

SHIP ARREST IN MOROCCO

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INTRODUCTION

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

- Geographically speaking :
 - Morocco is located at one of the most important *strategic* points in the planet being situated at the crossroads of Europe and Africa, East and West,
 - Morocco has two maritime facades with a coastline of about 3,500 km on both the Atlantic Ocean and the Mediterranean Sea. Bordered in the North by the Gibraltar Strait and the Mediterranean Sea and in the West by the Atlantic Ocean.
- Economically speaking:
 - Morocco has some dozen port along its lengthy coastline,
 - In particular, Tanger Med, a new ultra modern port operational since 2007 is one of the greatest ports in the Mediterranean and in Africa
- Legally speaking:
 - Arrest procedure is simple, fast and flexible: no power of attorney required, application is heard under summary and non adversary procedure, no original documents required,
 - An alleged maritime claim is sufficient,
 - A vessel can be arrested whoever is the debtor (even if Owner is not the debtor),
 - No counter security is required
 - No preliminary claim on the merits required and no obligation to start legal procedure on the merits
 - No impact on jurisdiction

The legal regime applicable to the arrest of vessels in Morocco is 1952 Brussels convention. The procedural aspects are determined by the civil procedural rules.



SHIP ARREST CONDITIONS

SHIP ARREST PROCEDURE

SHIP ARREST CONDITIONS

Conditions regarding the claim

Conditions regarding the vessel

As per the conditions regarding the claim

- The situation of vessels flying the flag of a non-contracting state
- The situation of vessels flying the flag of a contracting state

The situation of vessels flying the flag of a non-contracting state

- Article 8.2 provides that *“ships flying the flag of a non-Contracting State may be arrested:*
 - *in respect of any of the maritime claims enumerated in Article 1*
 - *or of any other claim for which the law of the Contracting State permits arrest “*
- Yet, Moroccan law does not provide any restriction as per the nature of claims in relation of which arrests can be granted (article 110 of Moroccan Maritime Code).
- Accordingly, a vessel flying the flag of non contracting party can be arrested in Morocco in respect of any kind of claim.
- Example of Precedent : We managed to obtain, based on the above analysis, arrest of a vessel as security of a claim of a law firm in respect of unpaid fees (Arrest order 16,11,2016- Court file 2016/4/29659)

As regards vessels flying the flag of a contracting state

- The scope of the concept of “Allegation of maritime claim”
- The limits of the concept of “Allegation of maritime claim”

The scope of the concept of “Allegation of maritime claim”

- Moroccan courts apply this expression literally.
- In other words, it is not necessary to prove at the arrest stage that Arrestor has a valid claim which is bound to succeed on the substantive merits. It is sufficient to prove an alleged maritime claim. Therefore a mere prima facie evidence of a claim is enough.
- This rule is well established under Moroccan court precedents:
 - “Article 1 of Brussels conventions and articles 452 of Civil procedural rules do not require a debt certain in order to get an arrest order” [Casablanca Commercial appeal court judgment dated 24/10/1997 in the file No. 1761/97]
 - The Commercial Court of Rabat held also in this respect that “it is commonly accepted by the maritime doctrine that it is not required for the arrest of a ship, that the claim to be certain, an allegation of a right or claim is sufficient” [Order of Rabat commercial court dated 17/09/1999 file n° 99/4580/1]
 - The Commercial Court of Casablanca specified: “Under Brussels convention ... a ship can be arrested in respect of a maritime claim and it is meant by maritime claim under article 1 of Brussels convention an allegation of right or claim based on one of the 17 causes listed in the same article and it is sufficient under this convention to allege a right or a maritime claim, no condition of certainty of the debt is required” [Casablanca commercial court order dated 06/01/2000- File No. 99/1/3139]

The scope of the concept of “Allegation of maritime claim”

- That being so, in some cases, arrest orders are obtained even if the claim in question is very slim.
- As matter of practice, when there is no substantial claim nor pending procedure on the merits, we often recommand clients who seek to arrest a vessel to only issue :
 - An invoice,
 - A letter of desingation of an abitrator

Court consider that it is sufficent to establish the allegation of claim and to arrest the vessel

As per the conditions regarding the vessel

- The possibility to arrest the vessel in respect of which the maritime claim arose
- The possibility to arrest any other ship in the same ownership than the vessel to which the claim is related

The possibility to arrest the vessel in respect of which the maritime claim arose

- The situation of the vessel chartered
- The situation of the vessel sold

The situation of the vessel chartered

- **In rem arrest :** the possibility to arrest the vessel in respect of which the claim arose
- **The arising issues :**
 - The situation where the chartered vessel was redelivered
 - The possibility to cash a security put up by Owners whilst Claim is against Charterers

The situation of the vessel chartered

In rem arrest : the possibility to arrest the vessel in respect of which the claim arose

- As long as Brussels convention provides the possibility to arrest the vessel in respect of which the claim arose, Moroccan courts accept to grant arrest on the ship to which the claim is related without regard to the ownership and even if the vessel was chartered.
- Therefore, Moroccan courts accept to grant arrest of a vessel even if the claim against Charterers
- This appears to be very efficient for Bunkers claim
- This extensive construction can lead some time to extreme situations.

The situation of the vessel chartered

In rem arrest : the possibility to arrest the vessel in respect of which the claim arose

- This extensive construction can lead some time to extreme situations. I can mention a case under which:
 - Charterers ordered bunkers to a company “A”,
 - Bunker company “A” outsourced the order to subcontractor “B”
 - Charterers paid the bunker to company A
 - Company A did not pay subcontractor B
 - meanwhile, the vessel was redelivered to Owners
 - Company B arrested the vessel whilst operated by Owners
- Owners filed proceedings seeking a judgment of release arguing :
 - that they have no contractual relation with Arrestor,
 - that bunkers have been paid to the company to which Charterers made an order
- Commercial court held that:

“Under article 3 of Brussels convention of 10.05.1952, the party that invokes a maritime claim is entitled to arrest ... the particular ship in respect of which the maritime claim arose ...; that Arrestor relies on a claim related to the vessel to which bunkers were provided so that he is entitled to arrest said vessel ” [Commercial court of Casablanca of 08/05/2000 – file n° 2000/1/991]

The situation of the vessel chartered

- The arising issues :
 - The situation where the Charterered vessel was redelivered
 - The possibility to cash a security put up by Owners whilst Claim is against Charterers

The situation of the vessel chartered

- The situation where the Chartered vessel was redelivered
 - The question that occurs is whether the possibility to arrest the vessel in relation with a claim against charterers is possible only as long as vessel is still operated by Charterers ?
 - Article 3,4 of Brussel convention provides : « *When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims* ».
 - What is the scope of this text :
 - Owners argue that the vessel chartered, once redelivered, can be arrested only in case of charter by demise “*affrètement avec remise de la gestion nautique*”;
 - Arrestors argue that the vessel in respect of which claim arose can always be arrested; still, when it is a demise charterer, Arrestors can also arrest any other vessel owned by Charterers whilst they cannot do so if it is not a demise charter,

Still waiting Court stance in this respect

The situation of the vessel chartered

- The possibility to cash a security put up by Owners whilst Claim is against Charterers;
- The question that occurs is whether Arrestors are entitled to cash the security put by Owners in execution of a condemnation on the merits against Charterers (or an amicable settlement) ?

Still waiting Court stance in this respect

The situation of the vessel sold

- The question is whether a party who has a claim towards a vessel that was sold after the claim arose, is entitled to arrest her in the hands of new owners.
- Article 9 of Brussels convention provides that “nothing in this convention shall be construed ... as creating any maritime liens ...”
- Therefore, in principle, unless the claim amounts to maritime lien, it should not possible to arrest the vessel in the hands of new owners.
- Moroccan courts adopted in respect of that issue a pertinent stance providing other criteria of appreciation.
 - Casablanca Commercial appeal court held: « *it appeared to the court, in light of the documents disclosed, that the ownership of the vessel ...was transferred to the appellant [new Owner].. that had no relation with the appellee [Arrestor] ..; that the latter did not adduce the proof that the transfer of ownership was made in bad faith under a collusion between both companies*” [Casablanca Commercial appeal court of June, the 1st 2000 File 200/4/244]
- Therefore, by contrast, Claimants would be entitled to arrest the vessel in the hands of new Owners if they adduce the proof that the vessel was sold in bad faith in order to enable the previous Owners to escape from their debtors.

The possibility to arrest any other ship in the same ownership than the vessel to which the claim is related

- The situation of sister-ship vessels
- The situation of associated vessels

The situation of sister-ship vessels

- As per the text of Brussels convention, it is perfectly possible to arrest a vessel in respect of a maritime claim that arose in relation with another vessel in the same ownership
- The question can raise difficulties when dealing with vessels registered in the name of the leasing company;
- In a case, Claimants had a claim against a vessel which was registered under the name of a Financial company because vessel was under leasing. We tried to arrest another vessel with no relation with the « guilty vessel » apart the fact that she was financed by same leasing company and therefore registered under the name of the latter,
- The arrest order was issued and Owners challenge rejected before court of first instance and Appeal court (decision of 05,06,2012 (file number 4/2011/5453))

The situation of associated vessels

- In order to avoid the single ship company model becomes an “escape-route” for certain bad faith debtors”, Moroccan courts accept in certain circumstances to pierce the corporate veil.
- To do so, court rely on the concept of “community of interest” and/or “legal fiction”
- Thus, court refers to the economical reality rather than sticking to the legal appearance.
- Court refers thus to a series of clues proving the existence of common interests such as: same manager, same address of head office, same shareholders ...

The situation of associated vessels

- In this respect, I shall mention a very specific case we handled regarding a vessel named AYANA. The situation was as follows:
 - we were acting for 5 different parties who had claims against Cuban Owners,
 - a Cuban vessel belonging to another Cuban company called Casablanca port,
 - we filed several application (one per client) seeking the arrest of the vessel on the grounds that Cuban state, as communist, does not recognize private property right so that both companies belong in fact to Cuban state and thereby we are entitled to arrest the said vessel
 - court complied with our request and delivered five arrest orders
 - we executed a first arrest order
 - owners filed proceedings seeking release of the vessel
 - court refused to lift the arrest
 - Owners put up security
 - then, we executed the second arrest order ... and so on
 - eventually, as per the last arrest order, Owners appealed the decision refusing to lift the arrest and the appeal court accepted to release the arrest order on the following ground:
- *“Appellant [Owners] that justified that the vessel is duly registered on their name, disclosed the articles of corporation of Owners, the activity reports and documents proving that vessel is insured, have proved that it is not a fictitious company” [Commercial appeal court 25/12/2000 - File n°4/2000/2125]*
- It emerges from the above that the Appeal Court hold that arrest of the vessel in the hands of a fictitious company is valid. However, in the present case, it considered that it was not the case.

SHIP ARREST PROCEDURES

How the vessel can be arrested ?

How the vessel can be released ?

How the vessel can be arrested ?

- Arrest application
- Arrest order
- Execution of the arrest order

Arrest application

- The applicant files an ex-parte application before the commercial court within the province of which is the port where vessel is berthing.
- The application should contain:
 - a brief explanation of the claim,
 - arguments regarding the fact that the claim came within “maritime claims” as defined in 1952 Brussels convention,
 - proof that the vessel is the ship in respect of which the claim arose or a vessel in the same ownership or associated to debtor
 - the amount of the security sought
- The application must be supported with relevant documents.
- There is no need for the documents to be originals.
- However, as a general rule, court requires documents to be translated into Arabic or French.

Arrest order

- Given the urgency the arrest order is delivered within the same day or the day after.
- Even though Moroccan law provides possibility for the court to require a counter security, practically speaking, it is never required.
- The arrest is ordered in the hands of Harbor master.
- A couple of years ago, court used to request Arrestor to file proceedings on the substantive merits within a specific period of time, generally 30 days.
However, this requirement is not any more fixed.

Execution of the arrest order

- The arrest order should be notified through bailiff on port authorities who then execute the order.
- The arrest entails the immobilization of the vessel.

There is however some exceptions regarding Moroccan fishing vessels. As a general rule, port authorities refuse to immobilize them on the grounds that they have no control upon their movement. Besides, some courts (such as Agadir court) used to specify in the arrest orders delivered against Moroccan fishing vessels that the arrest is issued without detention.

- In any case, vessels under arrest can notwithstanding carry out loading/discharging operations.

How the vessel can be released ?

- The challenge of arrest order before the court
- The security

The challenge of arrest order before the court

- Basically, in order to do so, Owners should substantiate either:
 - that the claim does not come within maritime claims, or that
 - the vessel arrested is neither the vessel in respect of which the claim arose nor a vessel in the same ownership than the vessel to which the claim is related
- The problem for Owners is that such proceedings should be filed under adversary procedure which is time consuming:
 - a writ of summons should be filed,
 - a date of hearing is set before the court,
 - Arresting party's lawyer should be convoked to the hearing
 - Pleadings take place,
 - Judgment is delivered

This process requires at least 3 days.

- This is the reason why, Owners are often obliged to put up security even if they consider the arrest ungrounded in order to avoid the vessel to remain under arrest the time of the procedure.

The security

- As a general rule, security should be put up in a form of a bank guarantee or cash deposit before the court.
- In the meantime, it is common to accept P&I club LOU to be replaced by a bank guarantee within 8 or 15 days.
- Once security is provided, the release procedure depends of the usages and customs of port in which the vessel was arrested.
- For instance, in Casablanca, the procedure of release is very quick and flexible because port authorities accept to lift the arrest on the sole basis of a release issued by Arrestors' lawyer.
- In Tangiers, port authorities tend to demand a release order issued by the court which makes necessary to file proceedings. If security was provided and Arrestors are willing to lift the arrest, release judgment can be obtained within one or two days.



THANK YOU