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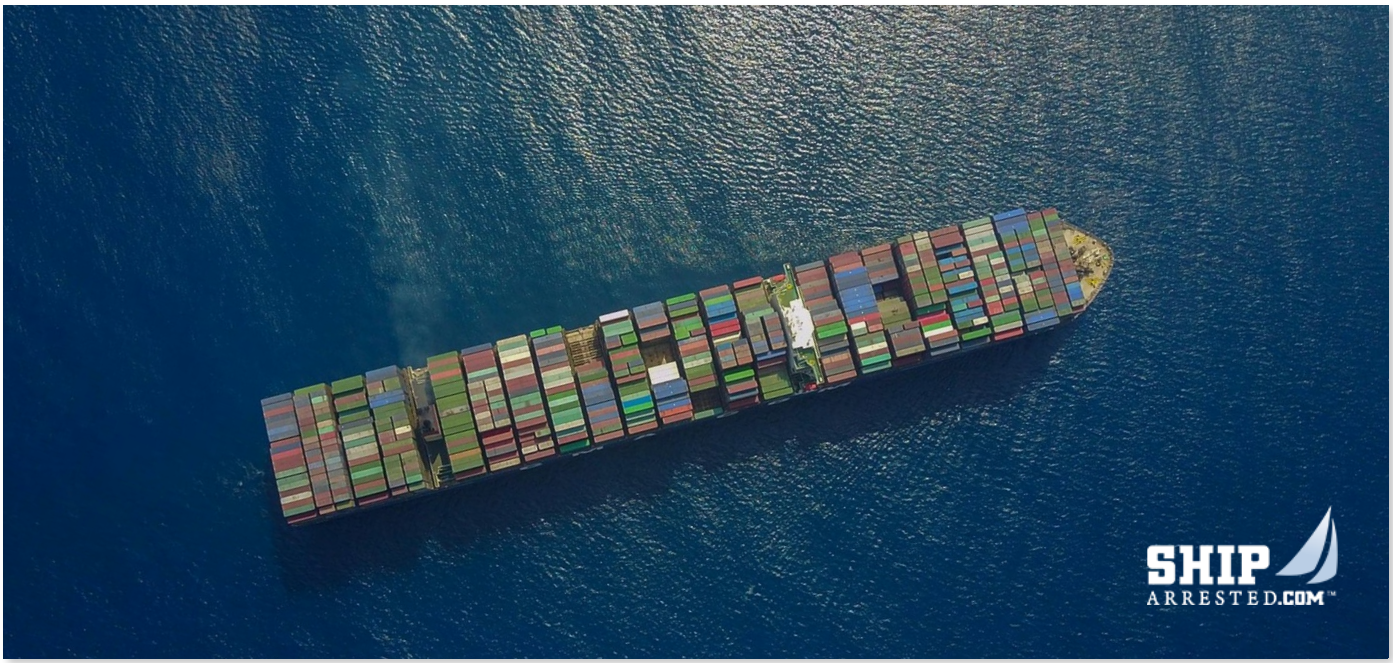

In this issue of *The Arrest News,* we examine the IMO2020 regulations enforcement from a U.S. perspective; the Indian Admiralty Act of 2017 and its most noteworthy features; and the Evangelismos test in wrongful arrest cases.

IMO 2020 Enactment & Enforcement in the United States by George Chalos, Chalos & Co (USA)

The shipping industry has been preparing, or perhaps more aptly termed: bracing, for the implementation of IMO 2020 and the worldwide requirement for commercial vessels to consume fuel with a 0.5% sulfur content or less. As we have reached the deadline for use of compliant low sulfur fuel, it is important to consider how the largest environmental regulatory regime in the world, the United States, is likely to treat enforcement. MARPOL Annex VI is aimed at preventing air pollution from ships, with a primary goal of limiting the main air pollutants contained in ships' exhaust gas, such as sulfur oxides and nitrous oxides. It also established Emission Control Areas (ECAs) which include the Baltic Sea; North Sea, coastal U.S. and Canada and the U.S. Caribbean Sea (around Puerto Rico and the U.S. Virgin Islands). In these special areas, the sulfur limit has been capped at 0.1% since 2015. A complementary "carriage ban" enters into force on March 1, 2020, which will prohibit vessels subject to the IMO 2020 regulations (except those equipped with exhaust gas cleaning systems, i.e. – scrubbers), from carrying noncompliant fuel onboard for any reason. The International Maritime Organization has made clear that IMO 2020 and the carriage ban will not be delayed and/or pushed back. Non-compliance will have serious consequences.

MARPOL has been implemented (and is enforced) in the United States through the Act to Prevent Pollution from Ships or "APPS". APPS and U.S. regulations apply to all U.S.-flagged ships anywhere in the world and all foreign-flagged vessels calling at a U.S. port or terminal or while operating in U.S. navigable waters, the U.S. ECA and/or the Exclusive Economic Zone of the United States. The U.S. government routinely

takes direct enforcement actions against Owners, Managers, and crewmembers of foreign flagged vessels alleged to have violated MARPOL, APPS, and U.S. regulations. The actions can be administrative, civil, and/or criminal in nature. As part of its port state authority, the Coast Guard is authorized to review vessel records and documents maintained onboard to ensure compliance. Although MARPOL anticipated that port states which discover suspected violations may refer the matter to the Vessel's Flag State Administration, the Coast Guard and U.S. government almost always elect to retain the investigation. Since 1998, the investigation of alleged false records (mostly Oil Record Books Part I, which failed to record discharges of bilge water and/or sludge), has led to over two hundred (200) criminal prosecutions and the collection of nearly USD 1 billion in criminal fines by the U.S. government.

Over 9,500 scheduled port state control exams, including Annex VI compliance checks, are conducted by the Coast Guard every year. Since 2015, approximately 80 MARPOL Annex VI deficiencies have been documented by the Coast Guard and over a dozen enforcement actions have taken place. In 2019, the first criminal prosecution of a MARPOL Annex VI violation was pursued by the Coast Guard and Department of Justice (DOJ). In that matter the Owner and Operator of a foreign flagged vessel each paid a criminal fine of USD 1,500,000 for the use of non-compliant fuel above 0.10 % in the Caribbean ECA and the crew's failure to accurately record the actual bunker transfers and consumption in the Oil Record Books onboard. Similarly, it can be expected that the Coast Guard will be focused on ensuring vessel compliance with the new global sulfur cap starting in 2020 as part of its port state control inspections.

When analyzing the enactment and enforcement of IMO 2020 in the United States, it is critical to be aware of the Coast Guard and DOJ's perception. Senior Coast Guard officials have made clear that it is the agency's belief that compliant fuel oil is not going to be a problem in 2020. The failure to have compliant fuel on board of a vessel, will be viewed as a failure of preparedness, not a failure of accessibility of resources. Parenthetically, the Coast Guard motto is "Always Ready." In addition, the DOJ perceives that there are vessels breaking the rules each day, and strongly believes in its mission to seek out noncompliance and prosecute alleged criminal activity accordingly.

To successfully demonstrate that a vessel is compliant with IMO 2020 regulations, shipowners and operators must ensure their vessels have the required documentation ready for port state control inspections. Critical records include:

- Bunker transfer procedures, as well as preloading plan and declaration of inspection retained for at least thirty (30) days;
- Bunker delivery notes (BDN), to be retained onboard for a minimum of three (3) years;
- Declaration that fuel conforms to MARPOL Annex VI and does not exceed maximum sulfur content;
- Fuel changeover plan;
- Oil Record Books (with accurate and timely information properly recorded therein);
- Fuel oil non-availability reports (FONAR).

The best practices for shipowners and operators to avoid any issues during inspections by the Coast Guard is to obey the law and applicable regulations and have good policies and procedures for IMO 2020 compliance in place. Owners and Operators must know and manage the type of fuel which is being put onboard their vessels. The failure to have compliant fuel onboard and/or false records hiding the non-compliant fuel will be viewed unfavorably by the Coast Guard. Education of vessel officers on IMO 2020 requirements and making sure that all crewmembers are aware of a vessel's non-retaliation and open reporting policies if they observe misconduct, is critical for a successful port call to the United States.

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Salient Features of the Admiralty Act, 2017 by Zarir Bharucha, ZBA (India)

Introduction: The Relevance of History

Admiralty jurisdiction has a long history, dating back to 14th century England. In India, the statutory framework comprised of two Victorian statutes viz, the Admiralty Court Act(s) of 1840 and 1861, which were preserved by the Colonial Courts of Admiralty (India) Act, 1890. These pre-constitutional enactments remained in force in India as existing laws, by virtue of Section 18 of the Indian Independence Act, 1947, and the Article 372 of the Constitution of India.

India is neither a signatory to nor has it ratified the 1952 Brussels or 1999 Geneva Convention on the arrest of ships. One, therefore, cannot be faulted for thinking that the admiralty jurisdiction of the Indian courts was restricted to those maritime claims catalogued in the Admiralty Court Act(s) of 1840 and 1861.

However, this clearly was not the case. The list of maritime claims and admiralty jurisdiction of the Indian courts was further extended by a patchwork of judgments emanating principally from the Supreme Court. The Supreme Court in *MV Elizabeth's* case[1] sought to judicially remedy the statutory neglect by introducing the principles underlying the 1952 Brussels Arrest Convention into Indian admiralty law. Subsequently and more recently, the Supreme Court in *MV Sea Success 1* case[2], relying on its previous judgment, introduced into Indian admiralty jurisprudence, the principles underlying the 1999 Geneva Arrest Convention.

Hence, until recently the admiralty jurisdiction of the Indian courts was by a process of judicial interpretation, expanded and aligned with that contained in the 1999 Geneva Arrest Convention, notwithstanding the fact that this Convention has not been signed or ratified by India nor given statutory effect to.

[1] MV Elizabeth v. Harwan Investment and Trading Pvt. Ltd., AIR 1993 SC 1014 (India).
[2] Liverpool & London S.P. & I Association v. MV Sea Success I, (2004) 9 SCC 512 (India).

This form of judicial activism on the part of the Supreme Court, whilst welcome by some, was an interim measure and a wholly unsatisfactory substitute for a modern admiralty statute. Indian admiralty jurisprudence was bedeviled by many obscurities and uncertainties. Parliament, therefore had a unique opportunity to cure the statutory neglect and lack of attention that this branch of the law has suffered over the years by revising, modernising and clarifying the admiralty jurisdiction of the Indian Courts in precise terms. However, this exercise requires a degree of care and knowledge, as admiralty law apart from being a specialist discipline, has international overtones.

It is therefore vital to India's national interest that the legislation that it ultimately adopts is reformist, modern, comprehensive and serves Indian interests whilst remaining compliant with the international norms. In this exercise, two broad factors have to be considered viz, the particular interests of those engaged in international shipping in India and the international acceptability of whatever position ultimately emerges in the legislation.

In this context, it must be emphasized that India's domestic interest is dictated by its status as a user rather than a supplier of shipping services. Contrast this with the position in the UK, Greece, Singapore and Norway, who are essentially the nations of ship owners and maritime service providers. Only a very small proportion of the total cargo movements into and out of India are carried on Indian flagged vessels. Most of India's trade is carried on, 'foreign bottoms'. This must not be lost sight of whilst legislating on the admiralty jurisdiction of the Indian courts.

India, therefore, has a powerful interest in using the unique features of Admiralty law, i.e. the *action in rem,* to enable those in India dealing with foreign vessels to have a reasonable prospect of bringing the dispute before an Indian court and of obtaining a decree against the owner or charterer of such vessel. This is because typically, the person liable whether owner or charterer, is often difficult to locate and when found, often proves to have elusive principals with no assets other than the vessel itself. Under the circumstances, it

is unrealistic to litigate against such defendants *in personam* and hope to recover on any judgment that may be obtained.

Thus India's interests support a policy of broadening admiralty jurisdiction *in rem*, viz, a universal jurisdiction based on service of process on the ship, which can be backed up by the arrest of the ship and her subsequent sale thereby providing a fund against which claims can be met. The *action in rem* is an exception to the general principle of territorial jurisdiction. Therefore, any expansion must ensure that the Indian admiralty jurisdiction remains within internationally acceptable limits, so as to ensure the recognition and enforcement of judgments and judicial sales in admiralty. The legislation should accordingly strike an appropriate balance between the interests of shippers and ship owners, i.e. ships and their operators and those who deal with them, whilst ensuring that the same is internationally acceptable.

Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, (hereinafter ***the Act***) was enacted in 2017 and came into effect on 1 April 2018. The Act repealed the provisions of the Admiralty Court Act(s) of 1840 and 1861 as also the provisions of the Letters Patent, 1865, conferring admiralty jurisdiction on the High Courts of Bombay, Calcutta and Madras.

Section 3 of the Act, confers admiralty jurisdiction on coastal High Courts exercisable on the 'territorial waters' of the state. The expression 'territorial waters' of the state is not defined. The intention behind this change was to restrict the pan-Indian admiralty jurisdiction that the Bombay and Calcutta High Court previously exercised.

An expansive list of maritime claims is found in Section 4 of the Act. These appear to mirror the claims found in the Article 2 of the 1999 Geneva Arrest Convention.

The right to arrest *in rem* is carefully delineated by Section 5 of the Act. Section 5, in short, makes explicit that the court's *in rem* admiralty jurisdiction can be invoked in circumstances where; a) the owner is liable and b) there is a maritime lien as defined by Section 9 of the Act.

Section 5 marks a departure from the 1999 Geneva Arrest Convention in two significant aspects. First, it permits a claimant to arrest another ship that is demise chartered to the same demise charterer that is liable to it in respect of an offending ship that was similarly under a demise charter. Second, it constricts the ability of a claimant to arrest a ship of, a time or voyage charterer in circumstances where the time or voyage charterer is the relevant person and liable *in personam* to the claimant.

Another significant change brought about by Section 5 is that the threshold test for granting or setting aside an arrest is that the court must have *'reason to believe'* that the owner is liable or that there is a maritime lien on the ship. The former test propounded by the Supreme Court in *Videsh Sanchar Nigam v. Kapitan Kud*[3] case was that the arrest should be granted or upheld as long as the plaintiff's case was not hopeless or unarguable. The changed test is a welcome development as it ensures heightened judicial scrutiny for the arrest of ships in India.

Codification of Maritime Liens

Section 9 of the Act enumerates five limited categories of claims that qualify as maritime liens. Section 9 is in effect a codification of the Supreme Court's ruling in *Epoch Enterrepots v. M.V. Won Fu*[4], where a maritime lien was restricted to five types of claims only viz,. a) salvage b) damage done by a ship c) seaman's and masters wages d) master's disbursements and e) bottomry.

The judgment of the Supreme Court in *MV Won Fu's* case was endorsed and approved again by the Supreme Court in 2017 in the case of *Chrisomar Corporation* v. *MJR Steel*[5] (*para 14*). The Supreme Court discussed the provisions of Section 9 of the Act (even though the Act was not in force) and ruled that maritime liens are restricted to five subject matters only and no more.

[3] Videsh Sanchar Nigam v. Kapitan Kud, (1996) 7 SCC 127 (India).
[4] Epoch Enterrepots v. M.V. Won Fu, (2003) 1 SCC 305 (India).
[5] Chrisomar Corporation v. MJR Steel, AIR 2017 SC 5530 (India).

The Admiralty Act, 2017 has now made a clear distinction between maritime claims and maritime liens. The Act has laid down twenty-three types of Maritime Claims under Section 4 of the Act and five types of Maritime Liens laid down under Section 9 of the Act.

This distinction between maritime claims and liens made by the Act is important as there had previously been judgments, notably of the Gujarat High Court, that conflated the concepts of liens with claims.

Arrest of Sister-Ship

As discussed above, the Act departs from the 1999 Geneva Arrest Convention by expanding the jurisdiction to arrest demise chartered ships and constricting it by not permitting the arrest of a vessel owned by a time or voyage charterer.

Section 5(2) of the Act permits the arrest of a sister ship of the owner of the offending ship where the owner is the person liable to the Plaintiff. However, the expression 'owner' is not defined and this omission may lead to litigation to determine whether beneficial ownership is contemplated by the Act. In other words, it is a moot question as to whether vessels beneficially owned by the person liable to the claimant can be arrested under the Act.

Order of Priority of Maritime Claims

Section 10 of the Act codifies the priority of maritime liens. This is a welcome development as it provides clarity to courts on the approach to be taken in the distribution of the sale proceeds of the vessel when faced with competing claims.

Arrest of Vessels for the Purposes of Providing Security under Arbitration Clauses

The Act does not make any provision for security arrests. In other words, the Act is silent on whether a ship can be arrested as security for a claim in arbitration.

In contrast, Article 7 of the 1952 Arrest Convention as also the Article 2 of the 1999 Arrest Convention permits the arrest of a ship for the purpose of obtaining security in circumstances where the merits of the claim are being adjudicated in a foreign jurisdiction or arbitration.

A Division Bench of the Bombay High Court had in *MV Mehrab's case*[6] upheld the right of an admiralty court to order security for a claim in foreign arbitration.

Notwithstanding this omission in the Act, a recent division bench judgment of the Bombay High Court in *Altus Uber v. Siem Offshore Redri*[7] permitted the arrest of a vessel as security for a claim in arbitration. The Court clarified that this would only be possible if a decree was being sought from the court.

There are difficulties with the court's reasoning in this case but it is a welcome expansion of the court's jurisdiction as it gives claimants the flexibility of obtaining security arrests in India.

Conclusion

The Act is still new and its contours and creases are yet to be demarcated and ironed out. An authoritative pronouncement by the Supreme Court on the Act is awaited as it would serve as a helpful guide to the High Court(s) when exercising the admiralty jurisdiction.

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[6] Islamic Republic of Iran Shipping Lines v. m.v. Mehrab, AIR 2002 Bom 517 (India).
[7] Altus Uber v. Siem Offshore Redri, (2019) 5 Bom CR 256 (India).

Wrongful Arrest by John Harris, Adv. & Yoav Harris, Adv., Harris & Co Maritime Law Office (Israel)

Introduction - The two detentions of Vasiliy Golovnin

Admiral Vasiliy Mikhaylovich Golovnin was a 19th century Russian navigator and explorer. In 1811, while attempting to survey one of the Kuril Islands, sandwiched between Russia and Japan and subject then of rival sovereignty claims by both countries, he was accused by the Japanese of having strayed too close to the island[1]. He spent the next two years in a Japanese prison – as at the time there were no established international conventions on how to deal with such transgressions[2].

Almost 200 years later, again a Vasiliy Golovnin was arrested - this time an arrest of a vessel named after the Russian admiral, which was arrested by the Singapore court. This time, thanks to international maritime law conventions and Singapore shipping practice, the vessel was promptly released, the maritime claim was denied, and the question of awarding damages for wrongful arrest was to be decided.

The Saga that lead to the Arrest

The saga, as described by the Singapore Court of Appeal, began around September 2005 with “FESCO”, the Owners of the vessels named "*Chelyabinsk*" and “*The Vasiliy Golovnin”*, chartering the *Chelyabinsk* to main charterers named "STC" which in turn sub-chartered the vessel to a company named "Rustal SA”[3].

Rustal SA was financed by two Swiss banks ("Credit Agricole" and "BCG") (collectively "the Banks") who received the relevant Bills of Lading relating to the cargos carried by the vessel, as security.

[1] https://en.wikipedia.org/wiki/Vasily_Golovnin;

[2] Suit No: CA 109/2007, 110/2007, Adm n Rem 25/2006, RA 214/2006, RA 214/2006, 216/2006, The "Vasiliy Golovnin", Singapore Court of Appeal, Decision dated 19 Sep, 2008, paragraph 1,2.

[3] Foot note 2 above "The Vasiliy Golovnin", paragraphs 9- 25.

The chartered vessel *Chelyabinsk* began its voyage, first with the loading of what was named as a cargo of 5,100 m/t "Chinese Rice" at Nanjing for discharge at "any African Port". Three B/L were issued. Thereafter, the vessel proceeded to Kakinada, India where it loaded a cargo of 15,000 m/t "Indian Rice". Five B/L were issued stipulating the port of discharge as the port of Lome', Togo.

After a request by Rustal, STC instructed the vessel to proceed to Abidjan where part of the Indian rice (two of the total five B/L) was discharged in exchange for letters of indemnity issued by STC. In early December 2005, Rustal also requested STC to affect a switch of the Lome' B/L's and have the cargo discharged at Douala, Cameroon.

The switch of STC's letters of indemnity with FESCO's original B/Ls and the surrender of the new B/L's was scheduled to take place at FESCO's brokers' offices in Surrey, England. However, neither Rustal's staff nor its agents turned up at the appointed time to effect the switch, and the Lome' B/Ls were never switched.

STC ordered FESCO not to switch the Lome' bill of ladings, ordered it not to enter the port of Douala and to navigate to the port of Lome' and have the cargo discharged there. It now emerged that STC [the main charterer) was in dispute with Rustal [the sub-charterer] about un-paid hire.

At the same time, the Owners, FESCO, received conflicting requests from the Bank's solicitors, to discharge the cargo at Douala in exchange for letters of indemnity. FESCO followed the main charterer (STC) instructions and discharged the cargo at Lome'.

STC obtained from the Lome' Court an order for the detention after discharge of the cargo as a security for its claim against Rustal. When the cargo was discharged (at Lome' Port) STC argued that part of the cargo was damaged and the Owner's P&I club provided a letter of undertaking as security.

The Banks also joined the "legal happening" and arrested the vessel for what was alleged as Owner's refusal to discharge the cargo at Douala and for the alleged damage to the cargo. Within 3 days, the arrest

was lifted as the Court of Lome' held, inter alia, the following: (**1**) That the Banks must have known that the Owners were bound to follow the instructions provided by STC; (**2**) That the cargo was discharged at Lome' which was the port stipulated as port of discharge in the B/L's and was also discharged following the orders of the Court of Lome'; (**3**) That sufficient security was already provided for the alleged claim for damage to the cargo; (**4**) That, accordingly, the Banks had no right to arrest the vessel.

The Banks ex-parte sistership arrest in Singapore

The Banks did not appeal against the Lome' Court's release order and one day after the time allowed for such an appeal had expired, the Banks applied ex-parte to the duty register in the Singapore Court and arrested the M/V Vasiliy Golovnin as a sister-ship arrest, on the very same claims earlier made, unsuccessfully to the court in Lome'.

The Singapore Court's decision

Following an application filed by FESCO the arrest-order was set aside by the Singapore Court which held, inter alia, the following: (1) That it was an abuse of process for the Banks to arrest one of FESCO's vessels again, as an issue of estoppel had arisen by the reasoning of the earlier decision of the Togolese Court; (2) That the Banks claim was unmeritorious as the Banks had no arguable claim against FESCO; (3) That the Banks failed to disclose material facts to the duty register when applying *ex parte* for the arrest.

Nevertheless, the Singapore Court did not award FESCO damages for wrongful arrest as the Judge felt that the Banks had honestly believed that they had valid claims against FESCO.

The Appeal before the Singapore Court of Appeal

An appeal was filed by FESCO, and the Singapore Court of Appeal began its legal voyage in the matter of wrongful arrest by introducing the Evangelismos Test of 1858[4] which sets a high threshold for awarding damages in wrongful arrest cases.

In that matter, a vessel was arrested on the cause of action of damage done by a ship in relation to a collision where a vessel hit a barge. However, it turned out that the arrested vessel was not the one that had been in collision with the barge. No damages for wrongful arrest were ordered as the court found that the arrest was a genuine mistake supported by an honest belief.

The Evangelismos test (1858):

The Evangelismos test laid out in the following two terms:

The first term: *"Undoubtfully there may be cases in which there is either mala-fides, or that crassa negligentia, which implies malice, which would justify a court of admiralty giving damages, as in action brought in Common law damages may be obtained"*. The other part of the test states the following: *"The real question in this case… comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or with so little foundation, that it rather implies malice on behalf of the Plaintiff, or that gross negligence which is equivalent to it?"*[5].

Some understanding of the above Evangelismos test of 1858, can be found in number of following decisions.

In *The Cheshire Witch*[6] (1864) the vessel was arrested "in a cause of damage". The defendant shipowners couldn't procure bail and the vessel remained under arrest until the claim was heard and denied in a judgement awarding also costs in favor of the defendant shipowner. Although the claimant did not file a notice of appeal he applied to the court and obtained an order for the vessel to be detained for a further period of 12 days while he considered filing an appeal. At the end of the 12 day period, the claimant decided not to appeal. The vessel was released and damages for wrongful arrest were awarded.

In *The Margaret Jane*[7] (1869) a "receiver of the wreck" had valued a salvaged vessel at £746, which was

[4] The Evangelismos (1858) 12 M00 Pc 352;

[5] Foot note 2 above "The Vasiliy Golovnin", paragraph 113.
[6] *The Cheshire Witch* (1864) Br& Lush 362;
[7] *The Margaret Jane* (1869) LR 2 A & E 345

below the minimum value of £1000 required for the admiralty court to have jurisdiction over the property the salvors having commenced proceedings in the Admiralty Court claiming £2,500.

The salvors applied for an appraisement of the vessel and eventually abandoned the claim. The shipowner claimed damages for wrongful arrest on the grounds that when the salvors instituted the suit, they were aware that the admiralty court had no jurisdiction as the value of the property salvaged was below £1,000. It was held, that there was no mala fides in this case but the salvors must have been aware within a short time after taking out their appraisement application, that the valued fixed by the receiver was correct, and that they were therefore liable in damages for the period from that point of time and until they released the vessel.

In *The Catchart* (1867)[8] the parties were involved in a financial scheme, including a mortgage, involving a vessel. The Plaintiff arrested the vessel, inter alia, on grounds of non-payment under the terms of the mortgage. It transpired that the contractual arrangement clearly did not support such a claim. Dr Lushington held that it must have been obvious to the plaintiff that they had arrested the vessel when no moneys were due to them and just on the eve of commencing a profitable voyage. The court held that the plaintiffs liable for damages and costs. This case suggests that a gross mistake can amount to *crassa negligentia*.

Most of the above cases were considered in *The Kommunar (No 3*). In an earlier judgement (The Kommunar (No 2) [1997] Lloyd's Rep 8), the court set aside the arrest of the vessel given that the defendant owners at the time of the arrest were not the same legal entity as the owners, charterers or party in possession of the vessel at the time when the cause of action arose. However, due to the fact that the change of ownership was a result of Russian Federation privatization legislation, the court held that there was no proof of mala fides or crassa negligentia on part of the plaintiffs, and the owners claim for damages for wrongful arrest was denied.

[8] The Catchart (1867) LR 1 A & E 314;

The Reasoning for the Evangelismos test:

Despite being decided 150 years ago, the Evangelismos test continues to prevail in several other parts of the commonwealth countries including Canada, New Zealand, Hong Kong and United States.

Considering the well-known fact that even a delay of few hours in a sailing vessel's schedule might cause the shipowner financial damages, the question is, what is the rationale with this strict rule (from shipowners' point of view) that has withstood the test of time in many commonwealth countries?

The answer to this is as follows[9], at the time when the Evangelismos matter was decided in 1858, in-rem proceedings were commenced by a warrant of arrest and the jurisdiction of the admiralty court was properly invoked only upon the arrest of the ship. In other words, the arrest of the vessel was required for the act of "opening the courts file". For this reason, same as a "regular" commercial claimant should not be held liable for damages simply for using his right to file a claim, liability for wrongful arrest would only arise in a situation analogous to malicious prosecution where the action was commenced with malice.

But that answer would allegedly be persuasive only until the year 1873 when the Supreme Court of Judicature Act (c 66) (UK) was enacted and changed the practice of commencing admiralty proceedings – to the introduction of a writ of summons. Which means, in other simple words, that since 1873 there was no need for an arrest of the vessel to "simply open the courts' file", a writ of summons was sufficient.

The historical reason for the high threshold of the Evangelismos test seemed to have sailed away in the year 1873, but still the test remained.

And the reason being, that still, the Evangelismos test serves a wider maritime-law economic policy.

Although the admiralty jurisdiction of the court can now be invoked without an arrest, still the arrest of the vessel provides security for the maritime claim which can't be defeated by insolvency, and which is

[9] Foot note 2 above "The Vasiliy Golovnin", paragraph 124

exclusively available only to maritime claims. The arrest has an effect of bringing the shipowner to furnish security which in today's modern world can be provided by a letter of undertaking from the owner's P&I Club and have the vessel relatively quickly released.[10]

Therefore, for the time being, the Singapore Court of Appeal did not depart from the Evangelismos test when deciding if FESCO is entitled to damages for a wrongful arrest. However, the Court did provide a different application of the test.

The Singapore Court's emphasis on the second part of the test:

Instead of focusing on the first part of the test - seeking for mala-fides in the subjective plaintiff's state of mind, the Court held that the focus should be made on the second part of the test. The facts are to be used in order to assess if the action and the arrest were brought "unwarrantedly" or with "so little color" or "with little foundation" - which implies malice on behalf of the plaintiff.

Coming back to the current matter of the Banks arresting the *M/V Vasili Golovinin*, after observing the relevant facts, the Court held that the Banks couldn't be fairly said that they had an honest belief that they had a valid claim. First, the Banks unreasonably persisted in arresting the sister-ship of the chartered vessel in Singapore, after their claim had been disposed of in Lome', not-withstanding that the Lome' Court had already ruled that sufficient security had been provided for the loss and damage of the cargo-claim. Second, the alleged breach of contract claim (against FESCO) was entirely without substance and indeed without any foundation whatsoever. Third, the Banks failed to disclose material facts in the ex-parte hearing before the duty register. The Court found that a groundless claim was filed by the Bank and the material facts were omitted and that a draconian remedy was recklessly sought. The Banks were to accept the painful consequences of having abused the judicial process and that damages against the Banks are to be assessed.

After Thoughts

It seems that one of the key examinations is, according to the facts, a plaintiff arrested a vessel ex-parte under an action brought with so little color and with little foundation, would be the manner in which the plaintiff did or did not disclose material facts. The deliberate non-disclosure of material facts would imply that the plaintiff is aware of the fact that the claim is without sufficient foundation, which might lead to the conclusion that the plaintiff did not have the subjective, honest belief that the claim was properly brought. This is an example of how an objective examination of the facts disclosed in the pleadings can result in a conclusion as to the subjective state of mind, and pushing the owners over the threshold of the 1858 Evangelismos test.

In this article we have focused on the common law approach as presented by the Singapore Court of Appeal and its approach as to the manner in which the Evangelismos test of 1858 should be interpreted.

After the CMI meeting in Hamburg 2014 an international working group ("IWG") on the liability for wrongful arrest was established. Further developments and the diversity between different jurisdictions and the terminology of the degree of the behavior of the applicant-arrestor when assessing liability for wrongful arrest can be found in the IWG's paper works, and should be followed. [11]

[10] Foot note 2 above "The Vasiliy Golovnin", paragraph 131

[11] Discussion Papare on Liability for wriongful Arrest of Ships. Proposed by Dr. Aleka Sheppard, the Chairman of the IWG of CMI, for debate at the CMI meeting to be held on 9 November 2018, London.

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Shiparrested.com 'Who's New' Industry Members

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Arresting a ship is always a last resource to collect a maritime claim, a debt, or defend your interest, but when forced to do it, bunker suppliers, agents, banks, charterers, ship yards, even owners all want to be aware of their rights and have first hand and accurate information regarding arrest law. You want to arrest or release fast and cost effectively. This is part of what the Shiparrested.com network industry membership can do for you; your claims department is fully involved in what is needed to defend your interest across more than 1.000 ports in over 100 jurisdictions.

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