

# THE ARREST news

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In this issue of *The Arrest News*, Shiparrested.com members discuss a remarkable judgement on Dubai's recognition of a foreign arbitral award under the NY convention; arrest of cargo in India; and procedures of arrest in Egypt.

## **Remarkable Judgement on Dubai's Recognition of Foreign Arbitral Award under NY Convention** by Omar Omar, Al Tamimi & Co.

You may have read recently many articles on the recognition and enforcement of foreign arbitral awards in the UAE, some of which were issued by the DIFC courts, whereas others were issued by the Dubai Court of First Instance or the Dubai Court of Appeal. However, this article demonstrates a clear precedent by the Dubai Court of Cassation, which is the highest court in Dubai, in its new path of recognising foreign awards in Dubai. The said court has recently established a precedent, not only in its recognition of foreign arbitral award in the UAE, but also in considering the application of foreign laws in the UAE.

### **Background:**

In October 2014, Al Tamimi & Company was instructed by a major shipping line (hereinafter referred to as the

"Owners" or "Plaintiffs"), to file a claim for Recognition and Enforcement of Foreign Arbitral Award in the UAE, issued pursuant to the LMAA rules in London/UK. The party against whom the arbitral award was invoked was a commercial company based in the UAE, (hereinafter referred to as the "Defendants" or "Charterers' Guarantor"). The facts of the arbitral award can be summarized as below:

Owners chartered their vessel to 'X', with 'Y' countersigning the Charterparty as a Charterers' Guarantor. X went into compulsory liquidation and failed to pay the hire amount punctually to the Owners. In accordance to clause 17 of the Charterparty, the matter was referred to arbitration in London. The arbitral agreement stated as follows:

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*“Should any dispute arise between Owners and the Charterers the matter in dispute shall be referred to Three persons at London, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for purpose of enforcing any award this agreement may be made a rule of the Court. The Arbitrators shall be shipping men. Said three (3) parties to be shipping men who are members of London Maritime Association...”*

By a Second Final Partial Arbitration Award, the arbitrators ordered Y/Charterers' Guarantor, as the counter signatory, to pay the Owners an amount of USD 12,221,875.00 plus costs, 5% annual interest from 2011 until complete payment and arbitration fees.

#### **Attachment Order**

Prior to filing a court case for the recognition and enforcement of the Award, the Owners took the precaution of seeking an attachment order over the Charterers' Guarantor assets in the UAE to prevent them being dissipated. The application was successful and the Owners duly filed within 8 days of executing the precautionary attachment order, a claim before the Dubai Court of First Instance for the recognition and enforcement of the award.

#### **Dubai Court of First Instance**

The Charterers' Guarantor submitted a reply on the claim sheet to challenge the legal proceedings, raising, amongst other arguments, the below defences:

1. The Defendants were not a party to the Charterparty, as their counter-signature was only to authenticate Charterers' signature on the Charterparty.
2. The Second Final Arbitral Award should be refused pursuant to Article V (1.a) of the New York Convention, on the basis that Defendants were under some incapacity, as the person who signed the Charterparty, which contains the arbitration clause, was not an authorized signatory on behalf of the Defendants to bind

them in arbitration proceedings. As per the UAE laws, which ought to be the applicable law on the Defendants, as it is a UAE entity, only a director of a company or its board shall bind the company for agreeing on arbitration clause.

3. The Second Final Arbitral Award should be refused pursuant to Article V (1.c) of the said convention, on the allegation that the Defendants were not given proper notice of the appointment of the arbitrator and/or of the arbitration proceedings of the Second Final Arbitral Award, hence, they were unable to present their defense.

4. The Second Final Arbitral Award should be considered as null and void, as the Second Arbitral Award dealt with a difference not contemplated by and not falling within the terms of the submission to arbitration, and the Second Final Arbitral Award contains decisions on matters beyond the scope of the submission to arbitration, provided that, the arbitral tribunal ended its jurisdiction over this dispute by issuing its First Final Arbitral Award.

The Plaintiffs, represented by Al Tamimi & Company, submitted their response on the arguments of the Defendants as below:

1. The issue of whether the Defendants were a party to the charterparty or not was an issue that could only be determined by the applicable law to the contract, which was the English Law (pursuant to Article 5(1)(a) of the New York Convention). The tribunal had found that under English law Defendants were bound by the charterparty and the arbitration clause it contained, and there was no reason to disturb this finding.
2. The issue of whether the person who signed the arbitration agreement was an authorized signatory on behalf of the company or not should not be considered, as Defendants had previously acknowledged its signature on the arbitration agreement as a countersigning party. In addition, this issue should be subject to the English law, being the applicable law on Defendants, in which it was provided that arbitration

clause could be agreed upon by the representative of the company, its brokers, or by any way of communications.

3. As regards the alleged procedural defects, Plaintiffs submitted that there was no merit to these allegations as Defendants had been duly served and had an opportunity to present its case and attend hearings, especially during the proceedings of the First Final Arbitral Award but on occasion had refused to do so.

4. As with regard to the allegation of Defendants that the Second Arbitral Award dealt with a difference not contemplated by and not falling within the terms of the submission to arbitration, Plaintiffs argued that this defense should not be arguable before the Dubai Courts as Defendants failed to submit a proof of this argument. Furthermore, a mere denial and objection on the arbitral award before the court where it was sought to be recognized should not have any effect as long as Defendants did not obtain a judgment from the competent authority to invalidate the award.

Accordingly, the court of first instance decided to dismiss the arguments of the Defendants, meanwhile, it decided to recognise the Second Final Arbitral Award in the UAE as it was satisfied that the award complied with the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (which the UAE signed in 2006), and was in compliance with local laws and did not contradict or breach the UAE public policy.

#### **Dubai Court of Appeal:**

Defendants appealed the Court of First Instance judgment, raising the same arguments raised before the Court of First Instance. However, the court of appeal upheld the arguments made by the Plaintiffs and ordered that the arbitral award be recognised and enforced in the UAE. In a short judgment the Court referred to the New York Convention, acknowledging that it applied directly to the enforcement of foreign arbitral awards, and rejected the arguments made by Defendants.

#### **Dubai Court of Cassation:**

The Defendants chose to lodge further appeal before the Dubai Court of Cassation, meanwhile, submitted an application to stay the execution proceedings until a final judgment was issued by the Dubai Court of Cassation. The stay of execution proceedings application was approved by the Dubai Court of Cassation, as it was held to be a necessity to issue a final court judgment by the court of cassation prior to enforcing the award before the UAE courts.

The appeal was based on two main reasons, namely; (1) Defendants were not served duly, through the diplomatic channels, with the arbitration proceedings, although a special federal decree no. 38 of 2007 has been enacted to regulate the judicial cooperation between the UAE and the UK. (2) the Defendant was an LLC company, based and incorporated under the UAE laws, in which its director only shall have the authority to bind the company on arbitration clause. The director of the company had never signed or agreed to the arbitration clause.

Plaintiffs submitted their response on the appeal before the Dubai Court of Cassation within the time limit.

Accordingly, the Dubai Court of Cassation issued its judgment on 10.04.2016, dismissing the appeal and affirming the Court of First Instance and the Court of Appeal judgment, for the following reason:

Pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (which the UAE signed in 2006), it is provided under article (V) of the said convention that: *"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or .....; or (b) The party against whom the award is invoked was not given proper notice of the*

*appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) ....etc.". The Court of Cassation explained clearly that "the advantage of this article is that an arbitral award shall not be dismissed and a party against whom it is invoked shall not challenge the arbitral award, unless he proves to the competent authority where the recognition and enforcement is sought to be recognized, that he was under some incapacity pursuant to law where the arbitral award was issued, or he was not duly served with the appointment of the arbitrator or the arbitration proceedings which made him unable to present his defense. Upon reviewing the Second Arbitral Award, it is apparent that the tribunal did mention in paragraph (6) of its award that Defendants denied its responsibility in this claim, as it was not a party to the Charterparty. This means that Defendants were aware of the arbitration proceedings and did attend before the tribunal to submit its initial defenses. Furthermore, it is apparent to the court upon reviewing the charterparty which is signed between the Owners (Plaintiffs) from one side and the Charterers and Defendants from the other side, that Defendants had signed the charterparty and its company stamp is placed on the charterparty, this means that they were charterers of the vessel and a party to this agreement. Furthermore, Defendants did not submit any proof to the UAE courts confirming that they were under some incapacity pursuant to the UK laws, although they were granted this opportunity before the Dubai Court of First Instance the Court of Appeal. Hence, the Court sees that the appealed judgment has been based on legal grounds and complies with the laws."*

#### **Practice Note:**

This case constitutes a helpful reminder that the Dubai Courts have established a proper application of the rules and articles of the NY Convention. Furthermore, the Court of Cassation has established a proper interpretation of Article (v) of the said convention, by confirming that a company's capacity for agreeing on

the arbitration clause shall not be limited to its director, it can be also extended to its employees, agents or brokers as long as this agreement is in compliance to the foreign laws where the arbitration proceedings are brought. Furthermore, the term of "*THE LAW APPLICABLE TO THEM*" referred to in article (V/1.a) of the New York Convention, shall mean the laws governing the arbitration proceedings rather than the laws governing the incorporation of each party.



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## **Arrest of Cargo**

by Ashwin Shanker, Chambers of George Rebello, India

While it is well settled that ships can be arrested, controversy erupts when arresting other properties such as cargo, bunkers or freight. The latest position of law allows the Admiralty arrest of the subject/offending cargo, but not any sister cargo, not bunkers and not freight. The Hon'ble Bombay High Court's Appeal Bench is now considering whether this should be extended to sister cargoes as well. For example, any cargo property belonging to the defaulting charterer in a claim for say, unpaid demurrage.

How does India enjoy this Admiralty Jurisdiction?

1. The Letters Patent of 1823 makes clear reference to arrest of cargo whilst endowing the Hon'ble Bombay High Court with admiralty jurisdiction. It states, "And we do further commit to the said Supreme Court of Judicature at Bombay full power and authority... to arrest, or cause or command to be arrested, according to the civil law, and ancient customs of our High Court of Admiralty, in that part of Great Britain called England, all



Admiralty, in that part of Great Britain called England, all ships, persons, things, goods, wares, merchandise."

2. In the landmark judgment of **M.V. Elisabeth and Ors. v. Harwan Investment & Trading Pvt. Ltd. (AIR 1993 SC 1014)**, the Hon'ble Supreme Court of India *traced the admiralty jurisdiction in England* and made clear reference to the arrest of cargo. It also emphasizes the need for expanding, and not imposing fetters on the admiralty jurisdiction of Indian Courts. The Court defined a claimants right against the property of a defaulter so as to secure its claim. It notes, '*Admiralty Law confers upon the claimant a right in rem to proceed against the ship OR CARGO as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtain security to satisfy judgment.*'

3. Simon Baughen in the book 'Shipping Law' notes that, 'The property to be arrested will usually be a ship within the territorial waters of UK. However, other forms of property may also be arrested.'

4. The Division Bench of the Calcutta High Court, in the 2004 **Liberty Commodities Ltd. V. LMJ International Ltd. (2005(1) CHN 369; (2004) ILR 2 Cal 492)**, 'It is possible to proceed for arrest of cargo on board a ship just as it is possible to proceed for arrest of the ship itself. However, the arrest of the cargo would also have to be founded on a recognized maritime claim.'

5. Similar was the observation in **The Beldis (c.a. 1935 51)** wherein it was admitted that in Civil Law, any property of the person within its jurisdiction may be arrested. Further in this decision the Court held that the *res* need not '*necessarily be a ship: it may be cargo, or proceeds of a ship and cargo, and arrest of cargo may include arrest of freight.*'

6. If a ship can be arrested for all maritime claims, so should cargo suffer the same fate as a target Defendant. There is no authority that restricts cargo arrests to maritime liens and claims for unpaid freight.

7. One such instance of arrest of cargo arises when a salvor is able to arrest cargo and secure its claim for

salvage services against cargo interests. If it is held that cargo can be arrested only in respect of a claim against a ship owner, salvors will be, without the comfort of security in the form of cargo, loathe to undertake the *pro bono* activity of salvaging cargo when there is a collision/ wreck.

8. In the event of a charterer failing to meet its obligation to meet its freight dues under a charter party, the shipowners often choose to exercise lien on the cargo. The method of attachment is by arrest of cargo. This could be noted in the 2014 case of **Peninsula Petroleum Ltd. V. Bunkers on board the vessel MV Geowave Commander (NOM No. 385 of 2014 in A.S. No. 85 of 2013)**, wherein Bombay High Court has held that cargo can be arrested for securing the payment of freight to the owner. It records that 'in a situation where a person who has a claim against the owner of the ship brings an action in rem, he would also apply for and obtain the arrest of the cargo on board so that when the owner of the cargo comes to take delivery of the cargo, he would deposit the freight payable to the credit of the suit.'

9. In **Rushab Ship International LLC v. Bunkers on board the ship MV African Eagle & Ors (2013) 3 Bom.C.R. 380**, the Hon'ble Bombay High Court has held that freight could not be arrested without the arrest of the cargo and has concluded that warrant against freight cannot be issued separate from ship and cargo or ship or cargo. Similarly in **Mansel Ltd. V. The Bunkers on board the ship M.V. Giovanna Iuliano & Ors. (Appeal No. 319 of 2015, in A.S. No. 91 of 2012)**, the Appellate Bench of the Bombay High Court agreed with the Single Judge and held that while ship, cargo and freight were maritime property, bunkers were not.

10. *Admiralty Jurisdiction and Practice* by Nigel Meeson makes reference to two situations: (a) where the ship is under arrest but cargo is not and (b) where the cargo is under arrest but ship is not. The clear implication is that there can be a claim against cargo without an underlying claim against the ship.

11. Similarly with regard to a case pending in Court, Attachment of Code of Civil Procedure, 1908. Bombay High Court in **SJJ Marine Pvt. Ltd. V. Pisces Exim (India) Pvt. Ltd. (Summary Suit No. 113 of 2013)** has held that the ATTACHMENT OF CARGO CAN be levied in a pending suit if the Court is satisfied that the Defendant has the intention to cause delay in the execution of any decree passed against him or intends to move whole or part of his property from the local jurisdiction of the Court.

12. In the event of an arrest of only the cargo, the Shipowners can take the appropriate steps to get the ship discharged. The said situation can also be observed from the findings of the Division Bench of Calcutta High Court in the **'Liberty Commodities'** (Supra) wherein it has noted, 'had there been a good maritime claim against THE CARGO, AND HAD THE CARGO BEEN arrested, it would be open to the ship to leave the arrested cargo behind and proceed on its voyage with the rest of the goods, if any on board her.' Similarly in the case of **Hoang Anh Shipping JSC v. Cargo of Sand and Ors. (NOM. No. 1410 of 2016 in AS No.19 of 2016)**, Bombay High Court has allowed the off loading of arrested cargo laden on board the ship M.V. Ocean 39 and has permitted the ship to sail out as the ship was not under arrest. The Court asked the plaintiffs to offload the arrested cargo at their cost so that an innocent third party, i.e. ship owners does not suffer serious prejudice.

### Other Jurisdictions

13. In India, the Supreme Court has observed the need to address this issue as there is no legislation dealing specifically with the arrest of ships and/or cargoes. There is a need to adapt according to the global changing scenario and therefore in the absence of any domestic legislation, India often tends to look towards the laws of other jurisdictions which have a persuasive value and wherein the principal is in consonance with the the scheme of Indian law. For instance,

- **The United States of America:** Rule B of the

Supplemental Rules for Certain Admiralty and Maritime Claims regularly allows attachment of cargo to secure maritime claims.

- **England:** Admiralty actions in England, whether *in rem* or *in personam*, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject-matter of the dispute. In England and Wales, Part 61 Admiralty Claims of Civil Procedure Rules talks about the various situations with regards to arrest of Ship and/or Cargo. It further notes that in a situation where a ship is not under arrest but cargo on board her is; or where a ship is under arrest but cargo on board her is not, then the persons if interested in ship or cargo and wish to discharge the cargo, they may, without being made parties, request the Marshal to authorize steps to discharge the cargo against an undertaking accepting to pay fees, and all expenses incurred on account of such a demand.

- **Canada:** Arrest of property is almost a matter of right if the minimal statutory requirements are met. For maritime arrest the property must be a ship, cargo, freight or another property as described in Federal Courts Act ('FCA') [s.43(2)].

- **People's Republic of China:** Allows the arrest of properties of a defaulter in order to secure a claim. On 1<sup>st</sup> April 2003, the Supreme Court of China issued "Explanations on Application of Special Maritime Procedure Law of China" (SMPL) whereby it provided that '*according to Art.12 of SMPL, the property subjected to preservation is limited to ship, cargo carried by a ship, ship's bunkers and ship's provisions.*' Furthermore, Article 19 of the said Explanations on SMPL provides that "cargos carried by a ship under the SMPL refer to cargo which are "not on board" the vessel, or which are "on board" the vessel or which are "discharged" from the vessel, but are under custody of the carriers".

- **Scotland:** Section 47 D of the Administration of Justice Act 1956, introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, so provides for Arrestment of

Cargo and further talks about the restriction and movement of ship. It records that where cargo is arrested, the ship is also treated as if arrested until cargo is unloaded.

- **South Africa:** It has not acceded to any arrest convention and ship arrest is dealt with under the Admiralty Jurisdiction and Regulation Act 105 of 1983. It allows an arresting party to arrest property in South Africa as security for a claim.

- **France:** In the decision of The Cour d'Appel of Bordeaux in February 2000, in the case SA Bec Freres v. Naviera Humboldt (The "J.B. Salcantay") wherein it was held 'the owner of a ship whose departure was prevented by the attachment of the Cargo on board as security for a claim against the owner of such cargo had no right to claim damages from the arrestor since his action was legitimate.'

14. Right of cargo arrest is an important and useful legal tool which will, no doubt, be used in the future by various stakeholders to secure their claim.

**Hot off the Press:** The Admiralty (Jurisdiction And Settlement Of Maritime Claims) Bill, 2017 has been passed in both the houses of the Parliament and once the President grants his approval, it will become the applicable legislation governing the admiralty matters in India. The Bill aims to establish a legal framework for consolidation of related laws to replace the age old archaic laws and to confer admiralty jurisdiction on all High Courts of the coastal states of the country. The Bill neither explicitly allows nor prohibits the right to arrest cargo.

However, attachment of cargo is still possible through other avenues such as Order 38 Rule 5 of the CPC. While it is omitted in the newly passed Admiralty Bill 2017, there are other avenues to secure one's claim.



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## Procedures of Arrest in Egypt

by Karim Marouny, Al Tamimi & Co.

### Introduction:

Arrest of a vessel is an extraordinary process which gives the creditor the right to exercise a conservatory arrest order on the debtor's vessel in order to settle his debt. However, due to the specific nature of maritime law, the debt accepted to file the arrest application before the court shall be a marine debt, and applied on the vessel which caused the debt or on a sister vessel which should belong to the same owner, and due to the geographical location of Egypt, which has ports on the Red Sea and the Mediterranean Sea, it can be suitable to creditors to apply for an arrest order on a vessel calling Egyptian ports.

### Conservatory arrest procedures under Egyptian Law is as follows:

A creditor has the right to apply before the Chief of the Court of First Instance in his capacity as the judge of urgent matters (The Competent Judge) for an order to arrest a vessel for security if such claim is considered to be a Maritime Claim.

The creditor's application should contain a brief explanation of the debt and reasons he is applying for security and prove that the liabilities giving rise to the claim would come within the "Maritime Claims" as defined in the Egyptian Maritime law and the 1952 Brussels Convention. Furthermore, the applicant must support his application with sufficient documents to validate his claim.

The "Maritime Claims" as defined in the Egyptian Maritime law are clearly defined by article 60, which stipulates that no conservatory arrests may take place unless for settlement of a maritime debt. The debt is to be considered as maritime debt in case it arises out of one or more of the following reasons:

(a) Ports and sea channels duties.

(b) Expenses concerning removal, picking up, or lifting the ship wrecks and cargo.

(c) Damage caused by the ship caused either by collision or pollution or other similar marine casualties.

(d) Loss of life or personal injury caused by the ship or occurring in connection with her operation.

(e) Contracts related to the use or hire of the ship.

(f) Insurance on the ship.

(g) Contracts related to the carriage of goods by means of a charterparty or bill of lading.

(h) Loss of or damage to goods and baggage carried on the ship;

(i) Salvage;

(j) General average;

(k) Ship's towage;

(l) Pilotage.

(m) Supply of goods or materials whether supplied to the ship for her operation or for her maintenance; whichever maybe the source of such supply.

(n) Construction, repair or equipment of the ship or dock charges and dues;

(o) Wages of Masters, Officers, or crew;

(p) Master's disbursements, and disbursements made by shippers, charterers or agent on behalf of a ship or her owner;

(q) Disputes as to the ownership of the ship;

(r) Disputes over the common ownership of the ship or her possession, employment, or in common earnings of that ship, resulting from her exploitation.

(s) Marine mortgage.

The enumeration, as mentioned in the law, is made on exclusive basis. It clearly appears that the Egyptian legislator followed the same course as the one followed by the 1952 Brussels Convention.

#### **The Court's decision and its effects:**

The competent judge who is reviewing the application and its documents has the right to carry-out brief investigations on the grounds upon which the application is made, and at his own discretion, is entitled to allow the order or reject same, without giving any reasons.

#### **If the application is accepted:**

No counter security would be required and the applicant is entitled to enforce the conservatory seizure order by arresting his debtor's assets/vessel as specified in the court order and be entitled to file a case within 8 days affirming the conservatory arrest order failing which, the said order will be considered as null and void.

In this case the debtor shall take the following actions:

A. To submit an application for lifting the arrest against suitable guarantee in order to transfer the effects of the arrest on such guarantee. It shall be noted that the Egyptian courts do not accept the letter of undertaking in order to release the vessel, however, it accepts the submission of A Bank Letter of Guarantee, which shall not be cancelled unless reaching a final judgment or a settlement agreement between the parties of dispute.

B. To file an objection within 10 days in any case against the conservatory seizure order which would not stop the arrest proceedings, and it must be mentioned that this procedure is lengthy and the matter will be treated as normal court procedure and would normally take years to obtain a final judgment by the Court.

#### **If the application is rejected:**

The applicant would be entitled to proceed as follows:

(I) To apply once again and submit a new application. The further application will be heard again in absence of the parties, and the judge may again reject the application or allow the conservatory seizure order but in the latter case the judge must state the reasons that the application was accepted after having been rejected.

(II) To file an opposition before the Court of First Instance in a full hearing in the attendance of all parties and the Court will then issue a judgment either confirming the decision given by the sole judge or reversing same.



The procedure follows the normal procedures of filing a lawsuit, which means that the judgment rendered from the court of first instance is subject to appeal before the court of appeal and before the court of cassation if needed.

#### **Conclusion:**

Legally speaking, as in our explanation above, the application of arrest is heard by the competent judge in absence of the parties and the decision is given on the documents. The matter of accepting or rejecting such an order is left to the judge's discretion without giving any reasons in either case.

Consequently, according to our extensive experience before the Egyptian Courts, the submission of the application to obtain an arrest order must be supported with sufficient documents that must be original and official, otherwise the chances of success in obtaining an arrest order will be poor.

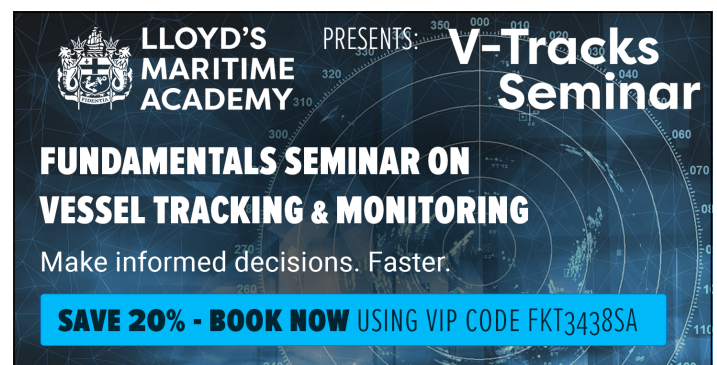


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