

# THE ARREST

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## news

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**In this issue of The Arrest News, the contributors address different scenarios to the traditional arrest of ships under a maritime code or an International Convention.**

- **Detention of ships for non-compliance with Maritime Labour Conventions.**
- **Detention of ships in Argentina resulting from ships' holds inspections.**
- **Las Palmas ship arrest; enforcement of a judgment and the ownership claim.**

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## How and why vessels are 'detained'

### Inspections under the Maritime Labour Convention highlight deficiencies in seafarers conditions – a new 'weapon'

Our membership is interested in the business of detaining vessels usually with a view to obtaining security in a dispute. The nature of such disputes can of course be varied [too numerous to list in this short article].

Vessels can be detained [rather than arrested] for a number of reasons and my own experience is dealing with ships that have been detained by virtue of the Port State Inspection Regime.

Having spent a number of years in the Commodity Trading World it is clear that a vessel that has been arrested or detained can have a huge impact on Trading Companies. The non-arrival of the vessel to load a cargo may put a Seller in Default or the detention of a vessel en-route can also lead to a default under the commodity contract.

It should not be forgotten that Commodity Traders drive world commerce and there disputes may also give rise to their looking to arrest a cargo to obtain security for their claims. Their claims are not limited to disputes under sale contracts because these same Traders are also major charterers of vessels and may well have claims against the 'ship' for non-performance.

Members who specialize in 'arrest' should not overlook Trading Companies as potential clients in need of their specialty services.

One of my 'special interests' is sub-standard ships – they are more likely to be stopped or arrested – often with a cargo onboard and this brings in the point of this article.

Sub-standard vessels can be caught by Port State Inspections but a new 'weapon' has come into existence which concerns the level of wages paid by unscrupulous Shipowners – effectively slave labour.

I recently brought this to the attention of the Grain Trade with an article for GAFTA World. My point to Shiparrested.com members is that when a loaded vessel is detained [for whatever reason] then Trading Companies and Cargo Underwriters may well be in a position where their interests could be best served for instructing members to make a formal arrest to obtain security for their claims.

I noticed this new 'weapon' when a representative of the ITF (International Transport Workers' Federation) spoke at the International Shipping

WITH THIS NETWORK OF TOP SHIPPING LAWYERS, ARRESTING OR RELEASING A SHIP HAS NEVER BEEN EASIER.

Arizon Abogados SLP - Major Sponsor 2009/15

Conference on 9th September 2015 revealing the organisation's experience of the Maritime Labour Convention's (MLC's) second year in operation. This is important to Trading Companies who charter vessels and also to all members of Shiparrested.com. Ships can now be stopped for being in breach of this convention. The ITF's press release is worth reading, especially if you take into account the requirements of the Gafta Shipping & Classification Clause [which requires that the cargo is carried on a "first class vessel"]. Is a ship stopped for such a breach "suitable for the carriage of the contract goods"? Not if she is likely to be detained.

A recent example is the MV Apellis operated by Pyrsos Shipping Co Ltd, chartered by Hudson Shipping Lines. This vessel was boarded by inspectors from the Australian Maritime Safety Authority (AMSA) at a grain jetty in Esperance, Western Australia, in early September. They discovered deficiencies related to the working conditions of the crew and detained the ship for a considerable PERIOD.

**Be Aware;** the following is taken from the ITF press release:

"The MLC came into force on 20 August 2013. Since its entry into force the ITF's 150 inspectors worldwide have been reporting MLC-related problems they've encountered. In 2014 our inspectors carried out 7,488 ship visits. 36% (2,755 vessels) were found to have MLC-related problems. This is a 4% increase (371 more vessels) compared to the 1st year of the convention's entry into force. The ITF had expected that the increase in flag states to which the convention applies would have resulted in an improvement in the standards of living and working conditions for seafarers on board their vessels, but based on the number of problems received, this unfortunately does not seem to be the case.

An optimistic explanation for the increase might be that the convention provides mechanisms that make it easier for seafarers to make complaints. If this is the case, then we can only speculate how many problems went unaddressed prior to the entry into force. Either way, there can be no room for complacency.

The ITF's survey of the effectiveness of the MLC in its second year (20 August 2014 to 19 August 2015) is based on the real life experiences of seafarers gathered by the ITF's inspectors. It covers problems found on vessels flying all flags and does not exclude those for which the convention was not in force.

It finds that:

- The number of reports of MLC non-compliance has increased in Year 2 of the MLC being in force, both in numbers and as a percentage of inspections.
- The flag with the highest number of reported problems is Panama.
- The flag with the highest percentage of problematic inspections is St Kitts & Nevis.
- The most frequently reported problems relate to unpaid wages; over the first two years during which the MLC has been in force some \$89 million has been recovered by ITF inspectors.

- The payment of wages below ILO minima is also a significant issue.

The number of inspections undertaken in Year 2 increased slightly by 2%. In 2013/2014 there were 146 inspectors and contacts, at 19 August 2015 there were 153. Of the vessels inspected in Year 2, 36% (2,755) were found to have MLC related problems, up by 4% (371 vessels) on Year 1 when 32% of vessels had problems.

This is not very encouraging given that the MLC is now in force for double the number of states. On entry into force on 20 August 2013, 30 countries had acceded to the MLC regime, at 20 August 2015 the convention was in force for 60 of the 65 countries that have now ratified.

There is no change in the ranking of the top 8 flags associated with the most problems on board their vessels. Panama leads the list with 569 (510 in Year 1), followed by Malta with 245 (229), Liberia with 242 (233), Antigua & Barbuda with 241 (188), Marshall Islands with 192 (155), Bahamas with 123 (91), Cyprus with 89 (78) and Hong Kong with 80 (72). However, Russia has dropped to 12th place, whilst Belize moves up to 9th place with 71 (66) and Singapore to 10th place with 67 (64).

Again this indicates a failure to improve standards and even a trend in the wrong direction. Of the 10 worst flag States in terms of numbers of vessels with MLC related problems, all but Hong Kong have ratified the MLC.

Of the problems reported, the biggest and recurrent issue is that of unpaid wages. In Year 2 almost USD 49 million was recovered by ITF inspectors, compared with just over USD 40 million in Year 1".

One aspect to consider is the value of arresting a vessel that has already been detained but this would need to be examined with a careful look at vales and hierarch of claims.

Something for us all to think of?

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## Tanks and holds rejection by governmental inspectors and the charter parties clauses: the argentine experience, the unlawful detention of vessels and the potential demurrage claims and cargo claims

Most of the bulk carriers and tankers calling at Argentine ports must proceed, after discharging cargo, to clean the holds and tanks before loading the next cargo -normally grains and Crude Soya Bean Oil. Naturally, most of the charter parties include cleanliness clauses which usually state that tanks or holds are to be cleaned to the satisfaction of the charterer's and/or shipper's appointed surveyor only. Usually, they do not make reference about cleaning to the satisfaction of the governmental inspectors.

This article sets out to make a general approach to the Argentine legal framework regarding cargo-worthiness and its interaction with the charter parties clauses. To begin with, it must be noted that whenever a governmental inspector gets on board a vessel, it is more likely that an issue will arise causing inevitable delays. The contention of this article is that situations involving tanks and holds inspection could be avoided and, eventually, a demurrage claim must succeed against a charterer relying on domestic legislation.

As one of a leading producer of grains for human consumption worldwide, Argentina has established strong phytosanitary regulations regarding their quality and the cargo- worthiness of the holds as a matter of public policy. It must be noted that the Argentine regulations only cover the bulk carriers cargo-worthiness and state that if the holds are approved after an inspection, the corresponding Hold Inspection and Authorization for Loading Certificate will be issued.

If the vessel fails to pass the first hold inspection from the government, the cost for all subsequent inspections, as well as the cost for any unberthing, reberthing, and/or shifting of the vessel is more likely to be for owners account. As a result, the NOR shall be deemed invalid and inoperative and all the time lost may not count as laytime.

On the one hand, bulk carriers can be subject to objections by governmental inspectors. It occurs when there is an issue that can be corrected by tasks of limited relevance which demand no more than 1 hour of activity and can be carried out by personnel on board (sweep floors, dry angles, remove some rust, among others). The regulation requires that the inspector will remain on board and will approve the hold once the reason for the observation is resolved.

On the other hand, the holds can also be rejected. This rejection will take place whenever a governmental inspector finds situations, which are considered to be of relevance and cannot be resolved immediately. The regulations posit that these are the grounds for rejection: rust residue; presence of live insects; humidity due to condensation; washing water and/or filtration; questionable odors when persist even with the hatches open and/or after adequate ventilation; residues of previous cargoes.

The severity of the regulations regarding the holds inspection led to a widespread common practice within governmental inspectors to reject holds and also tanks –even when the tankers are not included in the regulations- which are clean but due to presence of some odour or minor condensation. For more than 20 years, the governmental inspectors forced a system where the certificate of approval became a “tool of their own business” as part of their professional jargon. In this context, private surveyors had to stand down and follow the governmental criterion on this matter.

Naturally, because the cleanliness of the tanks became irrelevant, the system was exacerbated with the fact that some parties prefer to avoid doing the cleaning at all and try to get the approval by any means. Consequently, governmental inspectors gained through the years a huge power causing, on several occasions, if not all, an unlawful detention of the vessels when the holds or tanks are rejected when clean.

It can be said that any unlawful detention caused by any pythosanitary agency in Argentina, particularly with cargo other than grains, could be disregarded and it would be a matter of private surveyors to confirm following the standards under Fosfa rules, whether the vessel is cargo-worthy. There is no legal reason to consider the NOR tendered invalid due to the governmental inspectors rejection and consequently a potential demurrage claim should succeed.

As a result of this intricate system, it would not be odd for buyers to receive soya bean flour contaminated with coal or crude soya bean oil with diesel from previous voyage leading to a potential cargo-claim and vessels being arrested.

To conclude, there is a huge misunderstanding regarding the legal framework applicable to vessels inspections and the public policy rules in Argentina. Evidence of this is the common practice of local agents requesting the presence of governmental inspectors from the phytosanitary agency to inspect tanks not being compulsory since the public policy does not cover tankers loading certain cargo such us crude soya bean oil.

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## Las Palmas Commercial Court refuses ownership claim contesting an enforcement arrest action

The Commercial Court number 2 of Las Palmas (Canaries) has refused the claim put forward by the alleged owners of the ship.

This case has been running since the ship was arrested in May 2013 for the owner's failure to pay supply claims which at that time were already embodied into an Irish judgment against the owners.

The ship was arrested under the 1999 Convention as a fast track way to prevent the ship from leaving Las Palmas immediately. After the allegations of the opponents the Court decided to lift the arrest on the basis there was already a judgment, bringing the arrest outside the scope of the 1999 Convention. The Court of Appeal took the same view. However, as early as in June 2013 the ship had been arrested again, this time, by virtue of an enforcement action based on the Irish judgment under the 44/2001 Regulation.

As the ship was arrested her actual owners and debtors under the Irish judgment did not appear before the Court, but an off shore Company claiming to be the current owners of the vessel.

In the enforcement of the judgment proceedings the alleged new owners have presented an ownership claim and tried to convince the Court that

they are the actual owners of the ship. However, and despite the efforts, the Commercial Court has held that on the documentary evidence before the judge such allegation should fail as, inter alia: the ship continues registered in Ireland; no certificate of deletion has been provided; nor any evidence as to the mortgage on the ship has been produced. The alleged provisional registration of the ship in Panama in favour of the "new owners" has not convinced the Court to the contrary. The matter is now on appeal.

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