THE ARREST news

Issued by the industry network devoted to ship arrests, www.shiparrested.com

Issue 4 September 2011

IN THIS QUARTERLY ISSUE

Liability for Wrongful Arrest
A real risk in German Arrest Proceedings?

I. INTRODUCTION

As we all know an arrest of a ship is a legitimate "tool" and a recognized feature in the international maritime world to secure claims. Very often, after years of tough battles in the court-room, favourable judgements turn out to remain unsatisfied because the vessel, the only asset of the defendants has been sold or beached anywhere in the Far East. The other side of the coin of course is that every claimant considering an arrest has to be aware that he might destroy the business; sometimes the existence of a shipowner, if his ship is "clamped" in a port and for whatever reason security cannot be provided. The damage might be considerable and those shipowners will of course lodge a claim for "wrongful arrest". By the way, this is the reason why German courts sometime require counter-security before the bailiff is entitled to detain the vessel.

As the Brussels Arrest Convention regulates that all questions relating to liability for wrongful arrest shall be governed by the law of the place where the arrest was made or applied for applicants should be aware what risk they run in the different jurisdictions.

Germany is said to be not really an easy place to arrest ships. One reason might be the risk that applicants run if they are faced with a claim for a wrongful arrest. And indeed at first glance the risk of being sued by shipowners or charterers having suffered damage from the arrest of "their" ship might be real. However, is that special for Germany? And is this a real risk for prudent applicants?

Frank Smeele, Professor at the Erasmus School of Law, quite correctly pointed out *(see: Chapter 14 "Liability for wrongful arrest of ships from a civil law perspective" in "Liability regimes in contemporary maritime law, Rhidian Thomas, D. (Eds.), 261-276,London, 2007)* there does not exist a unified approach to wrongful arrest among Civil Law countries in Europe. He continues by stating that there is "a 'North-South'-divide on the European Continent: *"While a group of 'northerly countries' including The Netherlands, Germany, Poland, Denmark, Norway, Sweden and Finland answers this question decidedly in the affirmative and holds the applicant for arrest strictly liable if his claim fails on the merits, irrespective of fault or good faith, the 'southerly countries' including Belgium, France, Italy and Greece, - similar to English law - answer the above question in the negative and require instead that various degrees of "fault" ("abuse of rights", "gross negligence" or "bad faith") must be proven."*

So the answer to the first question is quite easy: Any applicant, considering an arrest in the northern part of Europe, and not only in Germany, should be aware of a rather strict regime on wrongful arrest; although it goes without saying that also all the applicants going more south will probably be careful of an unjustified arrest as well.

II. IN SHORT: THE "CONCEPT OF WRONGFUL ARREST" IN THE GERMAN LEGAL SYSTEM

The second question what is the real risk of a wrongful arrest in Germany may not that easily be answered. It is well known that German Law is based on statues and case law does not have an impact as it has in the Anglo-Saxon system. And if you add that arrest proceedings in Germany are not only ruled by the maritime part of the German Commercial Code ("Handelsgesetzbuch=HGB") but also by the – more general - German Procedural Code ("Zivilprozessordnung=ZPO"), which of course is designed to regulate all kinds of arrest or detentions, you may understand that it is not that easy to predict what the real risk is.

The start in German Law always is the wording of the statue. It is undisputed in Germany that the claim for wrongful arrest is based on § 945 ZPO, which reads:

"If it is proved that an arrest order or an injunction was unjustified from the beginning or the measure that was ordered is subsequently lifted based on § 926 (2) ZPO or § 942 (3) ZPO, then the party who obtained the order is obliged to compensate the other party its damage resulting from the enforcement of the measure which was ordered or resulting from his duty to provide for security in order to avoid the enforcement or to ensure the lifting of the measure."

If we extract the important part we can summarize:

"If it is proved that an arrest order ... was unjustified from the beginning ..., then the party who obtained the order is obliged to compensate the other party its damage resulting from the enforcement of the measure which was ordered...

To understand this law completely one should know that

- the judge will look at it from the date of the decision which lifts the arrest, so it is of no relevance whether the applicant had known all the facts which lead to the unfavourable lifting of the arrest at the time he filed his application,
- if at the time of the application the legal situation had been "uncertain" or the legal situation , may have even changed, that does not help either,
- it finally does not count whether the applicant acted in good faith or not; the mere fact that the order was unjustified from the beginning is the basis of the claim.

And the damage the shipowner might look for is not limited except for causation, but the judge will grant a full compensation of the damage occurred by simply comparing the shipowners' (financial) situation without the consequences of the arrest and the situation he is in having suffered from the arrest.

III. AND THE RELEVANCE IN THE GERMAN MARITIME WORLD?
Having read the concept one might suspect that most of the arrest proceedings in Germany end up with claims for wrongful (ship) arrest, but - not surprising to me: That is not all the case in Germany.

What maybe the reasons?

To start with we may exclude claims for wrongful arrest if (only) the proceedings on the merits are done under German Law but the arrest was done in a different state. As pointed out above, the laws of that (different) country have to be applied and consequentially § 945 ZPO may not form a basis for a "wrongful-arrest"-claim.

Secondly, the German Federal Court ("Bundesgerichtshof") ruled – although not in a maritime case - that the applicant may argue the damage which the respondents to an arrest claim would have occurred anyway. Transformed to a maritime case the applicant may therefore argue that the shipowner might have gone bankrupt anyway or the vessel's charter had been terminated due to the vessel's poor condition. However, the full burden of proof rests with the applicant.

Thirdly, in another decision – again not in a maritime case – the Bundesgerichtshof held that the claim of the respondents might be reduced or even eliminated in full by a "contributing negligence". In this case the respondent was trying to hide his (few) remaining assets and to transform those to a close relative. The applicants' attorney in a maritime case might argue that the vessel flying a flag of convenience was to be sold in order to escape from liability, but again the applicant has to prove it!

Finally, although shipowners and P+I-Clubs may disagree, I very much favour the argument that shipowners also in arrest proceedings have a duty to mitigate the loss. That duty (in German: Schadensminderungspflicht) is a widely accepted and undisputed concept of German Law. Leaving the very few arrest application aside, which are obviously not well founded or only made to cause damage, any applicant, i.e. the consignees of goods under a bill of lading or a charterers under a charter party, will only start arrest-proceedings if they have a well-founded claim; and the shipowner has to react! And no doubt the most simple and efficient way to mitigate the loss is to provide for a bank-guarantee or a guarantee-letter of the vessel's P+I-Club! Any shipowner refusing to "co-operate" in that way must have very good arguments to escape from this duty!

So the relevance of the strict liability for wrongful arrests under German Law is in probably 99% of all arrest proceedings limited to the damage a shipowner may suffer because his P+I-Club has to provide for a Guarantee-Letter or - at the most - to the bank fees he may have to pay if no P+I-cover is available – which in itself may a violation of the shipowners' duties! And if a shipowner may refuse to provide for such guarantees his claim will be limited to those costs by the court.

So, the clear answer is, that the risk of a prudent applicant in Germany is limited to costs he might ignore compared to the risk he might run if his justified claim will not be satisfied in the very end.

Thomas Wanckel
Segelken & Suchopar
wanckel@sesu.de
www.sesu.de
Baumwall 7 - Überseehaus - 20459 Hamburg
Tel.: +49(0)40 -3768050
Fax: +49(0)40 -362071

Thomas Wanckel is a Partner and Head of Shipping department at Segelken & Suchopar, Hamburg and Berlin. Born in 1953, he studied in Hamburg and Providence/Rhode Island, and was admitted to the Hamburg Bar in 1984 and also to all German Appeal Courts. In his career of more than 25 years in shipping and marine insurance law, Thomas specialized in subrogated cargo underwriters work, charter party disputes, collisions and GA. He advises major German and international Cargo Underwriters. He has been Lecturer at underwriters' in-house seminars and at the International Cargo Recovery Conferences in New York 2008 and London 2010, as well as at other Conferences in Istanbul, Odessa and St. Petersburg. Moreover, Thomas is Arbitrator, Member of the German Maritime Arbitration Association, the German Maritime Law Association, the Shiparrested.com network and the German Association for Transport Law.

New Turkish Ship Arrest Rules

On January 13, 2011 Turkish Parliament adopted the new Turkish Commercial Code ("New TCC")[1], which regulates the maritime transportation as well as other areas of commercial transactions. The New TCC will enter into effect on July 2012 and will radically amend many aspects of Turkish maritime law, including arrest of ships. We shall highlight some of the amendments brought by the New TCC in the sphere of arrest of ships.

INTRODUCTION
Turkey is not a party to any of the international conventions on the arrest of ships and the existing domestic law before the enactment of the New TCC did not have specific rules on this matter. The arrest of ships was in general terms no different than conservatory measures leading to the seizure of other assets owned by a debtor or a wrongdoer, which did not always address the special requirements of arresting ships and has led to a substantial amount of variance among the arrest practices applicable in different ports of Turkey. Most of the courts in Turkey were reluctant to give arrest orders mostly due to the lack of specific rules on arrest of ships. The New TCC aims to bring a full and unified set of rules dealing with all aspects of arrest of ships and to tackle the special needs of the different parties in maritime transport.

The arrest provisions of the New TCC mainly adopt the provisions of the International Convention on the Arrest of Ships 1999 even though Turkey is not a party to the aforesaid convention. In addition, relevant provisions of the International Convention on Maritime Liens and Mortgages 1993 are also adopted by the New TCC.

TYPES OF CLAIMS

According to the existing rules, arrest of a ship in Turkey could take place for all types of claims regardless of whether the claim has a maritime character or not or whether it is connected with the ship to be arrested or not. Under the New TCC a ship may only be arrested in respect of a closed list of "maritime claims", which are enumarated exhaustively, but in respect of no other claim. Maritime claims enumerated in the New TCC are the same as those listed in Article 1 of the International Convention on the Arrest of Ships 1999.

According to the New TCC, arrest is the only permitted conservatory measure for a maritime claim.

DEBTOR

The vessel may only be arrested due to a maritime claim against the owner. The debtor must be the owner both at the time the claim arose and at the time when the arrest is affected unless the claim is secured by a maritime lien or a mortgage or a similar charge, in which case, the vessel may be arrested even if the debtor is not the owner of the vessel. In contrast with the International Convention on the Arrest of Ships 1999, arrest is not permissible for the debts of the demise charterer unless the claim is secured by a maritime lien. Under the New TCC, the claims secured by a maritime lien are the same as those listed in Article 4 of the International Convention on Maritime Liens and Mortgages 1993. In addition to the claims listed International Convention on Maritime Liens and Mortgages 1999 general average contributions also give maritime lien under the New TCC.

The New TCC specifically deals with the issue of "sister ship arrest" and permits such arrest subject to certain conditions.

COUNTERSECURITY

Under the existing rules and practice of arrest, the Turkish courts required countersecurity and had extensive discretion to determine the amount of the countersecurity. In practice the countersecurity amount has been determined by the courts as a percentage of the claim amount regardless of the actual damage to be incurred by the vessel as a result of the arrest and would usually be between 10% to 40% of the claim amount. The New TCC requires the claimant to put up countersecurity but fixes the amount of the countersecurity as 10.000SDR regardless of the claim ammount. The claimant has to lodge the countersecurity along with the arrest application. The countersecurity may be increased or decreased upon the application of the parties.

PROCEDURE FOR ARREST AND RELEASE

The arrest can be ordered upon an ex parte application to be filed at the competent courts with jurisdiction. The New TCC provides for specific rules of jurisdiction for arrests. Accordingly, only the courts at the port of call, place of anchor or buoy or shipyard shall have jurisdiction to hear arrest applications (For Turkish flag vessels, the courts at the place of registry of the vessel shall also have jurisdiction).

The claimant must present documents evidencing a possible maritime claim and the amount of the claim. Once granted, the arrest order is enforced by the Bailiff Office immediately. The New TCC provides that the arrest may be enforced even during out of office hours and official holidays.

It is possible to file an objection against the arrest order before the court which has issued the arrest order or before the court where the action in merit is filed if the action in merit is filed before a Turkish court.

The vessel may be released by putting up a security covering the claim amount, interest accrued and costs.

ACTION IN MERITS

Under the existing rules, the action in merit has to be filed within 7 to 10 days (depending on the type of conservatory measure obtained) as from the date of arrest, which usually was not sufficient to prepare for the pleadings in merits or to reach a an out of court settlement among the parties and in most of the cases the parties would file the action in merits to preserve the arrest and at the same time try to reach a settlement and if a settlement is reached the action in merit would be cancelled, which created unnecessary costs and workload for the courts. Under the New TCC, the action in merits has to be filed within one month before the competent tribunals, which would give more time for any possible settlements or preparation for action in merits.

In addition to the jurisdiction of the tribunals arising from general rules of jurisdiction, the arrest confers the court in which the arrest has been affected jurisdiction in merits.

DAMAGES FOR WRONGFUL ARREST

Should the arresting party lose the action in merits, he may be held liable for loss and damages suffered by the vessel.

The New TCC shall come into force on July 1, 2012 and the ways of its application by the courts remain to be seen.

(1) Turkish Commercial Code No. 6102, published in the Official Gazette dated February 14, 2011 numbered 27846

Zeynep Özkan Özeren
Özkan Law Office
zeynep@ozkan.av.tr
www.ozkan.av.tr
Husrev Gerede cad., Omer Rustu Pasa sok
No.12 Tesvikiye, Istanbul, Turkey
Tel: +90 212 327 69 40
Fax: +90 212 327 69 43

Zeynep Özkan Özeren has a degree in both law and international relations and a post graduate degree in shipping law from University of Southampton. After working with various international consultancy firms specialized in transportation law and a local law firm in Istanbul, she founded Özkan Law Office in 2005. Her practice mainly focuses on shipping law and international trade law.

Zeynep Özkan Özeren is as a lecturer of international trade law at the Bosphorus University, Istanbul. She is a member of Istanbul Bar Association and International Bar Association.

Morocco : Arrestors heaven, Debtors nightmare

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

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 with two maritime facades on both the Atlantic Ocean and the Mediterranean Sea. Morocco has some dozen ports and in particular, Tanger Med, a new ultra modern port operational since 2007 is expected to become on 2012 the first port in the Mediterranean sea and in Africa.

The legal regime applicable to the arrest of vessels in Morocco is 1952 Brussels convention. However, what makes morocco so attractive as forum for vessel arrests is that the terms of the above convention are applied literarily and thereby extensively.

Besides, the 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 is required; no obligation to start legal procedure on the merits and no impact on jurisdiction).

Practically speaking, what Applicants need to prove in order to get an arrest order delivered by Moroccan courts? In summary, there are two main conditions:

1. As per the conditions regarding the claim in relation of which a vessel can be arrested

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 debt. Thus, under Moroccan courts precedents, 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.

For instance, we can mention a judgment of The Commercial Court of Casablanca providing *"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, we can refer to a case under which an arrest was delivered whilst the claim was even hypothetical. Thus, in relation with an alleged cargo damage, Receivers filed a claim against Subcharterers who hold Charterers liable. The latter wanted to secure the recourse they would have against Owners. Court considered that Charterers have an allegation of claim against Owners and delivered an arrest order for the amount of the claim. [Commercial court of Tangiers - Court order n° 1185/4/2011]

However, 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 the concept of "contestation sérieuse" i.e "serious challenge". Thus, when it appears to the court that the alleged claim is doubtful, it happens that the court lifts the arrest order.

Still, 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 once the arrest order is delivered and 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

Brussels convention provides the possibility to arrest the vessel in respect of which the claim arose.

As per Moroccan courts authority, the ship to which the claim is related can be arrested without regard to the ownership and even if the vessel was chartered. Therefore, Moroccan courts accept to grant an arrest on a vessel even if the claim is related to previous charterers (whether time or voyage c/p). Likewise, it is possible to arrest a vessel under charterparty even if the claim is related to Owners. This extensive construction can lead sometime to extreme situations. Thus, we can mention a case under which Charterers ordered bunkers. Bunkers Company was paid but did not settle the amount to Subcontractors. Then, after vessel was redelivered to Owners, Subcontractors arrested the vessel in Morocco. Owners filed proceedings seeking the release of the vessel on the grounds that they have no relation with this bunkering ordered by previous Charterers and that in any case bunkers company have been paid by Charterers. However, 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]

It is also perfectly possible to arrest sister ship vessels, i.e vessels in the same ownership than the vessel in respect of which the claim arose. 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 in order to arrest associated vessels. Thus, a vessel can be arrested in relation with a claim regarding another vessel belonging to another company in so far as both Owners pertains in fact to the same economical entity. To do so, court rely on the concept of "community of interest" and/or "legal fiction" taking into consideration a series of clues proving the existence of common interests such as: same manager, same address of head office, same shareholders …In such cases, court accept to deliver arrest orders against vessel belon.

This theory has been applied in a very specific case under which we raised the issue of the recognition of private property in communist countries. Thus, we arrested a vessel belonging to a Cuban company in relation with a claim regarding another Cuban company on the grounds that Cuban state, as communist country, does not recognize private property right. Thus, we argued that both companies belong in fact to Cuban public shipping company. After several favorable decisions before first instance court, the appeal court held that *"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 considers 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.

There is another issue in relation sold vessels In principle, unless the claim amounts to maritime lien, it should not possible to arrest the vessel in the hands of new owners. However, as per Moroccan courts precedent, 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.

Finally, we should underline that in application of article 3.4 of Brussels convention, in case the claim arose whilst the ship was under charter by demise, claim may arrest on top of the vessel in question, any other ship in the same ownership of the charterer by demise but no other ship in the same ownership of the registered owner .

Hakim Lahlou
Lahlou - Zioui & Associés
lahlou.zioui@gmail.com
www.lahlou-ziou.com
7 rue Bendahan, 20080 Casablanca
Tel: + 212 (0) 522 26 00 08
Fax : + 212 (0) 522 26 69 28

Lawyer member of Paris Bar (2002) and Casablanca Bar (2006), Hakim LAHLOU is graduated in Master in law (2001) and hold two Postgraduate Diplomas (DESS and DEA) in insurance Law and Business Law (2002 and 2003) from the University of Paris 1 – Panthéon SORBONNE. Since 2006, Hakim LAHLOU is partner of Lahlou – Zioui & Associés, a leading law firm in Casablanca Morocco.

Hakim LAHLOU is in charge of the Shipping Department of LAHLOU – ZIOUI & Associés Law Firm, and as such, handles litigation and counsel cases in all shipping matters.

Spain, an allied territory for P&I Clubs to collect unpaid premiums

In a previous note we advised on the entry into force in Spain next 14 of September of the 1999 Geneva Arrest Convention following Albania's signature.

It was good news but we had to be cautious as Spain had made a reservation and the 1999 Geneva Convention might not apply to other ships than those flying a State Convention flag, a very limited scope. However, following some concerns and notices among maritime lawyers, the situation has changed drastically in the last weeks for a much better scenario. Last 26 of August the Spanish Government issued the 12/2011 Royal Decree aimed to provide certainty in respect to the law of arrest of ships in Spain.

The 12/2011 Royal Decree introduces a new section into the Spanish Procedural Law Act, which in practice emptied the reservation made by Spain when the 1999 Convention was signed. The Decree states, inter alia; all the arrest of ships in Spain will be dealt with by the Courts of Justice under the terms of the 1999 Geneva Convention irrespectively of whether the ship flies a Convention State's flag; The mere allegation of a maritime claim will be sufficient to arrest a ship in Spain; The Court will request the arrestor countersecurity to cover damages and costs; The arrest might only be contested on the basis of the infringement of the 1999 Convention.

As a result certainty has been gained as to the applicability of the 1999 Convention in Spain, which at some point became controversial. Moreover, one of the most attractive features of the 1999 Convention is the possibility to arrest ships in Spain for a wider scope of maritime claims than its predecessor, the 1952 Convention. For instance, P&I Clubs, which had pursued their claims under the 1952 Arrest Convention with different outcomes in Spain and abroad, have now a permanent allied territory in the many Spanish ports to secure their claims against those members failing to pay their debts. Suppliers of containers will be also the beneficiaries of the new regime.

We will keep you posted, Arizon Abogados S.L.P.

Dr. Felipe Arizon
Arizon Abogados SLP
felipearizon@arizon.es
www.arizon.es
Paseo de Reding 43, G-Floor, 29016 Málaga, Spain
Tel: +34 952 211 774
Fax: +34 952 226 676

Felipe Arizon holds a Ph.D in English Law from Newcastle and a LL.M. from Southampton; he has been a "Visiting Scholar" at the University of Tulane-New Orleans. Dr. Arizon acts before many international and domestic arbitration forums including ICC, Gafta, Fosfa, CAP and RSA. He is a well-know barrister before Spanish Courts, including High Courts, Appeal Courts and Supreme Courts. According to The Legal 500 Felipe "is well liked and supported by the main players of the Spanish market". He is regular contributor to international and Spanish publications in commercial law, carriage of goods, insurance and arrest of ships and is the Founder of www.shiparrested.com. Felipe is lecturer at the Spanish State Institute for International Trade and has lectured widely in Spain and abroad: England (Newcastle University; Lloyd's Maritime Academy), Russia, Ukraine, Netherlands, France, and Turkey. He has been engaged on seminars at the Nautical Institute (England). Felipe is member to the International Bar Association and supporting member of the LMAA.