THE ARREST news

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

Issue 8 January 2013

IN THIS QUARTERLY ISSUE

Limitation of liability between Two Colliding Vessels at Fault - Recent Developments in China Maritime Trial

Claims in respect of wreck removal or salvage

Though the People's Republic of China ('PRC') is not a contracting party to the Convention on Limitation of Liability for Maritime Claims, 1976('LLMC'), her regime for limitation of liability for maritime claims contained in Chapter XI, arts 204 to 215, of the Chinese Maritime Code 1993 ('CMC') is mainly modelled on the LLMC. The scope of the claims subject to limitation under CMC (art 207) is narrower than that under the LLMC 1976. Art 207 of the CMC differs from that of the equivalent provision in Art 2.1 of the LLMC 1976 in that the former does not allow limitation for claims in respect of the removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned and of the cargo of the ship. The CMC is exactly alike with the LLMC regarding the scope of those claims which are excepted from limitation under which the limitation shall not apply to claims for salvage. It means that the CMC excludes application to claims for removal and salvage whatever the removal or salvage is done pursuant to a contract right/duty or pursuant to a statutory requirement.

However, it should be remembered where such claims arise out of a collision, the vessel paying the remuneration for removal or salvage may have a right of indemnity from the other vessel. Under such situations, the claims in respect of removal or salvage filed by one vessel against the other vessel fall into the category of the claims in art 207 (1) of the CMC or art 2.1 (a) of the LLMC 1976, that is to say such claims are classed as those in respect of loss of or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom and, shall be subject to limitation of liability.

The above opinions have been accepted both by Qingdao Maritime Court in the collision case of 'Bright Century' Vs. 'Sea Success' and also by Shanghai Maritime Court in the collision case of 'Sun Cross' Vs. 'Rickmers Dailian' and, were both affirmed by their appellate courts.

How shall the two categories of claim and their counterclaims be set off, separately or aggregately?

Both art 210 of the CMC and art 6 of the LLMC 1976 provided different limits for loss of life and personal injury claims and for property claims and, separate limitation funds are provided for the two categories of claim. They both stipulated that claims and counterclaims arising out of the same occurrence must be set off against each other and limitation is to be applied only to the balance, if any, payable. However, where the event gives rise to both death and/or personal injury claims/counterclaims and property claims/counterclaims in the typical situation of ships collision, How shall the two categories of claim and counterclaims be set off, separately or aggregately? Namely, the two categories of claim and counterclaims shall be set off separately and then to apply the limit to their balance respectively or, to aggregate all the claims respectively alleged by each party firstly and then to set off and, finally to apply the limit to the balance.

Thus, to take the very simplest of examples: X collides with Y and both are equally to blame. X has suffered loss of life totalling US$1 Million and property damages totalling US$2 Million; Y, US$1.5 Million and US$2.5 Million.

Separately:
Firstly to set off the counterclaims respectively: US$1.5 Million - US$1 Million = US$0.5 Million; US$2.5 Million - US$2 Million = US$0.5 Million. Secondly to apply the life limitation and property limitation respectively to the balances of US$0.5 Million and US$0.5 Million.

Aggregately:
Firstly to aggregate each party's all claims respectively: X = US$1 Million + US$2 Million = US$3 Million; Y = US$1.5 Million + US$2.5 Million = US$4 Million.
Secondly to set off the counterclaims: US$4 Million - US$3 Million = US$1 Million.
Thirdly to apply the limitation to the balance of US$1 Million.

Which of the above two is right?
In the collision case of 'Sun Cross' Vs. 'Rickmers Dailian', Shanghai Maritime Court held that: since the life/injury claims and property claims are provided separately and the former enjoy priority, the correct way shall be to set off the counterclaims separately, which is also affirmed by the appellate court.

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Arrest of Ships in Romania – New Rules 2013

1. Short Introduction of The New Rules

The new set of procedural rules (hereinafter "The Rules"), regarding the arrest procedure of sea-going vessels, as contained in the New Civil Procedural Code, which will enter into force on 1st of February 2013 contains significant changes in what concerns the Arrest of Ships procedures that was applicable until now.
The most important change, in our opinion, is that there is no need for substantive claim proceedings to have been commenced prior to the request to arrest a vessel. The substantive claim proceedings must however be commenced in 20 days starting from the day the arrest application was made.

2. Significant changes in the New Arrest Procedure

The first significant change is the one described in the paragraph above. Article 960 from The Rules states that in urgent cases, the application to arrest a vessel can be made before commencing the substantive claim proceedings. In this case, the Claimant who arrested the vessel has to commence the substantive claim proceedings in 20 days starting from the date the arrest application was granted by the Court. If the Claimant does not comply with this provision, and doesn't commence the substantive claim proceedings in the 20 days timeframe, then the arrest will terminate and the vessel will be released.

Another significant change in the New Rules concerns the competence of the Court to whom the arrest application will be addressed. In the Old Set of Rules, it was clearly stated that the arrest application will be addressed to the same Court the substantive claim has been brought to. Article 961 from The New Rules clearly state that the arrest application will be addressed to The Court at the place where the ship is located no matter the Court in front of whom the substantive claim was brought to.

Another innovation brought by the New Rules concerns the possibility that the debtor may, in extraordinary circumstances, to change the arrest from one vessel to another in his ownership. This provision, in our opinion has some major defaults, because this change of the arrested vessel with one from the same ownership can be ordered by the judge, without the prior consent of the plaintiff, thus leading to the arrest of a lower value ship. In any case, the plaintiff may defend the application and request that the owner's application be dismissed the Court.

A key innovation and an absolute novelty in the Romanian Arrest Rules, is the possibility for the creditor of the legitimate holder of the bill of lading to arrest the cargo listed in such a bill of lading and that is located on the vessel. This arrest is also possible in case the vessel that holds the cargo is not itself arrested in a Romanian port. In such a case, the claimant must ask for the discharge of the cargo located on the ship and arrest it separately.

Another provision, which until now was found by the involved parties a practical solution, instead of a legal one, is related to the enforcement of the Court's decision granting the arrest. According to the Old Rules, this enforcement was carried out by the Court's Bailiff (but in practice the claimant, to whom the arrest had been granted, would go to the Harbor Master, present the Court's Decision granting the arrest and request for the ship to be detained). The New Rules expressly grant the Harbor Master the ability to detain, at the request of the plaintiff, the ship and not to release the shipping documents in order for the vessel to leave the port;

The new rules keep the obligation of the claimant to provide counter-security for arresting the vessel, as provided by the old rules also. The counter-security will be fixed by the Court, there are no legal indications concerning the quantum of the counter-security. We have to mention that it was a common practice in the past that the counter-security to be fixed at 10% of the claimed amount. In any case, in accordance with the new procedural rules, the counter-security will not be fixed for an amount exceeding 20% of the claimed amount. As a rule, the counter-security will be placed in cash, at the disposal of the Court, to an authorised bank.

There is a clear mention in the new rules, that the arrest proceedings in Romania will follow the rules prescribed by the international arrest Conventions ratified by Romania.

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Counter-security under Dutch law

1.Introduction
On 24 December 2012, just one day before Christmas the arrest on Steve Jobs's motor yacht was lifted. The yacht had been arrested in the port of Amsterdam at the behest of French designer Philippe Starck, who claimed that Jobs owed him 3 millions Euros for finalizing the design of the yacht, which carries the name ***"Venus"***.

Indeed arresting a ship is an excellent way to obtain security for a claim, but before the ship's arrest a freezing order must be obtained, in which the court entitles a creditor to "seize" the ship. In the Netherlands, petitioners are not required to provide counter-security by way of a bank guarantee in order to have the ship arrested. However, situations have occurred in which the court has attached a requirement, i.e. counter-security as a prerequisite in order to obtain or maintain the freezing order.

2. Two ways to impose counter-security
There are cases in which providing a counter-security was a prerequisite in order to obtain a freezing order. Pursuant to art. 701(1) Dutch Code of Civil Procedure ["CCP"] courts have the discretionary power to make the freezing order conditional by requiring the arrest petitioner to provide counter-security prior to obtaining the freezing order. It seldom occurs that a court would make use of this discretionary power enshrined in art. 701(1) CCP.

Though the following case qualifies as an exception to the general rule. In the "Zuga" - case, Bunker Master supplied bunker oil to M/V ***"Zuga"***. Invoices remained outstanding. The ship was subsequently sold to Tuta. Bunker Master eventually filed an arrest petition with the District Court of Rotterdam. Due to the close relationship between the previous and the new owner, the arrest ground was mainly based on piercing the corporate veil. Usually not the strongest ground for an arrest.

The court nevertheless awarded Bunker Master the freezing order but it attached a condition to it as well: Bunker Master has to provide counter-security prior to the arrest [1]. Hence, when the merits of the claim or arrest grounds are doubtful, the court may request the petitioner to put up a counter-security.

The ***"Beltrade"*** - case affirms the aforementioned and emphasizes that counter-security can also be requested subsequent to the arrest of the ship in summary proceedings in which the respondent seeks to lift the arrest [2].

3. Dutch case law
Now, subsequent to ship's arrest, the debtor may initiate summary proceedings in order to lift the arrest. During these proceedings the debtor may request counter-security because of the supposedly wrongful nature of the arrest. Relevant case law regarding when a demand for counter-security was awarded by Dutch courts is set out below.

a.Continental Liner and Shipping Services LLC v. Danube Shipping Company - M/V "Ryshkany"
Class concluded an agreement with Fertis to carry apples, onions and potatoes from Flushing to St. Petersburg. The duty of Class to provide cargo in the voyage lead to the conclusion of an agreement with Cosmos and Cosmos subsequently concluded a time charter party with UDP with regard to chartering the ship M/V "Ryshkany", owned by UDP. The ship was not allowed to set sail due to several issues with the ship and the cargo was unloaded. Other ships were hired to transport the products. Class held UDP liable for the damages because the cargo had to be unloaded due to the inability of M/V "Ryshkany" to set sail. The ship was arrested on behalf of Class. In order to lift the arrest UDP provided a bank guarantee and in return requested Class to provide counter-security. The District Court in Middelburg granted UDP's request for counter-security and the Court of Appeal affirmed the district court's ruling. Class was required to provide counter-security because it does not have any assets vested in the Netherlands, thus it will be difficult for UDP to recover damages resulting from a wrongful arrest [3].

b.Deleclass Shipping Co. LTD v. Liebermann & Partners Co. LTD – M/V "Siderfly"
Claims under an alleged loan agreement concluded by Deleclass Shipping Co. Ltd with Deleclass Shipping Company Ltd were transferred to Liebermann upon signing the assignment agreement. Subsequently, Liebermann notified Deleclass regarding the outstanding amount of USD 1,6 mio owed by Deleclass to Liebermann under the assignment agreement. M/V "Siderfly", a ship owned by Deleclass, was arrested by Liebermann. Deleclass requested the court for Liebermann to provide counter-security, i.e. bank guarantee. The court ruled that taking into account Liebermann's recent incorporation, Liebermann does not possess sufficient assets to recover damages in the event of a wrongful arrest. The mere fact that Liebermann does not possess recoverable assets in the event of a wrongful arrest, should lead to awarding the counter-security [4]. Consequently, Liebermann had to provide a bank guarantee by means of the standard Rotterdam Guarantee Form. Not complying with the court ruling implies that the arrest shall be lifted. Apparently Liebermann could not comply with the court ruling and voluntarily lifted the arrest.

4.Summary
Dutch courts may attach an obligation to the creditor to provide counter-security in the event of insufficient or no recoverable assets which would lead to a situation where there are no assets available that can be pursued in order to recover damages arising from a – probable – wrongful arrest.

Another reason for courts to demand counter-security is when the merits of the claim or arrest grounds appear doubtful based on the content of the arrest petition.

Hence, counter-security serves as a safety valve for the debtor because it ensures the debtor that liability is covered in the event of wrongful detainment of the ship and recoverable assets are absent (or insufficient).

Counter-security can be demanded by the court in two ways: 1. pursuant to art. 701(1) CCP prior to obtaining the freezing order and, 2. subsequent to the ship's arrest in summary proceedings in which the respondent seeks to lift the arrest.

1 *Bunker Master Co., LTD v. Tuta Shipping and Trading LTD , arrest petition to the District Court of Rotterdam (no. 11-2231), case number: 386457. Kiveld International Laywers represented Bunker Master in this case.*
2 *Beltrade Shipping v. Jumbo Line, Court of Appeal The Hague, 28 December 2004, Schip & Schade 2007, 109, para. 23.*
3 *Court of Appeal The Hague 21 September 2004, Schip & Schade 2004, 131, para. 7.2.*
4 *District Court of Rotterdam 2 August 2010, Rechtspraak.nl 2013, LJN: BN3503, para. 5.6. Kiveld International Lawyers was instructed by the ship owner inter alia to avoid a re-arrest on the M/V "Siderfly" in or outside Dutch waters.*

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Arrest and merits costs in Spain: Is the arresting party entitled to secure them under the arrest order?

In crisis time owners, as many others, have become more willing to fight for claims. In this common battlefield scenario, are the arresting parties entitled to get security in the arrest order covering their legal costs?

Money turns on this issue as at the time to release the ship, if the arrest order covers the legal costs as well as interests, owners must leave security before the Court for up to about 30% of interest and costs. These costs often include both the arrest and merits. As far as the claimants are concerned, their interests to have the costs awarded is two folded; to ensure they are collected in due time, and to persuade owners to pay for the claims rather than buying time and credit.

Practice has changed lately in Spain. Bankruptcies in the past three years have become fashionable proceedings, newspapers can tell. As a consequence, arrest applications need further work and shape than they used to require. Commercial courts are collapsed, and support judges have turned up massively in detriment of the work that used to be done by senior commercial court magistrates who are now immersed and devoted to manage and resolve very dense bankruptcy proceedings.

As we all know arrest work often comes in as an urgent matter, and sometimes it requires lawyers to burn some midnight oil. This was the case in an arrest our firm got instructed last summer in a Valencia port. Things were so fast that we had to fill the gap advancing security with our firm's funds, as the arrestors' funds were not valued at our clients' account in time. The ship had a 90 minutes delay in port and this resulted in a successful arrest executed in three hours after presentation of the arrest application.

Oddly, owners decided to fight the arrest and presented an appeal to the arrest order by way of opposition proceedings. This was however a straightforward owners' claim for unpaid bunkers. An unexpected argued point by owners concerned the amount that the court had agreed to fix as security for interest and costs. Out of a claim of about USD 120.000,00 the court granted an arrest order for about USD 120.000,00 for the claim, about USD 4.000,00 for accrued interest, and EUR 25.000,00 for future interest and costs.
A hearing took place before the Valencia Commercial Court where the Magistrate heard the parties and a judgment was reserved. In the judgment the Magistrate strongly refused all three main arguments run by owners. As to the award of interest and costs the judge held that the inclusion of costs (for the arrest and merits) in the arrest order was proper and necessary. It was held by the Magistrate that "For a complete right to justice it is necessary to include an amount to secure the interest that may accrue until the settlement of the claim and the costs . Otherwise, the sole security for the principal amount would not give the proper satisfaction to the eventual judgment in interest and costs, which in turn would oblige the arresting party to undertake new arrest (except in a rare case of voluntary payment by the debtor), which is irrational anti-economic."

Costs are not always covered by arrest orders, even if these have been requested. Nevertheless, now in our arrest applications we do not only provide for the legal arguments entitling the arresting party to costs but also copies of many Spanish arrest orders where costs have been awarded to our clients in many Spanish ports. This builds our argument with consistent evidence before the Court, and in turn, at the time to release the ship, it often persuades the owners to pay for the claim and look elsewhere for banking services.

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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 supporting member of the LMAA.