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The Naval Prize Before The Haifa Maritime Court

By John & Yoav Harris, John Harris & Co. and Doron Tikotzki & Co.

Almost 80 years after it has been established in 1937 by the King's Council as a Court of Admiralty in Palestine, the Israeli Supreme Court attended to a unique matter which was not dealt with before: The Naval Prize (of the M/V Estelle). This small vessel which carried cement to Gaza strip has wakened the question of a Maritime Court as a Prize Court for the first time after the ending of World War II (at least in the western world).

On October 2012 the M/V Estelle ignored Israel's massage to its owners that humanitarian aid carried on the vessel will be transferred through land passage, and reached the restricted area of the Naval Blockade imposed on the coast of Gaza. The vessel was taken over by the Israeli Navy who navigated it to Ashdod Port. The passengers were questioned and released and the cargo was discharged and forwarded to the Palestinian Authority and to UNRWA. But, as opposed to previous incidents where the vessels were returned to their owners, the M/V Estelle was held by the Israeli Army and after 10 months of detention the State of Israel applied to the Haifa Maritime Court ("HMC") and requested it to exercise its authority as a Prize Court under the (English) Naval Prize Act of 1864 and to order confiscation of the vessel (FolioNo 26861-08-13).

According to the traditional law, all merchant ships, whether enemy or neutral, may be stopped, visited and searched. An enemy cargo on board enemy merchant ships can always be seized and captured as a prize. Neutral cargo on board an enemy merchant vessel can be seized if it is contraband, or if the vessel is a blockade runner or actively resists visit and search. Enemy's property, whether vessels or goods is liable to capture and, subject to a decision of a prize court, to condemnation. Although the act of capture itself takes place at sea it should be confirmed by a Judgement of a Prize Court where the owners and the cargo interests can bring their allegations before a specialized Court. The Prize Court does not only rule on the validity of the capture itself but also gives orders in relation to the management of the Vessel, its crew and cargo, according to the principle that the property of private persons must not be converted without due process of law. Hence, under clause 16 of the Naval Prize Act 1864 – **"Every ship taken as a prize and brought into port within the jurisdiction of a Prize Court,**

shall forthwith and without bulk broken, be delivered to the marshal of the Court." (Wolff Heintschel Von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I: The Traditional Law", (29 Can.Y.B. Intl's L. 283 (1991), page 284, footnote 4, pages 298, 304, 307-308).

The State of Israel based its application on the legacy from the British Mandate over Palestine (Israel) which ended on 15 May 1948. By a King's-Order-in-Council dated 2 February 1937, the Supreme Court of Jerusalem was constituted as a Maritime Court under the Colonial Courts of Admiralty Act, 1890 (the **"Colonial Act"**). This Act established Maritime Courts in Her Majesty's Dominions and elsewhere out of the United Kingdom.

On the date when the Colonial Act was enacted the relevant Acts of Admiralty which were in force were the Admiralty Court Acts of 1840 and 1861. These, continue to govern the Israeli Haifa Maritime Court to-date. The Naval Prize Act, 1864 which was also in force at that time was never considered or was required to be considered as governing the Israeli Maritime Jurisdiction until the matter of the M/V Estelle.

The difficulty the Haifa Maritime Court was faced with, is the following: Under clause 2(3)(a) of the Colonial Act, unless being duly authorized, a Colonial Court of Admiralty was not allowed to exercise any jurisdiction under the Naval Prize Act or otherwise in relation to prize.

Therefore, according to the above Acts, the Authorization given to the Admiralty Court established in Jerusalem was limited. In relation to able it to act as a Prize-Court, a special additional authorization by her Majesty was required. The historical–legal question was whether or not such an authorization was provided?

The State of Israel argued that the HMC's authority to act as a prize court was established by an Order given by the High Lord Admiral of the United kingdom to the senior judge of the Supreme Court of Palestine (Israel) published in 10 October 1939 ordering him that **"when an announcement is made in Palestine (Israel) stating a war has commenced between her Majesty's and any foreign country, to pay attention to all kinds of captures and prizes of all kinds of ships, vessels aircrafts and cargos which will be taken and will be brought before the Supreme Court of Palestine (Israel) to rule over them, to judge and to confiscate them according to the Law of Admiralty and Regulations as will be in-force at that time. For this purpose this order is your writ of authority until cancelled or dismissed"**.

The counter argument was argued that the announcement mentioned in the above mentioned orders was not presented, and in any event it seems that it was in force only for the purpose and period of the Second World War which had ended – as so had the British Mandate – on 1948. In 1952, the State of Israel enacted the "Admiralty Court Act" which was merely an administrative act stating that all the authorities which were given to the Supreme Court of Jerusalem (to act as a Maritime Court) are transferred to the Haifa District Court acting (from now on) as the Maritime Court. This Act, therefore, does not deal with the jurisdiction and authorities themselves and can't establish an authorization to the Israeli Maritime Court to act as a Prize Court.

These unique matters got the attention of scholars. The underwriters, under articles published in the “Kathedra" (The Emil Zula Chair for Human Rights) questioned if indeed the HMC was authorized to act as a Prize Court, and if indeed back in 1952 the Israeli legislator indeed intended to authorize the Haifa District Court to give orders to the State of Israel (relating to confiscation of vessels) where such authorities to adjudicate in public law matters involving the State were transferred from the Supreme Court to the District Courts much later - only in the 1990. Due to the relevance of Prize considering the security challenges the State of Israel is facing, we argued that the Maritime Court should be provided with better legislative foundations than that of a doubted act of legislation, which took place almost a decade ago. Also Dr. Ziv Borrer of Bar-Ilan University argued under his article that the HMC was authorized to act as a Prize Court.

The Haifa Maritime Court, Honorable Judge Mr. Ron Sokol decided that between the two possibilities: The one he is authorized to act as a Prize Court and the other, he has not such authorization, he prefers the first. A specialized Prize-Court is in compliance with the Traditional Law's requirements rather than an absence thereof. This is reinforced by the need for matters of Prize to be dealt promptly as the capturing authority is required to provide the vessels documents to the Court immediately after the capture, and where the Maritime Court has the required experience and knowledge and authority to give immediate orders regarding the management of the captured vessel, its crew, its cargo and to relate to third-parties and cargo interests and claims.

Therefore, the Haifa Maritime Court held that it is authorized to act as a Prize Court. However, the Judgment ordered that under the current circumstances where the Israeli Navy has delayed the filing of proceedings for a 10 month period, which is contradictory to the principles of the Traditional Law, is also inequitable and is considered as being against the principals of administrative law, the Vessel Estelle

should be released immediately. The release of the vessel is also justified in the current circumstances where the cargo carried by the Vessel was humanitarian and the Vessel did not resist the visit of the Israeli Navy or its capture and arrest.

The State of Israel appealed before the Supreme Court and argued that the HMC erred in denying its application to order on the confiscation of the vessel (Civil Appeal 7307/14). Under the appeal, both parties presented again the question of the HMC's authority to act as a Prize Court. The Supreme Court, after citing the different opinions as expressed in the articles related to this matter (as mentioned above), held in its judgment released on August 2016 that in order to decide if the HMC' was right in its decision not to order on the confiscation of the vessel, there is no need to decide in the debate whether the HMC is authorized to act as a Prize Court. The fact that the State of Israel had waited 10 months from the capture of the vessel until it brought proceedings before the Court, is sufficient to dismiss the appeal. The Supreme Court's main reasoning was that, under clauses 16 and 17 of the Naval Prize Act 1864, every ship taken as a prize shall forthwith be delivered to the marshal of the Court, and "the captors shall, with all practicable speed after the ship is brought into port, bring the ship papers into the registry of the Court". In fact, The Supreme Court held, the act of prize is not completed without the adjudication (which should take place promptly), and therefore, a postponement of 10 months does not comply with the requirements of "forthwith" and "with all practicable speed, as set by the law.

Vessels owners and operators must be aware that a 1864 British Act relating to Prize might be exercised on their vessel and lead to its confiscation if the vessel would be involved in a breach of the naval blockade (which was found lawful by the U.N Report of the Secretary-General's Panel of Inquiry headed by Sir G. Palmer - which investigated the M/V Mavi Marmera incident) or in trafficking weapons to any of the Israeli enemies.

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Cross-Border Insolvency and Hanjin Shipping Co Limited: A South African Perspective

By Edmund Greiner and Pauline Kumlehn,
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On 1 September 2016, Hanjin Shipping Co Limited ('Hanjin') successfully applied for and obtained an order whereby it was placed under rehabilitation. Such an order was obtained within 24 hours of the company making application to the Korean courts, without notice or input from other interested parties, most notably Hanjin's creditors.

It is reported that Hanjin has filed a Chapter 15 petition in a US bankruptcy court in New Jersey and plans to pursue legal action in roughly ten countries during the week (5-9 September 2016), and later expand that to 43 jurisdictions, no doubt to obtain recognition of the Korean rehabilitation proceedings ("the Korean proceedings").

Although South Africa is a signatory to the United Nations Convention on Cross Border Insolvency, the provisions of that convention have not been given effect to in South Africa, with the result that there is no automatic recognition of the Korea proceedings. In order for the Korean proceedings to be recognised in South Africa, the Receiver would formally have to make application to the South African court for recognition. A number of applications for recognition of foreign 'rehabilitation' proceedings have been made in South Africa in the past, including those of Korea Line, STX Pan Ocean, Excel Maritime, Daichi Chuo Kisen Kaisha and Starbulk Carriers.

The practice that has developed in South Africa is that such applications are brought ex parte (without notice). Recognition is sought on the basis of comity, meaning that the position of the appointed official / liquidator would be recognised in South Africa and afforded appropriate power in this jurisdiction, based on the association between South Africa and the U.S. for their mutual benefit. To date, none of these applications have been challenged, and as a result, there is no jurisprudence in South Africa on this point. Comity, in principle, requires that similar relief is available in this jurisdiction.

Whether an application for recognition of the Korean proceedings would succeed on the basis of comity remains to be seen. As mentioned above, no opportunity was provided to other interested parties when the Korean order was sought. The affairs of the company are not susceptible to independent judicial

board. Most notably, it is reported in the international press that it is expected that Hanjin will ultimately be liquidated.

South Africa's company law was extensively overhauled with the promulgation of the Companies Act 71 of 2008, which became effective on 1 May 2011. The Act introduced the concept of business rescue and is the piece of legislation that seems to precipitate applications in South Africa for the recognition of foreign 'rehabilitation' proceedings.

Business rescue in South Africa amounts to judicial oversight of the continued operation of the company by a court appointed independent business rescue practitioner. Importantly, an application for business rescue is made on notice to interested parties and, furthermore, the court may only grant such an order in circumstances where there is a reasonable prospect of rescuing the company.

The recent judgment in the Western Cape court in the matter of the MV "Kenanga" may provide further arguments against recognition of the Hanjin Korean proceedings. In this case, the applicant (the mortgagee bank) sought recognition of a decree of the Indonesian courts suspending actions against the vessel owner pending the approval of a scheme of arrangement or settlement plan. This matter is distinguishable from previous applications in which recognition of such proceedings had been sought, in that the application was made following the arrest and application for the sale of the vessel. As was accepted by the court, recognition of such proceedings following an arrest would not, pursuant to the provisions of section 10 of our Admiralty Jurisdiction Regulation Act, suspend the arrest or sale proceedings. The applicant had to attempt to argue that the arresting creditors were bound by the decree of the Indonesian court from the date such decree was issued by that court, which preceded the arrest of the vessel.

The application was not brought on the basis of comity. Instead it was accepted by both parties, as well as the court, that the principles that apply to the recognition of the enforcement of a foreign judgment similarly applied to the recognition of cross-border insolvency proceedings. The court accepted that enforcement of such proceedings needed to meet the requirements for the recognition and enforcement of foreign judgments. Amongst these requirements is:

- The need for international jurisdiction;
- Finality of the judgment; and
- That the judgment is not contrary to public policy.

Clearly the Korean proceedings would not meet the first two of these requirements, but as stated above, it may be that the facts in this matter are distinguishable.

Shepstone & Wylie has, on behalf of certain creditors, notified all the other maritime firms in South Africa that we require notice of any application by Hanjin seeking recognition of the Korean proceedings.

For any queries on the above, please contact the author.

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Judicial Sale of Vessels in Scotland

By Tim Edward, Maclay Murray & Spens LLP

Market factors are bringing into focus Court processes for judicial sale of vessels. Bond holders and other lenders are being faced with tough decisions in respect of underused vessels. In Scotland lower activity levels off-shore in the North Sea are exacerbating this. Real consideration is now being given to judicial sale as a method of enforcement for security.

What are the procedures in Scotland?

1. The procedure is under chapter 46 of the Rules of the Court of Session (replicated in chapter 49 of the Sheriff Court Rules).
2. The process requires judgment to have been granted. An undefended judgment can normally be obtained within the Scottish Courts within 2-3 months from date of arrest. The claimant can then apply by motion (Incidental Application) for an order for sale by public auction or private bargain. Before making that order, the Court remits to a Reporter to obtain an inventory, valuation, and recommendations as to advertisement for sale. The sale is then supervised by the Deputy Principal Clerk of the Court. If there is no offer, the claimant can apply to reduce the upset price.
3. Once sold the proceeds of sale are consigned into Court under deduction of dues payable to HMRC or port authorities. The Court then adjudges the ship disburdening it of all bonds, liens and encumbrances, orders the delivery of the ship and advertises for claims on the consigned funds. The Court will hear submissions on the ranking of claims if necessary before disbursing funds.

4. How long is the process likely to take?
   A report is usually obtainable within two weeks or so. The sale process is more difficult to predict but if an early sale can be set up by private bargain the timeframe can be quite short. It is not impossible for the process to be completed within 2-3 months.

5. Is there scope to defer payment into Court?
   This is a very live issue as full price cash buyers thin on the ground. More long-term recovery deals may have to be contemplated by the security holder. The normal procedure is of course for payment of the full purchase price but the Deputy Principal Clerk has some degree of discretion. The discretion is limited by the upset price and the need to maintain the reputation of the Court (the "Union Gold" [2014] 1LLR53). For deferment to be possible, there would have to be no prejudice to other creditors and that would mean in particular quantifying all potential creditor claims ranking prior to the security i.e. HMRC, Port Authorities, prior arresting creditors etc. and ensuring that funds are paid into Court to cover these. If it is only the arresting security holder who is being affected by deferred payment, and that security holder is consenting to deferment, there is no reason why the Court should not have discretion to approve the sale on that basis. The Court will have regard to the consequences of no sale i.e. loss of jobs etc. (see "Union Gold" above).

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Article 37 of the Maltese Merchant Shipping Act: a Practical Precautionary Instrument for Creditors

By Dr. Jean-Pie Gauci-Maistre & Dr. Christine Sammut, Gauci-Maistre Xynou (Legal I Assurance)

When it comes to maritime claims, Maltese law offers different types of protection for creditors, such as the arrest of a vessel subject to the claim. In some instances, like when a Maltese registered vessel may not be arrested in any one jurisdiction immediately or when there is the risk that the vessel shall be transferred to another owner or have its registered flag changed, another instrument is available to the creditor. Article 37[1] of the Maltese Merchant Shipping Act gives the power to the Court to prohibit any dealing with a vessel or any share therein. In this way, transfers, leases or any other dealings regarding the vessel or any of its shares are prohibited. Further mortgages on the vessel are not allowed to be registered and no deletion certificate from the Maltese registry is allowed to be issued, unless such is the prerogative of the Registrar according to any law or policy.

The rights over the vessel which may give rise to an application for this order to be issued are a right to ownership, a right secured by a mortgage, or secured by a registered encumbrance, privilege, lien, or any other claim which gives right to a claim *in rem* against a vessel under Maltese law. Generally, maritime claims such as collisions, bunker claims, services or debt claims, and damages claims may all give rise to such an action. The order ensures that the assets of the ship-owner, usually being the sole vessel subject to the debt incurred and therefore to the action *in rem* of the creditor, remain those of the ship-owner/debtor so that upon a decision of the Court, the vessel may be sold with the proceeds recovered being used, in whole or in part, to settle the amounts due to the creditor.

The action is triggered by a sworn application submitted to the Maltese Civil Court, First Hall. Such sworn application should indicate the specific amount of the claim. The Court may award an interim order pending a final judgment. It is important to note that the Court must appoint the writ for hearing within twenty days, which is a clear indication of the legislators' intent to have the Court regard such application as an urgent matter. The Court may refuse to hand down the order, discharge the order already made, or in general *"act in the case as the justice of the case requires"*.[2]

The order may be made on any terms and conditions the Court deems fit. This includes an imposition to provide appropriate security for damages, interests, and costs that the applicant may suffer as a result of the issuance of the order. In a recent case,[3] the Court decided that the plaintiffs had established *prima facie* that they had a right to be protected; however, the Court found that the plaintiffs had not proven the right as clearly in contrast to the burden to be put on the defendants if the order was to be issued unqualified. The Court took cognisance of the fact that this order could result in serious repercussions, both financially and otherwise, on the ship-owner and must therefore proceed cautiously.

[1] *Chapter 234 of the Laws of Malta*
[2] *Article 37 (1), Chapter 234 of the Laws of Malta*
[3] Application No: *144/2014, Av. Dr Malcolm Mifsud on behalf of the absent Captain Wayne Foulis, Alex Dodson, Andrew Flanagan, Thibaut de Larquier, Sarah Foulis, Bryony Parr, Holly Whitaker, Guy Mannering vs Icon Boat Limited owner of vessel M/Y Pure One,* First Hall, Civil Court, Judge Mark Chetcuti, 20TH *November 2014.*

Therefore, since a *prima facie* contractual relationship had been established, the presiding Judge decided that the order of no dealings was to be issued. The Court also stated that the order was being issued on the condition that a counter security of Euro 10,000 is deposited by the plaintiffs in order to ensure that the interests of the defendants are safeguarded. This case was related to wages of employees working as seamen on board the vessel. The Court found that the evidence, *prima facie*, provided for the existence of a contractual relationship between the parties. The Court then reiterated that the plaintiffs provided evidence for a *prima facie* right. However, in order to decide whether such right was justified, a separate ad hoc action would be initiated and the matter determined.[4]

In the event that the order is issued by the Court, and the claim on which it is based must yet be judicially verified, then the plaintiff must prosecute such case in the courts of Malta or any other relevant jurisdiction within eight working days of the issue of the definite order. If not, on the application of the owner or any other interested party, the order is revoked by the Court. When the Court has issued a provisional order, the plaintiff is obliged to prosecute the claim within thirty days of the issue of the provisional order or eight days from the issue of the definite order, whichever is the earlier. Therefore, the order may not be an end in itself but a tool for the creditor to safeguard his rights while seeking to settle the claim.

This order is issued for a period of no longer than one year. However, the period may be extended by the Court upon application of the plaintiff for further periods of not more than one year each. The applicant needs to confirm that the order is still required and the application must be filed at least thirty days prior to the extinction of the then-current term of the order. In fact, on the argument that the issuance of the order would be tantamount to a perpetual injunction, the Court was very clear in refuting this idea and stating that the issuance of the order would only be made to stand *pendente lite*.[5]

If the court is satisfied that the rights of the plaintiff are already otherwise secured, the Court will not issue the order. Similarly, once the respondent deposits the amount of the claim in Court or gives sufficient security to cover such claim, the Court does not issue this order or it is discharged accordingly. If this is not the case, the order could provide an undue burden on the ship-owner and the vessel.

The Registrar is notified of such an order and a note showing the issuance of the order is included in the registry of vessels. The Registrar may issue any deletion certificate according to merchant shipping law, excluding on request of the ship-owner. The holders' rights of the already-present mortgages registered over the vessel, as well as bareboat charter registrations, and the sale of the vessel pursuant to a competent court's authorisation are not affected.

The order is a helpful instrument that further safeguards the creditors. Together with the warrant for arrest of vessel, this order helps the creditor have a further possibility in recovering the credit he is owed since the vessel subject to the claim remains the property of the debtor and therefore may be sold, by judicial sale by auction or private sale, in order to recover profit therefrom. The transfer of a vessel by the owner to a different flag, the legislation of which will place a creditor at a disadvantage, or the transfer of the same vessel to a different owner, may likely create difficulties for the creditor. Article 37 of the Merchant Shipping Act seeks to minimise these risks for a creditor, and it is precisely with this in mind that Article 37 was included in the Act.

[4] "*L-atturi pprezentaw dokumenti ta' hlasijiet dovuti li juru prima facie pretensjoni. Jekk tali pretensjoni hi gustifikata hi kwistjoni li trid tigi deciza fl-azzjoni ad hoc li trid issir*" – *Ibid. P. 6.*

[5] Application No. 526/2016, *Yacht Projects Limited vs Phelan Good Chartering Limited as owner of the vessel M/Y Phelan Good (official number 16463),* First Hall, Civil Court, Judge Mark Chetcuti, 2nd August 2016.

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Ship Arrest in Iran

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Until recently, Iran has not been considered as a potential jurisdiction for maritime arrests due to the applicability of the international sanctions and the complexities those sanctions entailed. Now that Iran is beginning to open up for international business, coupled with a sharp downturn in the regional shipping market, the ability to arrest ships to secure maritime claims is a frequent topic of enquiry in the shipping industry once again. This article seeks to give an introductory overview of how a claimant can obtain a vessel arrest in Iran and of the accompanying procedures to which he must adhere.

The Two Ways to Arrest a Ship in Iran

Surprisingly, Iran's Maritime Code does not contain any specific provisions governing the arrest of vessels to secure maritime claims. Furthermore, Iran is not a signatory to the International Convention Relating to the Arrest of Sea-Going Ships 1952 nor the International Convention on the Arrest of Ships 1999 (together the "Arrest Conventions") which offer a uniform set of laws and procedural rules on all aspects of ship arrests for contracting States. For example, the Arrest Conventions list the nature of debts which a vessel can be arrested against, referred to as "maritime debts".

Whilst Iran is a party to the International Convention for the Unification of Certain Rules of Law Relating to Maritime Lien and Mortgages, Brussels 1926, in practice, a legal framework for the enforcement of maritime liens has not been implemented in Iran.

In the absence of incorporated international law and the omission from the Iranian Maritime Code of arrest provisions, the Iranian Courts will grant a claimant an arrest order pursuant to two civil law procedural applications, as follows.

The first method of making an arrest application in Iran is to claim pursuant to Article 108 of the Iranian Civil Procedure Act. The article reads as follows:

"[In a civil action] the Claimant, either prior to the commencement of an action and the submission of a statement of claim, or at any time during the proceeding, but prior to a final judgment, may, on the satisfaction of the conditions below, ask the Court for security for judgment and the Court is obligated to order same;

a) The subject matter of the dispute is pursuant to an official document, [dispute of title ownership of property where there is a title deed etc]

b) The Respondent may dilute or divert his assets,

c) In respect of commercial documents or such deed of commercial value against which the Court must issue an Order for security,

d) The Claimant to deposit with the Court an amount equal to an estimated damages that the Respondent may suffer.

The Court of competent jurisdiction will be responsible to determine the value of the estimated damages referenced above."

At a high-level view, a claimant can petition the court at any time for an attachment order over a debtor's assets, including a vessel registered in the debtor's name, where the debtor owes a sum of money to the claimant. The nature of debt against which the vessel can be arrested is widely construed by the court to include any debt or the debtor, not limited to "maritime debts". Under Article 108, if an attachment order is granted by the judge, counter-security must be paid into the court, the sum of which shall be at least 10% of the claim value but determined by the judge in his discretion. The judge will then issue a letter to the relevant port authority where the vessel is located ordering its seizure. The claimant will then have 10 days from the service of the order on the vessel to file his substantive claim against the vessel owner.

Although under Article 108 the claimant can apply for an attachment order over the vessel during the course of the main claim itself, as per normal practice, the claimant will most likely seek to secure the attachment prior to filing the main claim.

The second manner in which an arrest can be obtained is pursuant to Article 310 & 316 of the Iranian Civil Procedure Code, set out below:

> *"Section 310 – In circumstance where is an urgency in rendering an expedited interim judgment, on the request of the interested party to the proceeding, the Court may issue an interim Order on an expedited manner.*
>
> *Section 316 – The Interim Order pursuant to Section 310 can be made in respect of seizure of assets, order to undertake a deed or action, or against a deed or action."*

This method involves an ex parte application to the court on an "urgent" basis which must evidence to the court that there is a risk that 1) the movable asset (vessel) will leave the jurisdiction and 2) there is no alternative asset available which can secure the claimant's claim. If convinced, the court will issue a provisional attachment order over the ship preventing it from leaving the jurisdiction. As with the Article 108 procedure outlined above, counter-security will be required. From the date of service of the arrest order, the claimant will have 20 days to file his substantive

claim, failing which the arrest order will be lifted.

Other Considerations for Arresting Parties

Sister-ship arrests are possible under the Iranian legal system but only where the debtor is the legally registered owner of the sister-ship. The courts will not be prepared to lift the corporate veil and order the arrest of a vessel which is group owned, beneficially owned, chartered, managed or operated by the registered owner of the offending ship. For example, if "Ship A" has not paid for its bunkers and the registered owner is "Owner A", the bunker supplier cannot arrest "Ship B" because it is beneficially owned by "Owner A" but the registered owner is a 'shell company' called "Owner B".

In a similar vein, a claimant cannot arrest a ship as security for charterer debts because the Iranian courts view the debt as a third party debt and will not permit attachment of property under the civil code if not owned by the debtor charterers.

Counter-security must be in the form of cash or an acceptable bank guarantee and will usually be in of an amount ranging between 10-20% of the claimed sum. The court will not accept a Club Letter of Undertaking (LOU), although there is nothing preventing the claimant accepting a Club LOU and then requesting the court to release the vessel. The vessel can be released on the same day as the counter-security is deposited with the court.

If a claimant wishes to arrest a vessel in Iran, he should allow a few days for preparation of the documents. In theory, an arrest could be granted on the same day as the application, but in practice, it usually takes between 1-3 days before an arrest order is actually served on the vessel.

Restrictions and Risks

In both Article 108 and 310 actions, the claimant's claim must be equal to or greater than IR 200,000 (approximately USD 65,000) in order to obtain a provisional attachment.

In some instances, defendant ship owners are able to raise a wrongful arrest petition. Usually, the court deals with the merits of the wrongful arrest petition at the end of the case. Where the court dismisses the claimant's claim and the defendant ship owner can prove that damages arose from the arrest, the defendant ship owner shall be entitled to wrongful arrest compensation. Unlike neighbouring jurisdictions in the Gulf region, there is no requirement for the defendant ship owner to prove malicious intent on the part of the claimant. This represents quite a serious risk to claimants and means that they should be convinced of the validity of their claim before proceeding with an arrest application or otherwise risk having to pay wrongful arrest compensation.

Costs

Within a period of 10 days of obtaining an attachment order, the claimant must file his submissions on the merits of the claim and at such time a fixed fee of 3.5% of the claim amount is payable. There is no ceiling to the fee payable and therefore can be quite high where large claims are concerned.

The successful party is able to recover the court filing fees and any expert fees incurred, however, there is a general reluctance of the Iranian courts to allow recovery of professional legal fees.

Conclusion: Can you arrest?

Yes, it is possible to arrest a vessel in Iran to secure a claim against the vessel owners. Whilst there is no specific provision in the Iran Maritime Code, attachment of debtor property is routinely achieved to secure claims. These methods are extended to attachment of vessels to secure claims, regardless of whether such claims are "maritime debts". We believe that members of the shipping community will increasingly explore arresting vessels in Iran as trade opens up more with the country, particularly by those who supply services to vessels in the Gulf region. However, arresting parties should be confident that their claims are well supported and valid because of the increased risk of ship owners succeeding in wrongful arrest claims. This, in our view, is positive to the extent that it should filter our spurious claims.

Al Tamimi & Company partner with an experienced maritime organisation in Iran on arrest instructions and has exclusivity for membership in Iran in the Shiparrested.com network.

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W. Harry Thurlow | Cox & Palmer | Partner

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Practice Areas

Commercial Litigation ; Insurance Litigation ; Health Law ; Construction ; Defence ; Security & Marine ; Fisheries & Maritime

Biography

Harry is a partner with Cox & Palmer's Halifax office. His litigation practice has particular focus on insurance, commercial, construction and marine matters.
He is a frequent lecturer on various topics related to the insurance and construction industries and is active in various industry groups including the Canadian Board of Marine Underwriters (Claims and Loss Prevention Committee member) and the Canadian Maritime Law Association (Marine Insurance Committee member).
Harry's marine law experience includes retainers by insurers, ship owners, creditors, port agents and various related entities. Harry was called to the Nova Scotia Bar in 2002 and has appeared in Federal Court and all levels of court in Nova Scotia.

Education

University of King's College (B.A. 1995)
University of New Brunswick (LL.B. 2001)

Law Society Memberships

Canadian Bar Association
Nova Scotia Barristers' Society

Professional Activities & Affiliations

- Member, Nova Scotia Medical Legal Society - Board of Directors
- Risk Management Association
- Canadian Board of Marine Underwriters (Claims and Loss Prevention Committee)
- Canadian Maritime Law Association (Marine Insurance Committee)
- Member, Canadian Defence Lawyers
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