

# THE ARREST

## news

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In this issue of *The Arrest News* read about two decisions in US Court of Appeals of the Second and Eleventh circuits, amendments to the Russian Merchant Shipping Code, and how to arrest a vessel in Saudi Arabia.

### **OW / ING Case Decision on Maritime Liens in the US Court of Appeals for the Second Circuit** by Mathias Steinø, Hafnia Law Firm LLP

We all know the US as a good place for arrest of charterer's debt. That position has been tested intensely in the body of case law which has erupted following the bankruptcy of OW. Among other things, there has been a debate as to who had the lien on the vessel. Was it the physical supplier or the party who contracted with the vessel – the “last trader before the vessel” so to speak?

The US courts have generally granted maritime lien in favor of the party who contracted with the vessel or the vessel representative. The “last trader before the vessel” has consequently been successful in asserting maritime liens in competition with the physical suppliers. But, there have been a few decisions which have found in favor of the physical supplier of the vessel or holding

that neither the physical supplier nor the trader had a maritime lien. A leading appeal decision on the competing lien claims has now been issued by the Court of Appeals for the Second Circuit (which covers the geographical areas of New York, Connecticut and Vermont).

The decision rendered on June 13, 2018 concerned the vessel TEMARA. In this case, CEPSA was the physical supplier and CEPSA sought to wipe out the claim of ING/OW holding that it was CEPSA not ING/OW who was entitled to assert a maritime lien. OW/ING also claimed to have a maritime lien, and the question before the Court was consequently who among the competing claimants would have the right to assert the lien.

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The first instance decision held – quite mysteriously – that none of the claimants were entitled to a maritime lien. The first instance court found in favor of the vessel.

The Court of Appeals for the Second Circuit has reversed the judgment and has found in favor of the OW/ING. The Court finds in its conclusion that “we hold O.W. Denmark was a provider of necessities under CIMLA and may assert a maritime lien against the Vessel.” (CIMLA is the Commercial Instruments and Maritime Liens Act)

According to the decision, traders enjoy a better position than physical suppliers. It is the trader – not the physical supplier – who can enforce a lien on the vessel.

The decision in full can be found in the link below. It is relatively long but informative.

<http://shiparrested.com/wp-content/uploads/2018/06/Second-Circuit-decision-TEMARA-N1491393xB08FB.pdf>



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## US District Court's denial of in rem warrant for arrest reversed

The US Court of Appeals for the Eleventh Circuit reversed the district court's denial of a warrant in rem for the arrest of a motor yacht for injuries allegedly sustained by a marine engineer while boarding the yacht. The gangway gave way during the boarding, allegedly resulting in personal injury to the plaintiff. The court held that the claim gave rise to a maritime lien supporting an in rem action through operation of the general maritime law (rather than the maritime lien statute). The case is: *Minott v M/Y Brunello*, No. 18-10374 (11th Cir., June 6, 2018)

The opinion is available for download at: <http://media.ca11.uscourts.gov/opinions/pub/files/201810374.pdf>

## Russia to Establish New Register of Ships Owned by Foreign Companies

by Alexey Karchiomov & Larisa Peshekhonova, Egorov Puginsky Afanasiev & Partners

On August 3, 2018 the Russian President signed the Federal Law “On Amendments to the Russian Merchant Shipping Code (the “RMSC”) as regards the formation of the Russian Open Register of Ships in view of the adoption of the Federal Law “On International Companies” and the Federal Law “On Special Administrative Regions in the Kaliningrad Oblast and the Primorye Territory” (the “Law”).

The Law provides for establishing effective January 31, 2019<sup>1</sup> of the Russian Open Register of Ships (the “RORS”) to register ships that are owned not only by Russian companies and individuals but by foreign ones as well. Taking into account that the right to fly the Russian flag was previously granted only to those ships that were owned or bareboat chartered by Russian entities, the amendments constitute a step that is totally unprecedented for the State.

The key developments introduced by the Law are as follows:

1. Foreign individuals and companies, as well as companies registered under the Federal Law “On International Companies”<sup>2</sup>, would be able to register a ship with the RORS and to be granted a right for the ship to fly the Russian flag.

However, the legislator has made a reservation: the ships owned by foreign companies or individuals shall be registered with the RORS, provided that the ship has been bareboat chartered by a company registered

<sup>1</sup> Date of entry in force of the Law.

<sup>2</sup> An international company is a foreign commercial corporate body that has had an international company status due to changing of its governing law by way of redomiciliation (transfer of a company to another jurisdiction) (Article 1(1) of Federal Law dd. 03.08.18 No. 290-FZ “On International Companies”).

under the Federal Law “On International Companies”.

Ships that could be registered with the RORS are:

a) vessels, including small vessels, used for commercial purposes (provided that such vessels are not operated for performance of the activities listed in Article 4 of the RMSC<sup>3</sup>) by an entity registered as a special administrative region<sup>4</sup> party under the Federal Law “On Special Administrative Regions in the Kaliningrad Oblast and the Primorye Territory”;

b) small vessels used for non-commercial purposes, sports sailing and leisure boats.

2. Registration of ships with the new register would only be done in seaport Kaliningrad and seaport Vladivostok. However, there would be no need to show the vessel to the Harbour Master and to bring the vessel in the Russian Federation.

3. Terms of State registration of ships with the RORS are no different from the existing terms of registration:

a) where the vessel has been previously registered with a foreign register of ships, it would have to be removed from such a register and a confirmation to that end would have to be provided;

b) a vessel could be registered with the RORS for a definite period of time, which could be further extended, or for an indefinite period of registration;

c) registration would need to be confirmed annually.

4. Foreign nationals and stateless persons on the crew of a vessel flying the Russian flag and registered with the RORS would also be in a position to act as a Chief mate and a radio operator. However, only Russian nationals are eligible to act as a Master and a Chief engineer.

<sup>3</sup> Coasting, ice-breaking services, pilotage, search and rescue operations, recovery of sunken assets, hydraulic, underwater engineering and other similar works in the inland sea waters and/or the territorial sea of the Russian Federation, marine resource research, exploration and development of the seabed and its subsoil in the waters under the Russian jurisdiction, marine shipments of oil, natural gas, gas condensate and coal extracted in the Russian Federation and/or on a territory under the Russian jurisdiction, etc.

<sup>4</sup> Special Administrative Region (SAR) is the territory of Russky Island (Primorye Territory) or Oktyabrsky Island (Kaliningrad Oblast) regulated by the legal regime of a special administrative region; a SAR Party is a foreign company entering into an operation agreement with the SAR Authorized Authority and put on the Register of the SAR Parties (Article 2(1)&(10), Article 5 of Federal Law dd. 03.08.18 No. 291-FZ “On Special Administrative Regions in the Kaliningrad Oblast and the Primorye Territory).

5. The Law shall also clarify certain provisions of the RMSC with regard to giving possession and ownership of a vessel to a foreign charterer under a bareboat charter, temporary putting of a vessel under a foreign State flag; classification and inspection of vessels subject to State registration; putting of entries into ship registers; removal from ship registers; mortgage over vessels or vessels under construction. For instance,

a) a vessel could be registered with a bareboat charter register, even where the bareboat charter validity is under a year (at the moment the charter validity shall be at least a year);

b) the list of reasons for removal from the Russian International Register of Ships has been supplemented with additional reason, which is: use of the vessel to perform the activities provided for by Article 4 of the RMSC. A similar reason for removal has been introduced as related to the RORS.



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## Saudi Arabia Ship Arrest

by Wisam A. Sindi & Omar Omar, Al Tamimi & Co.

### Introduction

The Kingdom of Saudi Arabia (‘KSA’) enjoys a strategic geographical and economical position on the map of global sea trade. By contrast, the domestic maritime practice has resisted assimilation which kept the arrest of ships in KSA to be an enigma for some international carriers, insurers, and traders. It is thus fitting that this article discusses, both briefly and broadly, the complex area of the maritime practice for ship arrest while touching on a few of the conceptual standpoints behind the practice.

## Background

The basic tenets of KSA maritime practice rest on section two of the 1931 Commercial Court Law ('CCL'). The CCL was amended over the years by a few converging laws; most notably the newly enacted Enforcement Regulations ('ER') that now govern the procedure for arresting ships in the kingdom.

Likewise, amendments by the Judiciary Regulations rendered the kingdom without a devoted maritime court. Instead the commercial courts (circuits) are delegated with reviewing the merits of substantive maritime claims and ship arrest measures, while the enforcement courts oversee the interlocutory sale of arrested ships.

Furthermore, all vessels sailing a predetermined course to Saudi Arabia, while anchored in its territorial waters, are subject to the national jurisdiction of its domestic courts, regardless of the ship's nationality or flag.

However, not all sea going ships are arrested the same way. Military and official ships, governmental owned vessels, and vessels used in port support services are excluded from the subject matter jurisdiction of commercial and enforcement courts.

Even though the kingdom is a signatory party to multiple international conventions on public international maritime and admiralty law, it has not ratified the 1952 International Convention Relating the Arrest of Seagoing Ships, the 1999 International Convention on the Arrest of Ships, or the International Convention on Maritime Liens and Mortgages of 1993.

## Treatment and Ranking of Maritime Debts

There are two categories for liens; one for the threshold liability that may extend to cover all of the debtor's sea going assets, the other is for the hiked liability that attaches the debt or lien to a certain pre-determined asset. Under the general rules of civil liability debtors are presumed to be personally liable in their own private assets, this concept creates the threshold or minimum standard for securing debt obligations that are naked or fully exposed- lacking backup collateral. By the same token maritime debtors are also presumed liable for

debts connected to their ongoing sea trade; however, the standard for treating a lien varies accordingly.

Creditors holding naked or exposed lines may direct arrest actions *in-personam* against all of their debtor's sea going assets irrespective of whether they are the owners or charters of the vessel. However, in case of a registered mortgage the standard is elevated to premium collateral in the form of an attached *in-rem* lien that grants creditors supremacy over the mortgaged vessel itself, without having to establish a personal connection with the debtors or holders of the vessel. Quasi-mortgage liens- liens that are in a position of a mortgage by rule of law also warrant debtors with *in-rem* right over the vessel. In this context, bareboat and time charterer agreements are two extreme examples of quasi mortgage liens that entitle the owners of a ship with a direct claim over the ship, its machinery and equipment, the freight allowance, and its cargo without regards to debtors.

The main advantage of *in-rem* jurisdiction is that it renders creditors immune to subsequent transactions that may produce adverse affects to the value of the underlying vessel, such as taking another mortgage or selling the vessel unless stringent conditions, disclosures, and procedures are met. Real mortgage requires that creditors officially register their debts with the port authority in order to benefit from such protection against subsequent creditors.

Overall, there are eleven different liens mentioned in article 154 of CCL in the following specific order: 1) claim expenses as well as the expenses resulting from the interlocutory sale of the vessel, 2) pilot, anchorage, and docking fees, 3) watchman and custodian charges, 4) storage expenses, 5) expenses for safekeeping, 6) registration and administrative fees and crew charges, 7) pre-voyage resupply loans, 8) the sale price for the vessel as well as monies owed to foreign creditors, 9) in-voyage resupply loans, 10) insurance premium; and 11) salvage and insurance charges for the general average.

Speaking of rankings, Jeddah Islamic Port was ranked #33 on Lloyd's global list of busiest ports running bulk docks.

### **Arrest and Re-arrest**

The court will serve its orders upon a certain ship through delegating the pertinent authorities, i.e. the port director or the coast guard.

Since the arrest procedure is unusually expedited the ER has a number counter checks and balances that equalize between claimants positions and limit frivolous claims. First, the underlying right should be connected to a maritime debt that is both prima facie credible and mature. Second, creditors should be acting in good faith and are expected to file a following substantive claim within a maximum of 10 working days (averaging two weeks) from the date of obtaining the arrest order. Third, creditors are required to deposit a monetary security in the form of a rectified cheque or bank guarantee with the court. The court enjoys full discretionary powers to determine whether an arrest is possible and how much security should be posted by considering a number of factors. These factors often include one or more of the following: the amount of debt owed, the value of the vessel, the costs for maintaining the vessel and/or its cargo in port, and the practicality and accompanying risks arising from the arrest.

Re-arrest of a ship directly depends on the cause for foregoing the prior action. Re-arresting a ship is not possible when the arrest action was removed by force of law, i.e. neglecting to follow it with a substantive action. That being said, the court will consider re-arresting a ship and even sympathize with the creditor if he had dropped his prior action in goodwill such as where there are efforts transpiring for the settlement of the debt.

Arresting sister ships reverses the *in-rem* jurisdiction back to *in-personam* under exceptional circumstances. It is so the case then that arrest of a sister ship might be possible (without being guaranteed) providing that both ships are owned by the same debtor, there are valid concerns that the transaction would jeopardize the rights

and position of the creditor, and that the sea going asset is at real threat of diminishing in value.

### **Release and Wrongful Arrest**

Release of a ship can occur in one of three stages; the initial stage, the court of first instance stage, and the court of appeal stage. Debtors are urged to promptly respond to arrest actions, particularly during the earlier stages of an arrest while they have the better chance for diffusing the action with minimum casualties.

The risk of an arrest in the initial stage can be mitigated by making diligent efforts to verify the threat of arrest by obtaining a legal opinion of a specialised local counsel followed by efforts to negotiate with the arresting party. However, if the ship is in fact arrested, then debtors would turn to seek its release while seeking personal indemnity from the claim. Prudent debtors are expected to respond within the above mentioned 10 days window, failing to do so would only increase their losses. In order to release the vessel from arrest, debtors should first provide a counter security and then dispute the arrest. The counter security would also be determined by the court, but most likely it would be of an equal amount to that of the arrest security and issued in a similar fashion. If the release is not successful, the debtor may contest the court order for arrest by appealing to the court of appeals within 30 days from the order of arrest.

In general, debtors may defend against an arrest by raising the issue of lack of jurisdiction, lack of conditions to maritime debts, impracticality of an arrest, or expiration of the time bar. Intuitively, the better approach is to prevent an arrest action from occurring in the first place by providing creditors with alternative options or collateral to cover the underlying debt. Personal guarantees, such as escrow accounts and Letters of Undertaking ('LOU'), are not accepted by the court at the moment; however this doesn't completely rule them out of practice. Escrow accounts are widely practiced in substantive law suits, rendering it an available recourse at the disposal and mutual agreement of the parties and outside the enforcement court scope of review.

Wrongful arrests are rarely compensated by courts due to the principle of judicial immunity and the prudent assumption on the end of debtors. However, it would be possible for debtors to recover actual and direct damages if they can prove for certain that the arresting creditor has acted in bad faith and falsified the information or documentation submitted with the request for arrest.

I hope this article has been informative to those interested in learning about the Saudi practice for ship arrest in KSA. Thank you.



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▼ Cover page photo and below photo taken at our 15<sup>th</sup> Annual Members' Conference hosted this past May in Malaga, Spain.

Members new and old enjoy gathering for one weekend each year in a different city of the Shiparrested.com network to discuss the latest developments in maritime and shipping law. With nearly 100 members from five continents in attendance, we thank you all for making this year a great success.

We look forward to sharing details about Malta 2019 with you soon!



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