existence of *periculum in mora.*

The decision is in sharp contrast with the position previously reached by Italian Courts as to measures taken pursuant to Article 39 of Brussels Convention 1968,[6] but has been likely influenced by the fact that the *quantum* for which arrest was sought (60.000 €) was limited compared to the value of the ship and claimants had failed to pursue alternative actions which would have been less disruptive for the Owners.

The Court may alternatively issue an order preventing the vessel from leaving pursuant to article 646 Navigation Code: the order does not state the quantum for which the arrest is granted and is not, strictly speaking, an arrest, but has in practice the same effects.[7]

Unlike other legal systems, no security is required as a preliminary condition to seek an arrest of ship.

The Judge may order the applicant to tender a countersecurity, although this is normally requested only where the Court considers that the arrest is controversial or the merit of the claim has not been assessed with sufficient depth.

Where the arrest is obtained and confirmed the applicant is compelled to commence the proceeding for the merit (unless one is already pending) before the Court having jurisdiction within a deadline set by the Judge which may be up to 60 days.

In case the application is rejected it is possible to file an appeal within 15 days.

It is disputed whether an appeal can be pursued once the ship has left Italian waters: the possibility to seek an appeal should be unquestionable under Italian law, but a few decisions have held that an appeal cannot be pursued where the ship cannot actually be placed under arrest.[8]

If the claim is subject to foreign law and jurisdiction (for instance, where the arrest is sought as security for a claim arising from a *charter party* containing an English law and jurisdiction clause) the applicant is required to provide suitable evidence of the ground of the claim: this could be provided for example by means of affidavits or disclosing foreign authorities and case-law proving the grounds for the claim.

A peculiar position exists for arrests aimed at securing the enforcement of arbitration awards or foreign judgments: jurisdiction for the *exequatur* is in the Court of Appeal, and the position expressed by Italian Courts[9] is that an arrest preceding the *exequatur* must be sought before the Court having jurisdiction for the recognition of the award or the judgment.

This may have (and frequently has in fact) practical pitfalls, since it may turn out quite complex to obtain an order of arrest from the Court of Appeal at the speed normally allowed by Tribunals.

Italian Courts have started in the last few years (and in very few cases) to recognize the possibility of lifting the corporate veil,[10] but this is still uncommon and the burden of proof resting on the applicant

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5 Court of Appeal of Cagliari, 8 July 2009, *Zeppelin Power System GMBH c. Stradeblu S.r.l.*
6 Cassazione, 16 November 1987, n. 8380, *Capelloni c. Aquini Pelkmans, Court of Appeal of Naples, 17 January 2000, Lloyd Werft Bremerhaven*
7 Court of Venice, 5 June 1998, *TMB c. Dal Bon*
8 Court of Gorizia, 25 May 2006, *Stx Pan Ocean co. ltd. c. Adam Swoboda*
9 Court of Gorizia, 2 May 1998, *Ministero trasporti ucraino c. Pied Rich BVA. Court of Appeal of Genoa, 12 February 2000, Morsviazputnik Satellite Navigational c. Azov Shipping co.*
10 Court of Bari, 19 July 2002, *Morfimare c. Poseidon; Court of Leghorn 18 November 1996 , Cipriani c. Baltic Shipping*

is severe. Italian law is indeed very strict in the definition of ownership in the context of companies and in applying the principle of autonomy of companies which are distinct and separate entities.

As a result Italian Courts are rather reluctant to pierce the corporate veil, and the applicant intending to do so must be able to prove that the company structure has been actually created or employed with the purpose to frustrate creditors' actions.

Arrests under Brussels Convention 1952

Italy is a signatory of the Brussels Convention 1952.

If a ship is flying the flag of a state party to the 1952 Arrest Convention, arrest in Italy can be sought only with respect to maritime claims listed under article 1.1; if the ship is not flying the flag of a contracting state she can be arrested for the aforesaid claims as well as for any other claim for which arrest is allowed under Italian law (i.e. virtually any credit or claim against the owner of the vessel, including those not mentioned in the list of maritime claims set out by article 1 Arrest Convention).[11]

Italian Courts generally apply the 1952 Arrest Convention also for arrest of ships flying the flag of a non-contracting state, on the basis of a rather extensive construction and application of article 8.2 of the Convention.[12]

However, the position taken by Italian Courts on the issue is far from being settled and uniform: although the majority of the recent decisions for instance have held the applicability of the entire Convention including Article 7 on jurisdiction such a possibility has been excluded by the Italian Supreme Court 20 years ago, [13] and quite recently by the Court of Trieste.[14]

An issue still controversial is the possibility to seek the arrest of a ship based on article 3.4 of the Convention if the claim is not secured by a lien: several Courts[15] have declined to grant the arrest on the grounds that article 9 makes clear that the Convention does not create maritime liens, and that an arrest based on article 3.4 in the absence of a lien could not be subject to further enforcement against the owners and the ship.

A very recent and quite detailed (but probably controversial) decision of the Court of Genoa has opted for the full applicability of Article 3.4 of the Convention to arrests arising from claims vs. the charterer regardless of the fact that at the time of the arrest the *charter-party* is already terminated.

The Court has argued that the Convention does not explicitly require the actual existence of the contract at the time of the application, hence implying that the arrest is possible even following termination of the contract (provided that the claim is not time-barred), that Owners can seek some form of protection from risks of arrest arising from charterer's operations by asking the charterer to provide a suitable performance guarantee and that Owners are likely aware of the employment of the ship and can therefore foresee the liabilities which may arise from the conduct of the charterer.

Arrest of sister ships is possible, provided that the sister ship is owned by the same entity which owns (or owned) the ship connected to the claim at the time the cause of action arose.

It is furthermore possible to arrest assets other than the vessel (for instance the bunkers on board) to secure a claim: from a practical viewpoint, arrest of the vessel's bunkers may be as effective as arresting the vessel itself, and may often lead to security being put up by the owners; however, the bunker must be owned by the debtor, and it is important to keep in mind that under a time *charterparty*, the bunkers are normally owned by the charterers, not the shipowner.

Maritime liens

If the claim is secured by a maritime lien, this may operate to allow the arrest of a vessel even if it has changed ownership, the doctrine being that the lien attaches to the property at the time the cause of action arises and remains so attached until satisfied or time barred.

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11 Court of Appeal of Genoa, 12 February 2000, *Morsviazputnik Satellite Communications Navigational c. Azov Shipping co.; Court of Venice, 6 October 1999, Elmar Shipping Agency c. Turkmen Shipping*
12 Court of Genoa, 22 March 1994, *Galaxy Energy International ltd. c. Soc. agenzia maritt. Dolphin*
13 Cassazione, 25 May 1993, Equinox Shipping Co.
14 Court of Trieste 14 August 2008, *Ramazan Gunduz c. UN Ro-Ro Isletmeleri*
15 Court of Ravenna, 23 march 2000, *Jakil c. International Transportation co. ltd; Court of Ravenna, 4 August 2001, Aagaard Euro Oil c. Sea Frantic co. ltd; Court of Venice 5 June 1998, Exnor Craggs ltd. c. Companie Navigatie Maritime Petromin*

Maritime liens take priority over registered mortgages, yet need not be registered themselves.
The existence of a lien is determined by the law of the flag at the time the claim or credit arose, and (pursuant to a recent decision of the Court of Trieste)[16] the assessment whether a ship seriously damaged can be still qualified as "navigating ship" must be likewise made under the law of the flag.

Italy is a signatory to the 1926 Liens and Mortgages Convention, and recognizes a list of maritime liens under article 552 of the Italian code of navigation, which largely coincide with the list contained under article 1 of the 1926 Convention.

The lien is subject to a short deadline for the enforcement, and the arrest of ship is the standard measure under Italian law to prevent the lien from expiring; hence, in case the claim is secured by a lien on the ship and the arrest is aimed at enforcing the lien, the measure is generally granted without requesting any evidence of the *periculum in mora*.[17]

Guarantees and Letters of Undertaking

Either under Italian law (art. 684 c.p.c) or pursuant to the provisions of the Brussels Convention 1952 on arrest of ships (art. V) Owners may obtain the release of the ship arranging the issuance of a suitable guarantee.

The options available in this respect are actually two: escrow or bank guarantee (or Club's LOU).

The first solution implies that the sums are deposited into a special bank account and authorization from the Court is sought to shift the arrest from the ship to the sums.

Funds are kept under escrow and released upon authorisation of the Court if the claimant proves that it is entitled to receive the payment out of the money (i.e. that an enforceable judgment has been obtained and that an *exequatur* in Italy has been granted).

The escrow solution is generally adopted either where the applicant refuses to accept a guarantee, or where the Owners wish to challenge the arrest, since the arrest order is simply shifted onto the sums and the defendant is therefore allowed to challenge the arrest after the release of the ship.

A further advantage for the defendant is that the actual recovery for the applicant may be much more time consuming, since sums are paid upon condition that claimant has obtained an enforceable judgment and that same has been recognized in Italy: the overall procedure is quite long and this may be used as an element of pressure to induce a settlement.

The downside is of course that the sums are under escrow and unavailable for a long time.

The second option is a guarantee payable against an enforceable judgment issued by a Court having jurisdiction, or payable against an award or agreement, based upon wording which normally is the one currently used for the standard P&I LOU forms (a standard form of LOU generally accepted by Italian claimants is enclosed). In this case the arrest is withdrawn against the release of the guarantee, and there is no more possibility to challenge the arrest.[18]

In case the offer of a guarantee or a Club's LOU is rejected, the Judge of the arrest proceeding will appraise the suitability of the guarantee offered, and will order the release of the ship where the guarantee is considered appropriate.

A crucial issue is the wording of the guarantee, which may be difficult to agree upon where the arrest is sought (for instance pursuant to article 3.4 of the 1952 Convention) for a claim against the disponent owner/charterer; it is generally possible to agree upon the issuance of a LOU with such a wording to cover also a claim against the disponent owner/charterer on the ground that the claim is secured by a lien on the ship; alternatively a LOU issued on behalf of the r/owners indicating them as carriers may be accepted against confirmation that the ship is not (and was not at the time of the event giving rise to the arrest) under bare boat charter or any similar demise charter.

As to bank guarantees, an issue often disputed is whether the guarantee may have a term, since Italian banks usually do not accept or issue guarantees with unlimited validity.

16 Court of Trieste 14 August 2008, *Ramazan Gunduz c. UN Ro-Ro Isletmeleri*
17 Court of Genoa, 11 November 1994 *Rimorchiatori Riuniti Porto Genova c. Morfini*; Court of Appeal Lecce, 12 January 1995 *Bibolini c. Barretta*
18 Court of Genoa, 6 December 1994 *Marline Universal Shipping co. c. Mediterranean Overseas Shipping Agency*

The Supreme Court[19] has recently held the nullity of the provision of a bank guarantee issued for the release of a ship setting a validity of 10 years, on the grounds that the applicant cannot be exposed to the risk of losing the security pending the time necessary to obtain a final judgment.

Requests for limited validity and expiry in guarantees or LOU could therefore be rejected in the future on the grounds that such a guarantee would be unsuitable.

Liability for wrongful arrest

Damages for wrongful arrest are relatively uncommon and generally awarded when it is clear that the applicant sought the arrest acting in bad faith or with gross negligence, disregarding the evidence available, or intentionally providing the Court with partial or misleading background information.

The burden of proof of the circumstances proving the abuse and the damages incurred rests upon the party claiming the wrongful arrest.

19 Cassazione 30 Novembre 2006 n. 25481, Impresa Barretta c. Comit Spa, The West of England, Lloyds Bank Tlc.

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