

# THE ARREST news

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## Ship Arrest Trends in the United States

by Gary Seitz, GSBB Law (USA)

*“Dry bulk — the world’s largest ocean shipping market in terms of volume — is off to one of its worst starts ever in 2023. The sector’s famous bellwether, the Baltic Dry Index (BDI), is viewed in financial circles as an important indicator of global economic health. The BDI fell to 530 points on Thursday, down 91% versus October 2021.”*<sup>1</sup> writes Greg Miller for Freight Waves, February 17, 2023. On the other hand, the Freight Mango Blog notes: *“The ocean freight industry is undergoing a massive transformation, as the technology and supply chain management tools are being improved by the day, impacting ocean freight rates. The rising demand for e-commerce, increasing scale of individual shippers and increased competition in ocean freight shipping are some of the key trends reshaping this industry.”* They conclude: *“Ocean*

<sup>1</sup> <https://www.freightwaves.com/news/baltic-dry-index-has-collapsed-ominous-sign-for-economy>

<sup>2</sup> <https://freightmango.com/blog/6-key-trends-reshaping-ocean-freight-industry-2023/>

*carriers have realized that they need to innovate quickly if they want to survive and we expect them to do just that in 2023.”*<sup>2</sup>

Whether the global economic recession grows or contracts, the number of vessel arrests by maritime creditors will likely increase as ocean carriers face growing challenges. Maritime attachments and vessel arrests in the United States will remain very useful tools for maritime claimants.

Here are some trends observed in vessel arrest cases in the United States. Some of these trends are tied to the particularities of the pandemic fueled recession. Others resurface at every economic downturn.

First, vendors may be more willing to move to arrest vessels during these uncertain times. For example,

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bunker suppliers have arrested multiple cruise ships for non-payment of invoices. Under U.S. law, maritime liens for necessities provided to vessels in the U.S. take priority over foreign (i.e., non-U.S. flag) ship mortgages. Maritime liens for necessities provided outside the U.S. are generally subordinate to preferred mortgages, but the priority of preferred mortgage liens is subject to certain exceptions that are not always well delineated. Whether the arrester's claims are subordinate or not, it is critical for the mortgagee to intervene in the arrest action. Otherwise, the mortgagee could lose its mortgage lien as a result of the action, without receiving any portion of the proceeds of the sale of the vessel. However, timely intervention can be challenging, especially because the arrester is not always required to notify the mortgagee or other lien holders. Publication of a notice of arrest in a local newspaper may constitute sufficient notice under U.S. law. Prudent lienholders thus maintain a close watch on the trading patterns of vessels, and, if a vessel remains in a port for a longer time than usual, monitor court dockets to be ready to intervene and preserve their claims.

Second, substitute custodians play an increasingly important role due to the limited resources of the U.S. Marshals Service during and post pandemic. In several districts, the U.S. Marshals Service does not have the staff sufficient to arrest and maintain vessels, at a time when federal courts are issuing many maritime arrest warrants. Many courts acknowledge that the pandemic-related unavailability of the U.S. Marshals Service staff justified granting requests for the appointment of substitute custodians and substitute process servers. Plaintiffs thus retained companies specialized in the niche field of vessel arrest, custody and brokerage, to execute the warrants, maintain and sell the vessels.

Third, judicial sales have been more frequent in recent arrest cases. In a healthier economy, the mere filing of a complaint, or threat of execution or the writ of arrest of a vessel, is often enough to bully payment from the owners. In the current financial markets, owners have limited access to financing. Their ability to bond vessels and defend arrest cases may be constrained by their lack of liquidity and unavailability of credit.

Fourth, the arrest procedure has moved from a feet-on-the-ground system to a remote digitalized format. Presence at the courthouse is no longer required to hand carry the arrest papers from the Clerk's office - to Chambers - back to the Clerk - and on to the Marshal. Now, from electronic filing of initial paperwork, through the pre-arrest court hearing by conference phone, to auction sale of vessels by video conferencing, counsel may not have to ever leave their office. The use of Zoom or Teams for judicial sales makes it easier for foreign auctioneers, agents and bidders to participate. We have observed videoconference sale bids by American and foreign ship bidders and their agents.

This use of streamlining technology in the ship arrest process creates a challenge for preferred mortgagees and other maritime lien holders: the vessel could be sold, free and clear of all liens, at a depreciated price, leaving them with few remedies other than a possible deficiency claim against the owner. In many cases, the owner is a one-ship company with no assets other than the ship. To protect mortgagees against this risk, U.S. courts tend to permit priority ship mortgagees to credit bid their debt, i.e., to use it as a currency in the auction of the vessel. The ability to credit bid, however, is at the discretion of the court and must be promptly sought by motion filed prior to the sale.

The economic uncertainty brought about by the pandemic crisis will likely remain for at least the short-term future. Although we have not yet seen many ship owners seek bankruptcy protection in the U.S., either in primary chapter 11 filings or chapter 15 cases supporting foreign insolvencies, this could be the next trend. Prudent maritime creditors should closely monitor not only the financial strength of its counter parts, but also the trading of the vessels so that it can intervene in any arrests as needed to protect its interests.



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## Shipbuilding Contracts: Practical Issues and Considerations

by Rafizah Gafoor, Joseph

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In very recent years, there has been an increase in the number of shipbuilding contracts for the first time following the 2008 financial crisis. Many vessels commissioned around the shipping boom of 2005 are now approaching middle age. The push for greener shipping (along with the incentives that follow) also provide an incentive for companies to invest in newer and greener vessels using new fuel technologies. These factors, among others, have caused a rising market for newbuilds.

In such a rising market, it is not surprising that many yards put forward their standard form of contract and are often unwilling to compromise on the terms. As with any contract negotiation, it is imperative for purchasers to identify the key clauses and tailor a negotiating strategy accordingly to safeguard their interests. This article identifies some of the key clauses in shipbuilding contracts and practical tips in the negotiation of such clauses.

### A. Ensuring Performance and Work Quality

More registries are offering incentives to owners through discounts in tonnage fees if the vessel meets such requirements. For example, the Maritime and Port Authority of Singapore administers a Green Ship Programme (GSP) where owners enjoy discounts on the Initial Registration Fees (IRF) and rebates on Annual Tonnage Tax (ATT) payable every year where the vessel uses low-carbon or zero-carbon fuels. Purchasers therefore have a strong interest in ensuring that the vessel achieves the specifications contracted upon with the shipyard.

A shipbuilding contract will contain performance guarantees in relation to, *inter alia*, speed and fuel consumption. Where the vessel is unable to meet these guarantees, the contract usually provides that the shipyard pays liquidated damages up to a cap at which point the purchaser can terminate the contract or take

the vessel at a reduced contract price. However, these remedies may not be feasible or sufficient for the purchaser.

Ideally, purchasers should be satisfied that the shipyard will be able to achieve the performance guarantees prior to execution of the shipbuilding contract. The purchaser should also include opportunities for reviews and inspection within the construction timeline and ensure that it exercises such inspection rights to identify any potential issues so that remedial action can be taken early. The purchaser should also oversee and ensure that the shipyard has sufficient time to prepare the design and engineering before commencement of construction. This also ensures that no issues (whether technical or cost) arise later.

### B. Risk of Delays

Generally, most shipbuilding contracts will stipulate a date for the completion and delivery of the vessel. If the shipyard does not meet this date, liquidated damages are usually paid by the shipyard to the purchaser (sometimes after a grace period). The purchaser may terminate the contract once the liquidated damages reaches the cap. However, this may not be desirable for the purchaser in a rising market as doing so may mean that the purchaser would have to wait even longer to secure another vessel at higher prices.

The alternative for the purchaser is to elect to accept delivery at a later date, often with no additional liquidated damages payable. Such delay may also be significant. One way to mitigate the possibility of such delays is for the shipbuilding contract to stipulate payments based on milestones accomplished as opposed to mere dates.

### C. Inflationary Pressures

With inflationary pressures being felt worldwide, it is important for the purchaser to ensure that the shipyard does not attempt to pass any rising costs to the purchaser under the guise of “variations” to the agreed scope of work. Shipyards may face rising costs from its suppliers and subcontractors which may only be felt some time into the construction. The purchaser should consider safeguards such as requiring the shipyard to



obtain approval for any variations before commencement of such works.

### Conclusion

Overall, the market for newbuilds is a crucial aspect of balancing the demand and supply of ships especially in a time when other modes of transport are thriving. Coupled with the push for greener shipping and utilisation of newer and greener technology, we expect to continue to see an increase in orders for newbuilds over the years. It is important for any purchaser to carefully review the terms of the shipbuilding contract to ensure that their interests are safeguarded.



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## Vessel Damaged in Marina... Can I Sue?

by Kenra Parriswhittaker, Parriswhittaker (Bahamas)

The Bahamas has been at the vanguard of marine services for decades. The value to the local economy of the numerous marinas and docks here that are used by private and commercial vessels can't be underestimated. Marina owners take on responsibility for these vessels when moored in their facilities, so there's a risk of high value legal claims following any damage to vessels. Damage might arise following severe weather episodes that expose flaws in the construction of a marina or from some kind of negligence on the marina owner's part that results in damage to a vessel.

### LIMITS ON LIABILITY

Historically legislation has limited the financial liability of dock owners when commercial vessels are damaged – even where the liability of the facility owner is not in doubt. Cases involving damage to commercial vessels can be hugely expensive, and the thinking was

that such caps on liability provided essential commercial certainty. A recent UK case from the UK Court of Appeal even appears to extend this protection to the owners of marinas where private vessels are anchored. The case offers reassurance to marina owners. But it is also a salutary lesson to owners of private vessels that, when it comes to suing for damage to a yacht moored in a marina or dock, recovery of damages may be limited. This is the case even when the liability of the marina owner is not in doubt. We discuss the case below.

### MARINA SERVICES IN THE BAHAMAS

The yachting sector in the Bahamas continues to evolve, and The Bahamas Maritime Authority has demonstrated its commitment to effective regulation for the yachting community. The Bahamas is the only flag, for example, with a dedicated code for small vessels. Increasingly valuable and sophisticated private super yachts and other vessels have in recent years become a regular feature of marinas and other docking facilities in The Bahamas. Owners should always be tuned into the legal position should their maritime property be damaged in any way while in The Bahamas. The Holyhead case we discuss below illustrates why.

### HOLYHEAD MARINA V. PETER FARRER [2021]

Severe storms are not uncommon in the Welsh port of Holyhead. But a violent storm in March 2018 almost destroyed the marina, and almost 100 vessels moored there sunk or were badly damaged. Claims against the marina owners for damage had the potential to rise above £5million because vessel owners argued the marina had severe design flaws, and this had exacerbated the storm damage.

The marina owners sought to engage the Merchant Shipping Act (the MSA) limitation of liability clause so that any payout would be in the region of £500,000. Disputes like this are the kind of case our shipping lawyers deal with on a regular basis.

The case rested on whether Holyhead Marina was a 'dock' within the meaning of the MSA. The vessel owners argued that the MSA was there to protect the



commercial shipping sector and provide commercial certainty. It was never designed, the owners argued, to protect owners of small private leisure craft like those damaged at Holyhead.

The Court of Appeal disagreed and found that the marina in Holyhead, made up of several pontoons, was as a whole a 'landing place' within the meaning of the legislation.

#### COMMENT

The UK Court of Appeal's decision in the Holyhead Marina case should be of interest to anyone who regularly docks a private vessel in The Bahamas. That's because judges here will use it as authority when deciding any Bahamas-based case. Our corresponding legislation is contained in s250 of the Merchant Shipping Act 1976 and is almost identical to the UK legislation under which the Holyhead case was decided.

For the avoidance of doubt, the Holyhead decision means that owners of marinas that host private yachts and other leisure craft – in the UK at any rate – can take advantage of the protections afforded to commercial vessels in the MSA.

In passing, it's worth noting that in 2021 a [new Merchant Shipping Act](#) for the Bahamas was drafted. The legislation is expected to incorporate more modern and effective policies and procedures so that The Bahamas can remain competitive in today's ever-evolving maritime sector. Whether this extends to any update of the rules about the liability of marina owners remains to be seen.

*For advice on shipping related matters feel free to reach out to us at ParrisWhittaker for an initial, no-obligation discussion.*



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## Blockade of the Ukrainian Seaports: Problems Faced by Shipping and Trade by Karyna Gorovaya, Interlegal Law Firm (Ukraine)

It is impossible to detach a business industry from the effects of a full scale military invasion by the Russian Federation of February 24, 2022.

It would be difficult to argue that the transport industry suffered the most severe shocks, but perhaps the trade industry takes first place as it was also seriously challenged since it critically depends on the ability to deliver goods quickly and cost-effectively to any necessary point both within the country and abroad.

There are several objective factors related to hostilities having a detrimental effect on the Ukrainian transport market; however, if we single out the sea transportation industry, the most significant factor would be the blockade of Ukrainian seaports.

The business has faced problematic situations and commercial disputes – consequences of the war and blockades of seaports. Such disputes include, in particular, cancellations of export contracts on supply of goods, the carriage whereof critically depends on maritime transport (they include, inter alia, grain cargoes). Cancellations of maritime transportation contracts (i.e. charter parties) are also widespread due to the fact that their terms are simply impossible to fulfill since many vessels were blocked in the seaport water areas.

For several months of war and before signing the so-called Grain Agreement, which made it possible to partially unblock vessels staying in Ukraine, we repeatedly studied the above situations.

Business entities (parties of trade contracts, shipowners and charterers) engaged lawyers in order to find the ways aimed at resolving the situation and defense of their interests.

Let us study some typical maritime and trade issues processed by the Interlegal team for the past few months from the outbreak of a full-scale invasion.

### **Accepted, but not recognized!**

Despite blockade of the Ukrainian seaports, not all operational processes were completely stopped.

In ports that did not feel the impact of hostilities so much, loading and discharging operations continued. One of our Clients (a seller under the contract on FOB terms) shipped cargo on board a sea-going vessel after the outbreak of a full-scale war.

As we know, the basis for goods delivery on FOB terms assumes that the seller's responsibility/risks and obligations shall terminate after the cargo is shipped on board of the vessel.

Having shipped the cargo, the Client quite rightly expected to receive a document confirming shipment, i.e. Bill of Lading, one of the principal documents against which the buyer should pay for the goods.

Despite the fact that the loading was carried out properly, the vessel master rejected to issue a Bill of Lading. The difficulty was that the Client had no direct contacts with the shipowner, since FOB terms imply that the buyer is engaged in vessel chartering.

The reason for rejection to issue Bill of Lading is quite obvious: due to blockade of the seaport, the vessel could not leave the port; therefore, the carrier could not guarantee the voyage completion.

As shown by analysis carried out by our experts in this particular case, even blockade of seaports shall not exempt the shipowner from issuing Bill of Lading as the principal document confirming loading the cargo on board the vessel. Such rejection is illegal, both from a legal aspect and from the aspect of fixed merchant shipping traditions.

With regards to the shipowner's obligation to issue a Bill of Lading, one of the possible legal instruments for the Client or any other cargo owner in a similar situation may be filing a claim to the court binding the shipowner to issue a Bill of Lading.

### **To retain someone's property in order to receive your own**

In the next situation, the circumstances turned out to be even more complicated. There was also an

international delivery of cargo on FOB terms, where our Client acted as seller of the goods.

However, in this case, the buyer, despite the fact of loading the cargo on board of the vessel and issuing all the necessary consignment documents, failed to make proper payment in favor of the Client; therefore, title on the cargo was not actually transferred to the buyer.

Moreover, the buyer failed to pay for services of the sea carrier with whom he entered into Charter Party.

The client (supplier of the goods) feared that the sea carrier would use the right of lien on cargo in order to secure payment for its services.

Lien on cargo is a common tool in shipping that allows the carrier to retain cargo if the carrier's rights are violated.

However, there are some specifications and limitations that should be taken into account when using lien on cargo. In particular, lien on cargo will depend both on the port in which the goods are retained (either port of loading or port of discharge) and on the applicable jurisdiction.

Having studied the situation from the aspect of national (Ukrainian) and international law, Interlegal experts stated that there are no grounds for legal lien on cargo by the shipowner.

### **Arrest along for the ride**

After the outbreak of full-scale war in Ukraine, cases of criminal prosecution of individuals under accusations of direct or indirect financing or other forms of support for the aggressor state have significantly increased.

Such criminal offenses are actively investigated and sometimes may directly affect the trade and transport industry.

For example, a Client faced a situation where its cargo was blocked on board a vessel arrested in the framework of criminal proceedings.

Despite the fact that the Client was not a party to the criminal proceedings, and while the cargo was not seized, in practice it is extremely difficult to secure

discharge of the goods from a vessel under criminal arrest.

Resolution of the situation requires for comprehensive support of the case by the cargo owner's lawyers. It is necessary to communicate in parallel with the court that imposed the arrest, with pre-trial investigation bodies as well as with port authorities which directly authorize any work at the seaport territory.

When deciding which legal instrument can be applied to effectively protect your interests in the cases described above, our readers are probably interested in position of the Ukrainian courts.

In particular, the possibility of applying to the Ukrainian court and effectiveness of such an instrument, given that both contracts on carriage of goods (charter parties) and contracts on supply of goods are governed by English law.

Please note that the Ukrainian courts specialized in resolving commercial disputes are aware of essence and significance of international contracts on supply of goods, as well as the fact that most of the international contracts on supply of agricultural products from Ukraine are governed by English law and are drawn up on the basis of proformas recommended by GAFTA & FOSFA.

Therefore, when the supplier and the consignor of goods apply to the Ukrainian court with a claim to the carrier to issue a bill of lading, the Ukrainian court should understand exactly how the rights of the consignor are violated, and why issuing a bill of lading is an important condition for receiving payment for the goods.

As for the practice of resolving such disputes in Ukraine, it is not so extensive, and this is quite understandable. The practice is based on market demands.

In the ordinary course of events, the carrier is interested in voyage performance as soon as possible. Accordingly, procedure for issuing a bill of lading cannot cause resistance, and the interests of the consignor and the carrier in this area will completely coincide.

The situation is quite different when the carrier is unable to leave the port and to perform the voyage due to blocking seaports.

After analyzing both legal grounds and prospects for applying to the Ukrainian court with such a claim, we believe that the applicant has every reason to expect a positive outcome of the case proceedings.

At the same time, in all these cases, the Client's goals were achieved through negotiations.

As we can see, the problems caused by war are not always directly related to hostilities and are not always expressed in destruction of infrastructure facilities or loss of control over certain territories. Sometimes the impact is more indirect, but no less significant for business representatives who may suddenly face a situation that promises significant property losses.

Non-standard circumstances provoke emergence of non-standard disputes that require a special approach to their settlement. Not all problematic situations, as described above, require applying directly to the court or international arbitration. However, a competent legal position allows Clients to predict risks, to refrain from making unfavorable decisions, and to determine the most optimal course of action.

The Interlegal law team is ready to protect your interests by means of the most flexible methods aimed at resolving the conflict as quickly as possible and minimizing your costs.



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### ShipArrested.com Annual Members' Conference 14-16 September 2023, Grand Hotel Oslo



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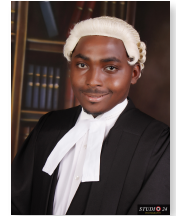
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