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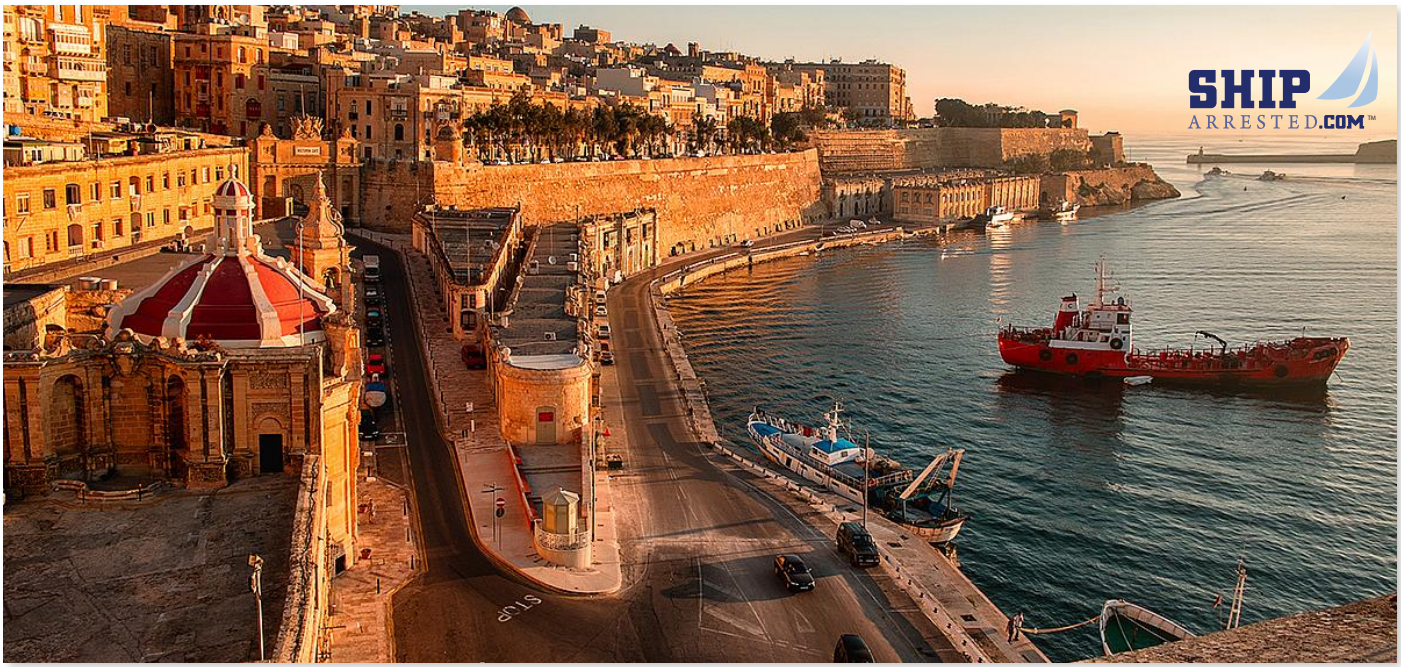

In this issue of *The Arrest News,* read a wide variety of topics from members of the Shiparrested.com network around the world including a broker's role in ship arrest, IMO 2020 regulations, recent developments regarding arrests and injunctions in Panama and much more.

Singapore Perspective on Using a Letter of Undertaking To Establish a Limitation Fund

by TAN Hui Tsing, Gurbani & Co LLC

Recent amendments to the Rules of Court which permit a party wishing to constitute a limitation fund to do so by way of a P&I Club's letter of undertaking bring us in line with the position in the UK and other jurisdictions that permit limitation funds to be constituted by way of letters of undertaking, as opposed to the traditional payment-into-court method. This article seeks to examine and discuss some of the practical consequences that have arisen as a result of this new mechanism for constitution of limitation funds.

I. Constituting a limitation fund by way of a letter of undertaking

1. With effect from 1 February this year,[1] a shipowner seeking to set up a limitation fund, by reference to the tonnage of his vessel pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims (the "Limitation Convention"), has the option of doing so by way of a letter of undertaking from a Protection & Indemnity Club ("P&I Club"). This means that cash does not have to be paid into court; instead, a letter of undertaking from the P&I Club stating the amount of the limitation fund that it shall undertake to pay will be sufficient for the purposes of setting up a limitation fund.

2. The amendment to the Rules of Court brings us in line with Art 11(2) of the Limitation Convention which permits constitution of a limitation fund either by depositing the sum or by producing a guarantee acceptable under the legislation of the State Party

[1] Rules of Court (Amendment) Rules 2018 (S 51/2018)

where the fund is constituted and considered to be adequate by the court or other competent authority.[2]

3. Therefore, in the summons application for a limitation decree, it would be prudent to annex a draft letter of undertaking ("LOU") wording to the summons for review and confirmation by all parties for the purposes of setting up the limitation fund. Additionally, an affidavit needs to be filed by the P&I Club demonstrating its financial capability to meet its obligations under the LOU. No doubt this deviates from the usual practice where the P&I Club's financial status is not challenged when LOUs are provided as, say, security for a claim or to secure the release of a vessel under arrest, but the rationale for requiring the P&I Club to make an express affirmation on affidavit appears to stem from the court's oversight of the arrangement.The decision in full can be found in the link below. It is relatively long but informative.

4. Following Art 8 of the Limitation Convention,[3] the limits of liability as per Arts 6 and 7 "shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment".

5. Therefore, upon confirmation of the LOU wording by the court, the party issuing the LOU, having checked the conversion rate of the Special Drawing Right ("SDR") equivalent for Singapore dollars (the currency in which the limitation fund will be set up and which the LOU has to guarantee), shall procure the LOU to be issued by the P&I Club undertaking payment of the limitation sum in Singapore dollars and the LOU shall be filed via e-litigation and the original document delivered to the Registry. The date of filing by e-litigation is the date of constitution of the limitation fund.

[2] Article 11(2) of the 1976 Convention on Limitation of Liability for Maritime Claims (the "Limitation Convention") states: "A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority."

[3] Article 8 of the Limitation Convention states:
The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment.

II. Replacement letter of undertaking

6. However, there will invariably be a variance in the SDR conversion rate, as demonstrated in the following scenario. When issuing the LOU, the SDR as defined by the International Monetary Fund ("IMF") shall be converted into the value of the national currency for the purposes of stating this in the LOU. Since the IMF publishes the conversion rate as at yesterday, the P&I Club, when issuing an LOU, will only be able to convert the SDR into national currency using yesterday's conversion rate. The LOU may or may not be e-filed on the same day it is issued, but even if e-filed on the same day it is issued, the limitation fund is not constituted on the same day as the day at which the conversion rate was obtained.

7. In other words, one cannot ascertain today's conversion rate on the IMF website and the latest conversion rate will be yesterday's rate or the last working day before today. Depending on how large the variance is in the conversion rate, this may have a discernible impact on the quantum of the LOU and hence a replacement LOU may have to be issued, particularly if the variance produces a higher quantum on the date of filing or deposit of the LOU in court.

8. Therefore, in the majority, if not all, of the cases, it may be necessary to replace the LOU initially filed with a replacement LOU. This creates an administrative hassle of having to repeat the process of obtaining an LOU from the P&I Club, filing the replacement LOU and expunging the earlier LOU filed.

III. Replacement letter of undertaking – Any way out?

9. Arguably, a way around this would be to fix the date of conversion so as to avoid having to replace the LOU and expunging the earlier LOU filed in court. A possible date may be the date on which the

limitation decree order is made or the date of occurrence of the event.

10. However, the committee discussions on the drafting of the Articles in the Limitation Convention show that such a possibility is unfortunately not feasible.

11. At the outset, the question of whether the conversion date of the SDR to national currency should be a date other than the date on which the limitation fund was created was debated by the Inter-Governmental Maritime Consultative Organisation ("IMCO") Legal Committee. The debate centred on whether the conversion date should be "the date of occurrence"[4] or "the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State, is equivalent to such payment".[5] The parties arguing for the former date suggested that using the date of occurrence would prevent speculation. However, as the settlement of a debt in foreign currency invariably entails delay, it was pointed out that the date of occurrence was not a good choice because of inflation.[6] The majority of delegates in the IMCO Legal Committee voted in favour of the latter date as the basis for conversion by 15 votes, 11 votes for the former and nine votes in abstention.[7] Whether the Committee was alive to the consequence flowing from the decision remains unclear, but certainly, the question of when the date of conversion of SDR to national currency should be was debated and considered.

12. Notwithstanding the above, is there still room for the national courts and legislative bodies in a State Party where the fund is being set up to intervene or decide on this question of when the currency conversion should take place or what amounts to the constitution of a limitation fund?

13. On a closer reading of the Limitation Convention, the answer, unfortunately again, seems to be "no". Except for Art 10(3) of the Limitation Convention which gives an express right to the State Party where the limitation fund is being set up to decide in accordance with its national laws on the question of procedure arising under Art 10,[8] no express provision or permission has been given to State Parties to deviate from the application of the Limitation Convention in relation to the other Articles.

14. In this respect, Art 8 (Unit of Account)[9] read with Art 11(2) (Constitution of the fund)[10] makes it clear that whilst the fund may be constituted by depositing cash or a guarantee, the conversion of the SDR rate into national currency shall be at the date the limitation fund shall have been constituted or payment made or security given.

15. Thus, it appears that no further deviation may be possible from the intended operation as expressed in these Articles.

IV. Continuing interest post-constitution of limitation fund

16. The Limitation Convention makes it clear that the limitation fund shall be constituted together with interest running from the date of occurrence giving

4 Comite Maritime International, The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996 at p 260.

5 Comite Maritime International, The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996 at p 260.

6 Inter-Governmental Maritime Consultative Organisation Legal Committee's debate at the Twenty-third and Twenty-eight sessions and the Committee of the Whole at the Tenth Meeting on 8 November 1976, available in Comite Maritime International, The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996 at pp 260–267.

7 Committee of the Whole at the Tenth Meeting on 8 November 1976, available in Comite Maritime International, The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996 at pp 262–267.

8 Article 10 of the Limitation Convention provides as follows: Article 10 – Limitation of liability without constitution of a limitation fund
1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been consolidated.
2. If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.
3. Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

9 Article 8 of the Limitation Convention states:
The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment.

10 Article 11(2) of the Limitation Convention states: "A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority."

rise to the liability until the date of the constitution of the fund.[11] However, it is silent as to the accrual of interest, post-constitution of the fund.

17. Prior to the use of depositing security or LOU to constitute the limitation fund, cash which is paid into court to constitute the fund will ordinarily be deposited by the Accountant-General into an interest-bearing account and the interest accrued on the sum so deposited will form part of the limitation fund and be apportioned pro rata at the point of distribution. Presently, with the use of security or LOU to constitute the limitation fund, the court has directed that post-constitution interest shall be provided in the LOU, so that the claimants are not made worse off, so to speak, by being deprived of post-constitution interest which would have otherwise accrued on a cash payment into court. In other words, the LOU which secures the amount payable as the limitation fund shall also expressly state and include interest running at the specified rate from the date of the constitution of the fund or deposit of LOU in court until the date of payment under the LOU.

18. Thus far, the quantum or rate of post-constitution fund interest has been the subject of legal submissions by counsel arguing at the limitation application hearing, with the result of different rates of post-constitution interest being ordered in different actions. A more certain means of fixing the post constitution interest may be to peg this to the average prevailing rate for fixed deposits of a prescribed number of local banks in relation to a prescribed period, eg, a period the Accountant-General would have applied if cash had been deposited in court.

[11] Article 11(1) of the Limitation Convention states:
Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

V. Conclusion

19. The practice of constituting a limitation fund has evolved from the relatively primitive method of locking up large sums of cash in court to the provision of a letter of undertaking from a P&I Club to secure the sum. Considering that substantial liquidity is thereby freed up as a result, the added exposure to post-constitution of fund interest and the administrative trouble of having to organise a replacement LOU may be a small price to pay for this convenience.

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When Arrest Leads to Judicial Sale – the Broker's Role

by Alexandra Willcox, CW Kellock & Co. Ltd.

Judicial sales, whether it be auction, tender or private treaty, are targeted by "bargain hunters" who are looking to purchase vessels at low levels. This is directly opposed to the interests of mortgagees and other claimants, who are seeking to maximise the recovery of what they are owed.

The Admiralty Court in England & Wales is one of the very few which maximises the value of arrested assets by providing for professional world-wide marketing via a broker.

Although the arrest and judicial sale of a vessel can be an effective way of securing and enforcing maritime claims, mortgagees are not always aware that most jurisdictions do not provide for adequate marketing. It is not sufficient to place an advertisement in a newspaper and wait for emails to come in. Newspaper

advertisements are easily overlooked: bargain hunters may see them and apply, but the best buyers are those who may already be seeking through their broker a similar ship on the open market. Such buyers may not previously have bought a vessel in these circumstances and the process may be unfamiliar. The broker's role is to encourage buyers to come forward by making it as easy as possible for them.

However, unless that broker is appointed by the court or by creditors, his interest lies in achieving a sale to his buyer, keeping the forthcoming sale as quiet as possible, avoiding competition and keeping the price low. Creditors who question the cost of appointing a broker are not always aware that brokerage commissions are already being paid in Judicial Sales: insofar as the sale will have been brought to the attention of a buyer by his broker, the buyer will be paying commission to that broker and adjusting his offer accordingly. Better, therefore a broker be retained to represent the interests of the creditors i.e. to maximise publicity, encourage bids and maximise value.

CW Kellock & Co Ltd have been the Admiralty Marshal's exclusive broker for over 100 years. The Admiralty Marshal's office recognises it relies on CWK's unique experience in the court sale process for assistance in the various steps of the sale process, including having a vessel surveyed, obtaining detailed plans and particulars, liaison with port agents, notifying previous flag and classification society, arranging advertising and marketing, coordinating buyers' inspections, circulating sale terms, receiving offers for submission to the Court, notifying successful bidders, ensuring that payments are received, drafting bill of sale and providing general assistance both to the Admiralty Marshal and to prospective buyers.

The result is that in England and Wales creditors have for very many years been assured that every effort is exercised to assist the highest number of serious buyers, to provide them with the technical and procedural information which they need, to encourage them to bid, and to maximise the value of arrested vessels.

CW Kellock's long experience of the court sale process and their marketing reach has led them to be appointed in many other jurisdictions either by the court or by mortgagees, through which they have gained first hand experience of judicial sales to date in Panama, Jamaica, USA, Nigeria, the Netherlands, Germany, Estonia, Malta, Greece, Turkey, UAE, India, Singapore, S Korea, China and Australia.

Case History 1

The Supreme Court of Jamaica ruled that 'Trading Fabrizia' a 34000 dwt bulkcarrier built in 2001, should be sold at auction in January 2018. The Bailiff, Mr AO Sherriah, called on CW Kellock for assistance with both procedure and marketing. CW Kellock's director Paul Willcox travelled to Jamaica to assist with the arranging and conducting the open auction. CW Kellock's advance marketing ensured that the assembly hall was packed with representatives of over 20 registered bidders, and the vessel achieved a price well in excess of its reserve and of general expectations.

Case History 2

Mortgagees had arrested in Rotterdam 'Lucina', a 9858 dwt multipurpose vessel built in 2004. Having previously enlisted CW Kellock's services in marketing ships which they had arrested in India and Turkey, and wanting 'Lucina' to receive maximum exposure to potential buyers, the mortgagees retained CW Kellock to advertise the Public Foreclosure Sale by Auction to be conducted by Loyens & Loeff N.V. on 14th December 2018. Within 24 hours of commencing marketing CW Kellock had already generated 24 expressions of interest and 3 inspection requests: at the time of writing these numbers are growing steadily.

Summary

The appointment of an official broker is often overlooked in the sale of arrested vessels. A broker acting for the court and the creditors will shoulder much of the administrative burden of answering routine technical and procedural queries and will stimulate participation by a greater number of genuinely interested buyers. An official broker adds significant value to the judicial sale process.

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IMO Mandatory Emissions Reduction Regime Adopted 15.07.2011

by Richard Faint, Charter Wise Ltd.

Introduction

The International Maritime Organisation (IMO) mandatory measures to reduce emissions of greenhouse gases (GHGs) from international shipping has come into force by amending the Marpol Convention Annex VI Regulations for the prevention of air pollution from ships (MARPOL Annex VI). The European Commission announced a proposed amendment to the EU's Sulphur Directive which will bring the EU's regulation in line with the IMO's sulphur regulations in MARPOL Annex VI.

Much has been written of global pollution caused by the Shipping Industry. I mentioned this in Malaga as something that should be of interest to members of Shiparrested.com. It is easy to see that more and more articles are being written on this subject – the general question being asked "Is the Shipping Industry prepared for the coming "global sulfur cap" which will come into force on 2020?"

At the moment the answer to this appears to be a resounding NO.

This will lead to ships being detained as, from 1 January 2020 the maximum allowable sulphur content of marine fuels will be drastically reduced from 3.50% TO 0.5% M/M.

To say that the Shipping Industry is concerned about this is to put it mildly. This global cap on the sulphur levels in marine fuels is expected to have a huge impact and not just on the shipping industry itself. It is expected that it will also have an impact on the oil refining sector as it will create an increasing demand for compliant fuel. It seems less than 1% of the worldwide shipping fleet is currently operating within the sulphur cap 2020.

As there is a range of options for compliance, shipowners and operators must urgently weigh their options and reach a conclusion on how to ensure compliance in the most cost-efficient way. This article aims to provide a brief overview of the regulations and the main alternatives for compliance with a focus on the scrubber systems.

An article published by the Marine Environmental Protection Committee (MEPC) 73 on 8 October 2018 shows just how anxious the Shipping Industry has become. (See https://maritime-executive.com/article/sulfur-cap-mepc-document-cosponsors-correct-the-record entitled "Sulfur CAP: MEPC Document Cosponsors Correct the Record"; worthy of reading). In brief, according to this article on 31.08.2018 the Bahamas, Liberia, Marshall Islands, Panama, BIMCO, INTERCARGO and INTERTANKO cosponsored and submitted a document to the Marine Environmental Protection Committee (MEPC) 73 meeting which took place on 22-26.10. 2018. This paper, MEPC 73/5/14, contained a proposal to establish an experience-building phase (EBP)," *intended as an institutionalized data gathering measure, with the purpose of providing greater transparency and detailed information on the compliance situation after January 1, 2020".* The cosponsors defended the paper from recent misconceptions but, if you read the article, progress seems limited and how the convention will be implemented may still be a problem.

Just what the sanctions will be is uncertain – apart from ships being detained.

Regulatory framework

MARPOL Annex VI Regulations for the Prevention of Air Pollution from Ships - Entered into force 19 May 2005

a. Revisions to Annex VI - Adopted October 2008 and entered into force 1 July 2010

b. Annex VI - Application Summary (inside an ECA "Emission Control Area")

Application > All Ships

Does not apply > (i) When suffering damage to ship or equipment

(ii) When saving life at sea

(iii) When securing safety of ship

Surveys & Certification > (i) International Air Pollution Prevention (IAPP) Certificate – applies to

- All ships of from 400 GT upwards
- Fixed or floating platforms (drilling rigs)
- Floating craft & submersibles
- For non-parties: ships constructed before date of entry into force of Annexe VI to comply by 1st schedules drydock but no later than 3 years after entry into force

(ii) Subject to Initial, Annual, Intermediate, and Renewal surveys

c. Regulation 14 "Sulphur oxides & Particulate matter (Sox & PM)

(i) 01.06.11 - Agreed at 4.50%

(ii) 01.01.2013 - Reduced to 3.50%

(iii) 01.01.2020 - Will be reduced to 0.50% (North American ECA will be even lower (o.10%)

In brief, the ability of ships to sail through a designated ECA will be limited to those that can show a valid International Air Pollution Prevention (IAPP) Certificate.

On the EU level, the Directive was adopted on 10.01.2012 and so implements the requirements of IMO Marpol Annex VI introduced in 2010. Where these have been adopted into domestic law they will have direct legal force.

China has designated some ECA's from 01.10.2018 for example: the Pearl River, the Yangtze River Deltas and the Bohai-rim Waters. Ships operating in these areas are already prohibited from using fuel with a sulphur content in excess of 0.5% - unless the ship has been fitted with an exhaust gas cleaning system.

Where is this heading?

Owners have 4 options as to how they can comply with the new limits.

1. Switch from heavy fuel oil (HFO) to marine distillates such as marine diesel oil (MDO) or marine gas oil (MGO),
2. Use ultra-low sulfur HFO/hybrid fuel (LSFO),
3. Retrofit vessels to use alternative fuels such as LNG or
4. Install scrubber systems – that is a system strips sulphur from fuel as it is being burned (and will allow ships to continue using high-sulphur fuel oil).

Shipowners/Operators are likely to choose MDO/MGO as the easiest option in the short run since it requires no modifications to the vessel.

Reuters updated their report on this problem on 06.09.2018.

With regard to fitting scrubbers it is being said that it is expected that the installation of scrubber systems will rise quickly but this will only cover one third of current of ships burning HFO. If that is right it will leave the other two thirds of current vessels unusable in any ECA.

Manufacturers of scrubbing systems such as Wartsila Marine Solutions (Finland) are taking in record orders as the 2020 deadline draws nearer. Sigurd Jenssen (Wartsila director of exhaust gas cleaning) has said that while the equipment has a major part to play and that fitting 2,000-3,000 ships with scrubbers by 2020 is "doable" there is "no silver bullet" to ensure the deadline can be met.

Commodity traders may well have to deal with this problem – and sooner rather than later – as Shipowners are normally able to pass on the additional cost of bunkers to Charterers. If they can do this then the actual price of fuel will not be their main concern. The falling demand for HFO that is expected as MARPOL bites and Shipowners shift to Low Sulphur Fuel Oil (LSFO) will create premiums for LSFO and MGO.

For Shiparrested.com members there may be a demand for arrests from Trading companies when FOB Buyers

find that the ship they wish to nominate falls foul of MARPOL Regulations.

Failure to meet MARPOL could render the ship "unseaworthy" with all that that entails.

Ships that are detained may well be considered unseaworthy with the result that there will be no Hull or P&I cover. How Cargo insurance policies with a "Seaworthiness admitted clause" will deal with this aspect remains to be seen.

Buyers of Commodities on a CIF basis could consider claiming against their Sellers under the commodity sale contract by using s.32(2) of the English Sale of Goods Act 1979. Section 32 of the Act holds that delivery of the goods to the carrier (Shipowner) is prima facie deemed to be a delivery of the goods to the Buyer.

However, the obligation is on the Seller to ensure that the contract of carriage is reasonable "Section 32(2) reads:

"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages".

A contract of carriage, i.e. the Bill of Lading, where the vessel has or will fail to meet MARPOL cannot be considered as a reasonable contract of carriage. There will be delays and claims will be made using the trigger of lost or damaged goods.

One area to bear in mind will be the level of compliance which will depend on enforcement and Port State Enforcement. How good Flag States will be in this regard remains to be seen. Estimates of "non-compliance" (cheating, in plain English) vary between 10% to +30% of total fuel consumption.

It may be that large trading companies may well write into their sale contracts a requirement that their cargoes can only be carried in vessels that burn IMO-compliant fuel.

It will be interesting to see how this actually plays out.

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Confiscation of Crew Passports in UAE Ship Arrests – Time for Change?

by Adam Gray, Al Tamimi & Co.

Introduction

UAE law and practice provide for the confiscation of an individual's passport where there is evidence of a risk of absconding with a view to avoiding a debt. Under UAE civil law, passports are typically confiscated to prevent company managers, against whom a judgment has been rendered, and less commonly in anticipation of a judgment, from fleeing the jurisdiction. UAE criminal law also includes provisions which enable the police to confiscate passports for the same purpose.

Within the ship arrest domain, confiscation of crew passports has also become a common practice adopted by the enforcement authorities, such as the UAE Coastguard, and which originated in a previous era when some arrested ships had managed to abscond. This article takes a closer look at the appropriateness and value of employing this practice in ship arrests cases, and questions whether confiscation of crew passports could be a practice that the UAE courts might consider phasing out.

Practice; Not Law

Restriction of movement of a crew due to a ship arrest within the jurisdiction is not strictly legal, in so far as there is no provision within UAE Federal Law No. 26 of 1981 ("UAE Maritime Code") which empowers authorities to confiscate crew passports at the time of arrest. However, it would be going too far to say that the

practice is illegal or unlawful because the authorities, tasked with executing an arrest order, are endowed with a wide degree of discretion when enforcing court orders.

Confiscating crew passports at the time of arrest is common practice, but not a legal requirement under the UAE Maritime Code. It is unclear why this practice persists, but it seems that it is implemented by the enforcement authorities as an added precaution, even if a judge has not so directed.

If a crew has their passport confiscated at the time of arrest, it will be returned when the case is resolved, that is, at the lifting of the arrest or the judicial sale of the arrested vessel. Return of the passport can be expedited by order of a judge or, failing outright return, a judge may allow the passport to be exchanged on a like-for-like basis with an incoming crew if the concerned crew is to be repatriated. An application to court is required to obtain either order, and it is at the complete discretion of a judge to return or exchange the passport. If a judge refuses, the crew could be confined to the ship until the underlying dispute is resolved. It is quite conceivable that the ship could be arrested for years, with the crew on board for the entire duration.

In our experience, there is very little, if anything at all, that crew unions, state embassies, consulates or even the media can do by way of protest. The authorities in the UAE are unlikely to be moved, however intense the pressure. The only remedy is for the crew and their representatives is to apply to the court through the usual legal channels, and the decision to release the passports will rest with the presiding judge.

In Practice – A Case Example

Earlier this year, Al Tamimi & Company was instructed in a high profile ship arrest of a superyacht. The captain and ship managers informed us that the authorities had boarded the ship late at night, and confiscated the ship's documents along with all of the crew's passports. None of the crew were from the Middle East region, and due to unfamiliarity with this practice, were distressed by the loss of their passports. There was a lot of confusion surrounding the reasoning for the confiscation, and many of the crew erroneously feared they might be the subject of criminal procedures.

The crew did not understand why the arrest affected them personally or why the authorities took their passports in connection with a dispute involving third parties. Al Tamimi & Company was instructed by the owners of the yacht to file an application for the release of all of the passports. On that occasion, the judge agreed to return the crew's passports. The judge noted that the arrest order had not included any direction to confiscate the passports, and that such action was an additional practice employed by the enforcement authorities.

Is the Practice Necessary?

Whilst the confiscation of passports in some civil matters may be appropriate, it is our view that the practice in relation to ship arrests could be phased out in the UAE for the following key reasons:

1. Confiscation of crew passports is not necessary to achieve its objective namely, to prevent the vessel from fleeing the jurisdiction of the UAE. The perceived value of withholding passports from crew is that it amounts to an added layer of security to a ship arrest. The logic is that the crew will not be complicit in fleeing the jurisdiction if the authorities hold their passports. However, in reality, this logic is flawed because even if the passports remain with the crew, the ship would still be deterred from absconding, or could be physically prevented from doing so. This is because when a ship is arrested, her operational documents are confiscated by the authorities which prevents her from obtaining port clearance, and calling at other ports. The ship's ability to move freely and trade is thus neutralised. Furthermore, even if the ship made an audacious attempt to flee the territorial waters, the UAE Coastguard has the power to physically prevent the ship from absconding. Consequently, little is added by the confiscation of crew passports for security purposes. The ship is not going anywhere regardless of whether the passports are retained by authorities or not.

2. There are alternative measures that can be employed if securing the ship is the chief concern. For example,

the rudder can be chained up or components of the engine removed. This would achieve the same objective, and reduce the impact of the measure to the owner of the ship, not its crew; holding crew passports is seldom practised outside of the Middle East region in connection with ship arrests, but ship document confiscation is commonplace. This demonstrates that ship arrests can be successfully executed to secure a vessel for an underlying claim without the need to confiscate crew passports;

3. Often it is only the crew who suffer in such circumstances because they cannot return to their families and dependants or accept new employment on board other ships. The boredom and frustration of being confined to a ship for many months is also considerable. Crew are fortunate if they work for a shipowner who will represents their interests, and continues to pay wages in the interim, but it is not uncommon for apathetic shipowners to disappear because of financial stress, leaving their unpaid crew on board an arrested ship on an open-ended basis.

Conclusion – Time for Change

For the reasons set out above, there is scope for the courts and enforcement authorities to reconsider the methodology employed for securing arrested ships by dissolving the practice of crew passport confiscation. Specifically, if the courts themselves are not requesting enforcement authorities to confiscate crew passports, but the practice of doing so persists, then perhaps the UAE courts could specifically request arrest of vessels only, without the adoption of other security measures, or even expressly forbid confiscation of crew passports. We understand the authorities are currently assessing arrest execution practices and dissolution of this practice which would be welcome.

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Avoid Surprises - Detention and Demurrage by Murali Pany & Ng Lip Kai

This article explores two scenarios where a charterer can find itself unexpectedly liable for demurrage or detention.

Notice of Readiness ("NOR")

The NOR is a key document in a voyage charterparty. It is issued by the vessel and gives notice to the charterer, shipper, receiver or other person as required by the charterparty that the vessel has arrived at the port or berth, as the case may be, and is ready to load or discharge.

The NOR is important because it allows the owners to commence calculation of laytime. In turn, this allows the owner to claim for demurrage if there is delay in loading or discharging beyond the laytime.

A fundamental requirement to the issuing of the NOR is that the vessel must have arrived at the specified destination in the charter. The vessel therefore reaches her "specified destination" not when she reaches the geographical area named in the charter, but when she reaches the berth, dock or port named – and is accordingly a berth, dock or port charter.

Needless to say, the NOR cannot be given before it has in fact arrived at the specified destination. However, voyage charterparties may contain one or two seemingly innocuous clauses, usually buried in the standard terms that can significantly alter this position.

The first clause is known as a WIBON Clause. In the case of a berth charter with such a clause, a charterer expecting the NOR to be issued only when the vessel reached the berth could be in for a nasty surprise as the WIBON Clause allows the vessel to give the NOR "*whether in berth or not*".

Thus, if a berth was not available when the Vessel arrived at anchorage, NOR could be validly tendered and laytime would run. Also, if a berth was available when the Vessel arrived at anchorage but could not be reached because of congestion, NOR could be validly tendered and laytime would run.

Other variations of the WIBON clause are as follows:

1.WCCON = Whether Customs Cleared Or Not

2.WIFPON = Whether In Free Pratique or not

3.WIPON = Whether In Port Or Not

The second clause is a "*customary anchorage or waiting place"* clause which allows the vessel to give the NOR upon arrival at such a location. A "customary anchorage" is often a vague and undefined point that is not usually marked out in the charts. This is a fact specific issue and it would differ from port to port. A waiting place may not necessarily always be within the fiscal or commercial limits of the port and could be in fact quite a distance away from the port.

These terms have been given a wide interpretation in cases. In an instance where the vessel was 2 hours away from the anchorage and outside of the legal limits of the jurisdiction of the port, yet it was determined that she was an arrived vessel because it was in accordance with commercial practice and the port authorities exercised *de facto* control over the location.

Both these clauses can advance the time when the NOR can be given and thereby, the commencement of laytime.

Time Lost Clause

A typical time lost clause will stipulate that any time lost would count as laytime. This reduces the time available for the shipper to complete cargo operations and if laytime is exceeded, the shipper becomes liable for demurrage. However, such a time lost clause is dependent on a valid NOR. If there is no valid NOR, laytime would not commence and any time lost would not count towards laytime.

The case of Freight Connect (S) Pte Ltd V Paragon Shipping Pte Ltd [2015] SGCA 37 illustrates a different time lost clause which stated:

"Time lost due to swell and/or weather and/or waiting for loading and/or discharging berth on ships arrival at or off port or so near thereto vessel may be permitted to approach, will be charged as time for which detention is due…"

The effect of the above time lost clause is that the clause operates independently of whether the vessel had tendered a valid NOR as any time lost will directly attract detention charges, as opposed to merely being counted towards laytime. This small but critical variation of a common clause allows the ship owner to claim for detention even if there was no valid NOR.

The clause was upheld by the Singapore Court of Appeal and despite the charterers assertion that there was no valid NOR as the vessel was not in berth, detention damages were awarded against the charterers.

As can be imagined, the impact of such clauses on an unwary charterer could be considerable and the terms of any charterparty should be carefully scrutinized to avoid such surprises.

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Recent Developments in Panamanian Arrests and Injunctions

by Joaquin de Obarrio, PMA Lawyers

The year 2018 has been interesting as to developments in judicial decisions and new legislation enacted in relation to the practical aspects of maritime arrests and injunctions in the Republic of Panama. This article will highlight a recent court decision relating to injunctions and a new law defining the measurement and extension of the territorial sea of the Republic of Panama. Both will

help strengthen the Republic of Panama's position as global hub for maritime arrests and disputes, allowing parties to execute arrests on vessels transiting the Canal or visiting Panamanian ports.

Landmark decision on injunction requirements

The Maritime Court of Appeals issued a recent decision on the requirements for the application of injunctions on causes arising outside of the Republic of Panama. Injunctions are regulated in Law 8 of 1982, as amended, as cautionary measures available to plaintiffs who have reasonable fear that an imminent or irreparable danger may occur and as such the results of the process would not be guaranteed. Through an injunction, a notation is made in the ship's records in the Public Registry, stating there is pending litigation and prohibiting the sale or transfer of title.

The request for injunction must be accompanied by *prima facie* evidence of the claim and substantiated fear of danger, and the corresponding bond to be set by the Maritime Court. The Maritime Courts had previously allowed injunctions on Panamanian flagged ships, under the sole condition of the flag itself. However, the recent Maritime Court of Appeals established other requirements that must be complied with in order to grant the injunction:

> *"Now, in regards to No. 4 of the second paragraph of article 19 of the maritime Law in question, whereby the A-quo court justified that it had jurisdiction and therefore admitted the claim and granted the injunction requested (unnamed, atypical and generic precautionary measure), this provided that "when a ship or one of the involved ships is registered in Panama", there is a caveat for its application, which is that when the cause has arisen outside of the territory of the Republic of Panama, as established in the second paragraph of article 19, there is "sine qua non" condition for the Panamanian courts to have jurisdiction, which is that the presumed or actual owner of the defendant ship has its principal business domicile in the Republic of Panama, notwithstanding that the ship is registered in Panama and its owner is a Panamanian corporation, as established in article 166, numeral 2, which states "…it is considered that the defendant is outside of the Panamanian jurisdiction when its effective and real business domicile is outside the Republic of Panama, even if the company is Panamanian or registered as a foreign company in Panama or has branches or affiliates in Panama or that the ship is registered in Panama."; therefore, the provision is clear indicating that in said event, Panamanian courts lack jurisdiction on the cause, therefore courts could not admit a claim, and much less grant an injunction, as it happened in this case."*[1]

Therefore, in order to grant an injunction on causes arising outside of the Republic of Panama, plaintiff must file "*prima facie*" evidence of the claim and substantiated fear of danger, complying with the requirements of "*fumus bonis iuris* and *periculum in mora*" *("proper right and danger in the delay")*. The other requirements to complete the test are that the ship subject to the injunction is registered in Panama, and that the defendant has an effective and real business domicile in the Republic of Panama. This decision was upheld by the Supreme Court of the Republic of Panama, through a decision on a special constitutional writ of "*amparo*".[2]

Territorial sea boundaries

Law 8 of 1982, as amended, establishes that Panamanian Maritime Courts will exercise jurisdiction over Panama's territorial waters, which include the territorial sea, rivers and lakes, and the Panama Canal. The territorial sea limits must not exceed 12 nautical miles as established by article 3 of the United Nations Convention on the Law of the Sea, of which Panama is a signatory.[3] However, the territorial sea baselines and points of measurements in the Republic of Panama

[1] DS-Rendite-Fonds NR.127 VLCC Younara Glory GMBH & Co. Tankschiff KG. vs. Younara Shipping, S.A., Gulf Marine Management, S.A. and Callisto Navigation, Ltd. Maritime Court of Appeals of the Republic of Panama, decision dated August 25, 2017, Appeal on Court Order No. 354, of September 14, 2015, Court Order No. 395, of October 15, 2015, Court Order No. 441, of December 3, 2015, Court Order No. 447, of December 7, 2015 and Court Order No. 448, of December 7, 2015, in Ordinary Maritime proceedings.

[2] DS-Rendite-Fonds NR.127 VLCC Younara Glory GMBH & Co. Tankschiff KG. vs. Younara Shipping, S.A., Gulf Marine Management, S.A. and Callisto Navigation, Ltd. Supreme Court of the Republic of Panama, decision dated May 31, 2018.

were not clearly established. This caused confusions when executing arrests within jurisdictional boundaries.

In order to remedy this situation, Panama's Ministry for Foreign Relations and the Maritime Authority, jointly prepared a new law project which was submitted for approval by the National Assembly. The result is Law 47 of 2018[4], which sets the baselines from which the width of the territorial sea is measured in the Republic of Panama, in the Caribbean Sea and the Pacific Ocean.

Law 47 of 2018, a very brief bill, establishes in its articles 2 and 3 a list of geographical coordinates on points of measurements which will serve to clearly limit the territorial sea extension in the Caribbean Sea and the Pacific Ocean. The importance of Law 47 of 2018 is paramount to the proper execution of arrests in the Republic of Panama and will help court marshals recognize jurisdiction. A recent decision by the Maritime Court of Appeals on *in rem* proceedings for the execution of privileged maritime lien held the following:

> *"When this type of action is directed against a ship, the maritime forum can only have jurisdiction once the ship is apprehended materially within the maritime spaces that the international treaties subscribed and our own regulations allow in the Republic of Panama, therefore precautionary measures are only possible in the territorial sea.*
>
> *In view of the above, the arrest carried out becomes illegal and does not grant jurisdiction to the court of first instance, since it has been executed in a maritime space where there are no faculties to execute it. Without taking into account the analyzed elements, it is impossible to execute a privileged maritime lien in this case, since the physical apprehension of the ship is of the utmost importance, as it not only represents the guarantee of the process, but also the way in which this Panamanian maritime forum acquires jurisdiction over the cause as it is originated by events that occurred outside the Republic of Panama, and finally it is also the means by which the defendant is notified that the action has commenced."*[5]

The 12 nautical mile jurisdiction has not changed, it has simply been clarified and enhanced through a thorough study of the baselines and the enactment of this useful piece of legislation. Courts will now have the availability of accurate measurements dictating their jurisdiction over the territorial waters of the Republic of Panama.

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"Against the Ship" or "Rooted in Personal liability" - The Maritime Lien Vs. The Owners by Yoav Harris (Adv) & John Harris (Adv), Harris & Co. Maritime Law Office

I. Introduction

"Springs into the existence the moment the circumstances give birth to it"[1] the Maritime Lien like an unseen demon, attaches itself to the res and subtracts from the Owner's property in the vessel[2]. Owners and other creditors might assume he lies somewhere, holding his possession on the vessel but they will not see him until he appears in a claim in rem carried into effect in a legal process.

At that point, in front of the Maritime Court the Knight of Personal Liability might step forward challenging the Maritime Lien and aiming to defeat it. Who of the two will

3 As ratified by the National Assembly of Panama through Law 38 of June 4, 1996, published in Official Gazette No. 23056 of June 12, 1996, in force.

4 Law 47 of August 28, 2018, published in Official Gazette No. 28602 of August 31, 2018, in force.

5 *Latin American Petroleum Trader LLC. vs. M/V Global Hospitality*. Maritime Court of Appeals of the Republic of Panama, decision dated April 23, 2017, Appeal on Court Order No. 38, of February 10, 2017, in Privileged Maritime Lien Execution process.

1 D. R. Thomas "Maritime Liens", 1980, page 13; foot note 75 (Dr. Lushington in The Marry Ann (1865).

2 Thomas, page 22; Foot note 35 The Veritas.

prevail and remain standing at the end of the battle? This is the question we deal with in this article.

In order to have a better understanding on the duel of the Maritime Lien Vs. Owner's Liability, a short voyage to the history and the development of maritime liens must be taken.

II. The development and history of Maritime Liens

According to Prof. W. Tetley, the roots of maritime liens are starched back to "Rhodian Law" (a code of marine laws established by the people of Rhodes), further, the Byzantine Rhodian Sea-Law prepared at Byzantium contained provisions on maritime liens and ship mortgages[3]. Thereafter, customary sea law was present at the medieval European *lex maritima*, which, as part of the *lex mercatoria*, governed the relations of merchants who travelled by sea with their goods in the Middle Ages. Originally purely oral, this customary sea law came into writing in the medieval sea codes which were generally collections of judgements rendered by merchant judges, accompanied by some loosely formulated principles thought to be useful for the future.

Of these early codifications, the most important was the Roles of Oleron dating from the late twelfth century and composed on the Island of Oleron (off Bordeaux), then the center of wine trade between Aquitaine and England. Eleanor of Aquitaine spent two years in Jerusalem (1147 to 1149) and brought back a copy of a maritime code named the *Assozes of Jerusalem, Livre des Assies des Bourgeois* to Oleron in 1149 and ordered it to be incorporated into the laws of her Court, according to Neil Hutton[4] presenting William McFee's research[5].

In 1152 Eleanor married Henry Plantagenet - later King Henry II and later gave birth to Richard I. The marriage opened the wine trade between England, Flanders, and Aquitaine. The trade would have necessarily involved an increased understanding and application of maritime law.[6]

The Roles of Oleron describe what is now known as "bottomry" and "respondentia", an early form of ship mortgage and the pledge of cargo as security for a loan, respectively[7]. The influence of the Roles gradually extended along the Atlantic cost of Europe, southwards to Spain, northwards to England and Scotland and eastwards to the ports of Flanders and the Hanseatic League.

Two other important codifications are the Consolato del Mare, a collection of judgements rendered by consuls who dispensed maritime justice in the Western Mediterranean, and the Laws of Visby, which rely heavily on the laws of Oleron and were first printed in Copenhagen in 1505.[8] The Consolato del Mare for example, granted seaman a preference for wages on cargo and on the ship.

These three major Rules eventually influenced the drafting of the Ordonnance de La Marine of 1861 under Louis XIV and later the commercial codes of France and other civilian jurisdictions.

III. Maritime Liens in the civil-admiralty Law

The principles of civil-admiralty law can be viewed, for example, in the Brussels Convention of 1926.[9] Articles 2 (1) to (5) list the claims which give rise to maritime liens on a vessel and Article 13 states that "*the foregoing provisions apply to vessels under the management of a person who operates them without owning them or to the principal charter*." According to this set of rules, a claim for "light or harbor dues, and other public taxes and charges of the same character" will constitute a maritime lien even on a chartered vessel where under the charter party it was for the charterer to pay the port dues and not the Owner.

VI. Maritime Liens and the English Law

The European civil admiralty law penetrated to the English Law through the "Doctors' Commons" - doctors of civil law trained at Oxford and Cambridge decided

3 Prof William Tetley, Q. C. "MARITIME LIEN IN THE CONFLICT OF LAWS"; 2002, pages 1-7;

4 Neil Hutton, "The Origin, Development, and future of Maritime Liens and the Action in Rem, 28, Tul. Mar. L.J. 81, 112 (2003).

5 William McFee, The Law of The Sea 64 (1950).

6 Neil Hutton, page 84.

7 Tetley, page 5, foot note 11;

8 Tetley, page 4.

9 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926

10 Tetley, page 5.

maritime cases until the Doctor's commons was dissolved in 1858.[10]

Accordingly, in 1835 it was pleaded in *The Neptune 3*, that: *"By the civil law, and the laws of Oleron, which have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand."*[11] In 1851, the maritime lien was defined in *The Bold Buccleugh* as: *"Having its origins in this rule of Civil law, a maritime lien is well defined…to mean a claim or privilege upon a thing to be carried into effect by legal process…It is inchoate from the moment the claim or privilege attaches and when carried into effect by a legal process, by a proceeding in rem, relates back to the period when it first attaches"*[12]. In 1897, in the *Ripon City*, the maritime lien was described also as "*a subtraction from the absolute property of the owner in the thing"*[13]. In 1946, in *The Tolten*, the maritime lien was described as *"comes into existence automatically without any antecedent formality, and simultaneously with the cause of action"*[14].

However, although oriented and even rooted in the Civil Law and also recognized by the English Courts as a "inchoate from the moment the claim or privilege attaches" and as a "a subtraction from the absolute property of the owner in the thing", in *The Castelegate* (1893) it was held that *"a proper maritime lien must have its root in personal liability of the owner"*[15] and later, the major opinion in *The Halycon Isle*, viewed the nature of a maritime lien as procedural (rather than substantial), and as such it should be governed by the law of the jurisdiction in which proceedings are brought (the lex fori). On that basis, the majority declined to recognize maritime lien asserted by a ship repairer under a contract governed by the law of the United States, even though such a lien would have been recognized under Unites States Law.

11 Tetley page 5, foot note 12.
12 Tetley, page 5. Foot note 13.
13 Tetley, page 6.
14 Tetley, page 6
15 D.C. Jackson, "ENFORCEMENT OF MARITIME CLAIMS", 2005, page 490 paragraph 18.70
16 Jackson, page 491, paragraph 18.57

Jackson in "The Enforcement of Maritime Claims" argues, "it is hardly arguable that a maritime lien remains mere procedure in the light of its diverse substantive characteristics"[16]. In his view, whether a personal liability of the ship owner is required for a maritime lien to exist is a matter of policy. In discussing the necessity of personal liabilities of the shipowner, English Courts tend to make a distinction between bottomry, wages and salvage claims which "*accrues independently of personal liability*"[17], "*lay against the ship*"[18] and "*may validly accrue not withstanding that there exists no personal liability on the res owner*"[19] and the remainder of claims attracting maritime liens.

It is also should be mentioned that, while the European-civil-maritime law recognizes maritime liens for a relatively large variety of claims (including damages resulting from collisions, damages to cargo, supply of necessaries), English law recognizes only five maritime liens (being wages, master's disbursements, salvage, damage caused by a ship, bottomry and respondentia).

Other maritime claims according to English Law do not give rise to traditional maritime liens but only to "statutory rights in rem". The latter do not arise with the claim and do not travel with the vessel in the sense that they will expire if the vessel is sold before the action in rem is commenced. This filing requires both the person liable on the claim at the cause of action to be the owner, the charterer, or a person in control of the ship and that when the action is brought to court that person be liable on the claim would be either the owner or the demise charterer of the vessel[20].

VI. The different principles relating to owners liability

In terms of owner's personal liability, European civil-maritime law will recognize a maritime lien even when the vessel is not operated by its owner. On the other hand, English law requires that the maritime lien be rooted in the owner's personal liability unless an exception to this rule takes place.

17 Thomas, page 15, paragraph 14.
18 Jackson, page 495-496, paragraph 18.70.
19 Thomas, page 15, paragraph 14.
20 The supreme Court Act 1981, clause 21 (4); Jackson page 262-263, paragraph 10.27, 10.28;

VII. The Differences as noticed by the Israeli legislators

The fact that English Law has differed from European civil-maritime law can also be evidenced from the Israeli legislator's explanations of the intended Israeli Shipping Act of 1960. There, the Israeli legislator explained that currently there are two systems of law relating to maritime liens. One is the continental system that has been included in the Brussels Convention of 1926 and the other is the English Admiralty system. The Israeli legislator further explained there that "after checking and comparing the two legal systems, it has found that the Continental system is preferable and that therefore, in the enacted Shipping Act of 1960, the articles relating to the maritime lien do not follow the principles of the English Maritime Law and are based on the articles of the Brussels Convention of 1926".

VIII. The two set of rules influencing the owner's personal liability in the Israeli Maritime Law

On the other hand, the other set of rules establishing the Israeli Maritime Court's authorities are the Admiralty Courts Acts of 1840 and 1861 which became part of Israeli Law through the establishment of the Maritime Court by a King's Order in Council dated 2nd February 1937 ordering that the Supreme Court in Jerusalem be constituted as a Maritime Court under the Colonial Court's of Admiralty Act 1890.

After the state of Israel was established in 1948, the only change in the above British legacy from the Mandate over Palestine-Israel was the transferring of the Maritime Court from the Supreme Court in Jerusalem to the Haifa District Court under a purely administrative Admiralty Court Act of 1952.

The result of the above was that on one hand, the Israeli Supreme Court in *The Nadia S* (1990)[21] held that the maritime lien is a substantial right, and as such it should be governed by the *LEX CAUSA* – resenting the majority opinion of *The Halycon Isle* that applied the "*LEX FORI*". On the other hand, while citing Lord Watson in The Castelgate ("*a proper maritime lien must have its root in personal liability of the owner*") The Haifa Maritime Court in The *Ellen Hudig* (2004)[22], denied a maritime lien for "indemnities for loss or damage to the cargo or baggage" as the alleged damage to the cargo (being additional expenses related to its discharge from the arrested vessel in Haifa, and additional freight paid to another vessel to compete its intended voyage to Singapore) was caused as a result of the vessel being arrested due to a claim filed by the crew for unpaid wages and the owners being within 10 days later, under bankruptcy proceedings before a Belgium Court, and not due personal liability on behalf of the owners.

Ever since, *The Ellen Hudig* matter is cited by the Haifa Maritime Court as an authority establishing the need to show owners liability in order to recognize in a maritime lien.

We ourselves were faced with a situation where amount due to the local agent in Haifa for port dues he paid in relation to calls of a chartered vessel at Haifa Port was recognized as a maritime lien by the Admiralty Court of Bari Italy[23] (thanks to our colleague Adv. Alberto Batini), although the charterer of the vessel and not its owner, was the one to pay these port dues[24]. But, at the same time, a similar claim filed on behalf of the same local port agent before the Haifa Maritime Court for the Haifa port dues paid by the agent for the calls of a vessel operated by the same charterer under a "Private Agreement" (which was not drafted as an common charter party) was denied, as the Haifa Maritime Court held that the owner of that vessel was not responsible for the payment the claimed port dues[25].

A narrow path for diversity might be found in *The Captain Hurry* (2016)[26] where the Haifa Maritime Court, while denying a claim for unpaid bunkers supplied to a chartered vessel (due to the fact that the owners were

21 Civil Appeal 352/87 Greefin Corporation Vs. Kur Trade ltd.

22 Claim in rem 732.96 BEHRENS INTERNATIONAL LTD Vs. T. Van Dooselaere.

23 Tiran Shipping (1997) Ltd Vs. Adriatic Lines S.A. Folio No. 8811/2013 RG

24 The Court of Bari haled that the part ("goods or materials wherever supplied to a ship for her operation or maintenance" of Article 1 of Brussels Convention of 1952, is centered solely on the objective element of the beneficiary of the service (supplied to a ship) and that the legislative intent was to leave aside all connections of formal nature with the subject who make the expenses which could be the ship owner or the charterer.

25 Claim in rem 23499-05-13 Tiran Shipping (1997) Ltd Vs. The M/V Nissos Rodos.

26 Claim in rem 22358-02-14 PRAXIS ENERGY AGENTS SA Vs. M/V CAPTAIN HURRY

not the contracting party in the bunker supply agreement) the Court held that one should keep in mind that the maritime liens differ from each other, some secure contractual obligations and other secure obligations according to law. The different kinds of maritime lien imply on the liability of the owners. For example it is obvious that a salvage debt is secured as a maritime lien even if the owner was not responsible for the vessel being in distress. Owners are responsible to third party for damages caused due to the acts of the vessel and such a debt is secured as a maritime lien for "indemnities for collision or other accidents of navigation".

It remains to be seen whether these obiter observations by the Haifa Maritime Court are to be followed in the future cases to come.

IX. Observation

At the end of day, the ability of the Personal Liability to overcome the emerging Maritime Lien depend on the jurisdiction in which this battle will take place and the nature of the maritime lien itself.

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Arresting a Ship in the UAE: When the Dispute Should Be Referred to Arbitration

by Tariq Idais, Al Tamimi & Co.

This article is an overview of a Dubai Court of Cassation judgment (appeal number 444 for the year 2017/ Commercial) in relation to a ship arrest in circumstances whereby the parties had contractually agreed that any dispute between the parties should be referred to arbitration.

The distinct issue before the Court was whether substantive arbitration proceedings must be commenced by a Claimant before or shortly after it had obtained an arrest order for ship arrest, if the parties had contractually agreed to refer all the disputes to arbitration.

Al Tamimi and Company represented the ship owning company (the "Defendant") in this matter.

Background

A ship building company ("Claimant") entered into shipbuilding agreements with a ship-owning company (the "Defendant") in which the Claimant undertook to build a number of ships for the Defendant. Thereafter, the Defendant granted the Claimant a First Preferred Ship Mortgage over one of its ships (the "Mortgaged Ship"), in the sum of USD 40,000,000, plus interest at the rate of 6.5% per annum, as a security for the cost of building the ships.

The Nature of the Claim

On 18 July 2016, the Claimant obtained an arrest order ("Arrest Order") in the Dubai Court of First Instance over the Mortgaged Ship which was at Dubai Drydocks at the time of arrest (the "Arrested Ship"). The Claimant based the application for an Arrest Order on the terms of the First Preferred Ship Mortgage Agreement. Furthermore, on 27 July 2016, the Claimant brought a substantive claim before the Dubai Court of First Instance against the Defendant requesting that the Court validate the Arrest Order over the Ship (the "Validity of Arrest Order Claim"). In addition to the validation of the Arrest Order, the Claimant claimed the sum of USD 95,489,569 for its alleged fees in connection with building the ships and additional legal interest at the rate of 12% from the date the claim was made until full payment.

The Main Defendant's Arguments and the Claimant's Responses:

The Defendant argued that the substantive claim and the Arrest Order should be dismissed based on the fact that the Dubai Court of First Instance did not have jurisdiction to hear the claim, as it was agreed in the shipbuilding agreements that the parties should refer any dispute relating to or arising out of, the agreements to arbitration governed by English Law and the English Arbitration Act 1996. Furthermore, the Defendant argued that the shipbuilding agreement in relation to the

Arrested Ship included an arbitration clause, and since the original alleged debt arose from the shipbuilding agreements, the Dubai Court of First Instance would not have jurisdiction to hear the claim.

Additionally, the Defendant argued that the arrest order must be dismissed, as the Claimant should have commenced arbitration proceedings before arresting the ship in question and/or commenced arbitration proceedings within 8 days of executing the Arrest Order over the Arrested Ship in accordance with Article 255 of the UAE Civil Procedures Law and in compliance with the arbitration clause in the shipbuilding agreements.

The Defendant further argued that the Claimant should have filed an application with the Court requesting the Court to validate the Arrest Order over the Arrested Ship and to stay the proceedings in the UAE, until a final award was issued in the arbitration proceedings. Lastly, because the Claimant did not file arbitration proceedings in England, and instead, filed the substantive claim in the UAE along with the Validity of Arrest Order Claim, the Arrest Order should be denied.

The Claimant responded to the Defendant's arguments by stating that its claim was based on the terms of the First Preferred Ship Mortgage Agreement, and not based on the terms of the shipbuilding agreements.

Furthermore, the Claimant confirmed that the Mortgaged Ship was in fact a form of security for the cost of building other ships and therefore, the Dubai Court should have the jurisdiction to hear the case.

Dubai Court of First Instance's Judgment

I) In Relation to the Substantive Claim:

The Court found that the Claimant's alleged claim was governed by the contractual terms of the shipbuilding agreements and not by the terms of the First Preferred Ship Mortgage. Moreover, the Court held that the First Preferred Ship Mortgage arose from the contractual terms within the shipbuilding agreements and these terms determined the parties' obligations. In addition, the Court ruled that since the shipbuilding agreement of the Arrested Ship contained an arbitration clause, the Dubai Court of First Instance did not have jurisdiction to hear the substantive claim. Therefore, the Court decided to dismiss same.

II) In Relation to the Validity of the Arrest Order Claim:

In relation to the Arrest Order, although the Dubai Court of First Instance acknowledged from the submitted documents that the Claimant had failed to commence arbitration proceedings, the Court decided to stay/ suspend the arrest order over the Arrested Ship until the dispute was finally determined by arbitration.

The Court of Appeal's Judgment:

The Claimant filed an appeal before the Dubai Court of Appeal challenging the Court of First Instance's judgment. The Claimant argued in its appeal that the nature of its claim was based on the terms of the First Preferred Ship Mortgage Agreement and not on the terms of the shipbuilding agreements and therefore, the Dubai Court should have jurisdiction to hear the case.

The Defendant filed its own appeal challenging the Court of First Instance's decision in relation to staying the Arrest Order over the Arrested Ship until the dispute was determined by arbitration. The Defendant argued the following:

A.The Claimant should have commenced arbitration proceedings before arresting the Ship or within 8 days from the day of executing the Arrest Order over the Ship according to Article 255 of the Civil Procedures Law;

B.Then the Claimant should have filed with the Court an application requesting to stay the arrest order over the Arrested Ship until a final award was issued in Arbitration;

C. Along with the stay application, the Claimant should have also attached evidence which demonstrated that arbitration proceedings had been commenced before arresting the Arrested Ship, or that the arbitration proceedings would be commenced within 8 days from the day of executing the Arrest Order over the Mortgaged Ship in accordance with the requirements of to Article 255 of the UAE Civil Procedures Law

In conclusion, the Defendant argued that the Claimant failed to follow the procedures, set out above in sections A, B and C, and since the Claimant instead filed a claim

to validate the Arrest Order over the Arrested Ship and claimed the sum of USD 95,489,569, the Arrest Order must be dismissed.

The Court of Appeal dismissed both appeals and upheld the Court of First Instance's judgment.

The Court of Cassation's Judgment:

Both the Claimant and the Defendant filed appeals with the Cassation Court reiterating the arguments they each had raised before the Court of Appeal. The Court of Cassation dismissed both appeals and upheld the Court of Appeals' Judgment.

Additionally, in relation to the Defendant's appeal, the Court of Cassation based its judgment on Article 102 of the Civil Procedures Law, which states:

"The court shall order a stay of the proceedings if in its opinion it should defer judgment on the subject matter pending determination of another question on which the judgment is dependent; as soon as the cause of the stay has ceased, either of the parties may recommence the action."

Furthermore, the Court of Cassation ruled that as long as the Courts did not have the jurisdiction to hear the substantive claim, (as the claim should be determined by arbitration), the Claimant could commence the arbitration proceedings separately from the Validity of Arrest Order claim. In other words, it is not required to commence the arbitration proceedings before arresting the ship, nor after arresting the ship or within 8 days of the date of executing the Arrest Order over the Ship, nor even after the arbitration clause is raised before the Court.

Comment:

The Dubai Court of Cassation contradicts other judgments, which require that arbitration proceedings should be commenced either before arresting the ship or after arresting the ship.

It is worth mentioning that in the dispute in question, the matter was eventually settled amicably and the Arrested Ship was released from the UAE Jurisdiction. Nevertheless, ship owners, ship builders and any parties incorporating any Arbitration clauses into relevant agreements should be aware of the Court of Cassation Judgement and act accordingly.

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