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Foreign Searfarers as Material Witnesses — Modern Day Subjugation?

by George Chalos, Chalos & Co., P.C. International Law Firm (USA)

Worldwide, there are signs and placards throughout airports, train stations, seaports, and bus stops offering assistance to individuals who may be experiencing being held against their will. They often pose a series of questions along the lines of the following:

"Is someone . . . holding your passport or personal documents; threatening you or your family; controlling your movements; and/or forbidding you to go anywhere or speak with anyone you want."

These are tale-tell warning signs of human trafficking, involuntary servitude, and modern-day slavery. The posted signs are jarring, but they are not just for individuals to reach out for help, but to raise awareness for the public to be on the lookout for distressed individuals in need. There is no dispute that persons being held against their will is a bad thing and has no place in the modern world.

However, in the United States, there is a government sanctioned regime whereby foreign seafarers are routinely held against their will as involuntary detainees and material witnesses in MARPOL/APPS prosecutions. Pursuant to 33 U.S.C. §1908(e), the Coast Guard (and Customs and Border Protection acting at the Coast Guard's instruction) can revoke and

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refuse to reinstate a foreign flagged vessel's departure clearance until surety satisfactory to the Secretary is posted. Such "surety" takes the form of an "Agreement on Security," which requires not only the posting of a financial undertaking by the Vessel's Owners and Operators, but also requires the removal of seafarers from the Vessel. It is standard for the Coast Guard to insist that the Captain and the entire Engine Room Department be disembarked from their shipboard home, turnover their passports/travel documents, and remain in a hotel within the federal district where the matter is pending for an unknown and unlimited amount of time during the government's investigation.



Sign at Larnaca International Airport, Cyprus
October 13, 2022

The seafarers are not parties or signatories to the "Agreement on Security." When a seafarer asks to go home or to have his passport returned to him, the government denies those requests. When a seafarer applies to the Court to have his travel documents returned or to have his deposition taken so he may leave the United States, the government opposes the requests. Typically, the government will implement some combination of the following procedure to block a seafarer's right to departure: 1) claim that the crewmember is in the United States voluntarily; 2) argue that there is no right to a deposition because criminal charges are not yet pending; and 3) if all else fails, obtain a material witness arrest warrant pursuant to 18 U.S.C. § 3144 to ensure that a seafarer remains for trial. The purpose of the material witness statute is to secure the presence of a witness who possesses information material to a criminal proceeding.

Some district courts have found that seafarers held pursuant to an Agreement on Security and/or material witness warrants in MARPOL/APPS cases were functionally detained as a result of this arrangement, even if not formally incarcerated, and therefore entitled to have their deposition taken so that they could return to their jobs and families abroad. *See, e.g. In re Zak,* 2017 U.S. Dist. LEXIS 222937, *17 (D. Me. 2017); *United States v. Dalnave Navigation,* Criminal No. 09-130, 2009 U.S. Dist. LEXIS 21765, 2009 WL 743100, at *2 (D.N.J. Mar. 18, 2009)*; Mercator Lines Ltd. (Sing.) PTE Ltd. v. M/V GAURAV PREM,* 2011 U.S. Dist. LEXIS 153429, *28-31 (SDAL 2011). However, even in those matters, the seafarers had to complain of detention for many months before the Court took action.

In two recent cases, U.S. Magistrate Judges in the Eastern District of Louisiana and Southern District of California have refused to order depositions, instead finding that the government's interests in completing charging decisions and live testimony of witnesses was of greater interest than the rights and liberty of the individual seafarers. *See, e.g., In re Joanna*, 2021 U.S. Dist. LEXIS 114281, (ED La. 2021) (finding that the prosecutors' subjective intent of the use of the material witness warrant was not reviewable, so long as the warrant was facially valid)(citations omitted). In another recent case, *United States v. Evridiki Navigation, et al.*, in the District of Delaware, the Court finally ordered Rule 15 depositions after the crewmembers were detained for several months by government officials on the basis their testimony would be significant to the investigation and prosecution. When the crewmembers returned for trial six months later, the government shockingly did not call any of the seafarers as witnesses in the case.

The actions of the government is all the more egregious compared to how the material witness warrant statute is routinely used in other criminal matters in the United States. For example, in *U.S. v. Whited*, the Court found that Christopher Cambron had material information relevant to a pending criminal matter in which the defendant was accused of armed robbery of at least seven businesses. Due to Mr.

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Cambron's history of drug and alcohol abuse, the government sought a material witness warrant to keep him in custody to ensure his availability for trial. *United States v. Whited*, 3:21-cr-29, 2022 U.S. Dist. LEXIS 230521 (E.D. Tenn. 2022). The Court agreed and ordered Mr. Cambron detained. However, the District Court directed his deposition to be completed within a week and Mr. Cambron's deposition was completed the day after Christmas on December 26, 2022. He was released the next day after spending less than seven days in custody. Similarly, in U.S. border cases, material witnesses are often detained, deposed, and then released within a matter of days. *See, e.g.*, W.D. Tex. Local Criminal Rule 15b (setting out the procedure for deposition and release of material witnesses and requiring release within 24-hours of deposition or 45 days of first appearance in Court, whichever occurs sooner).

So why are seafarers, who are historically recognized as 'wards of the Court' to be afforded special treatment and protection, abused by the system in MARPOL/APPS cases. The reason is simple: the crewmembers are pawns utilized by the government as an additional pressure point on the Owner and Operator in these prosecutions. The expense of paying for the total wage salary, per diems, hotel costs, and local travel expenses for the crewmembers detained in the district can reach $30,000 – $50,000 per month (or more). Meanwhile, seafarers who most times have done nothing wrong, are forced to miss important life events: births, deaths, anniversaries, family obligations, etc; a result that is all the more inhumane and disproportionate when considering that the US Courts routinely utilize remote appearances and/or video recorded deposition testimony in lieu of live, in-person testimony.

For more information on the US investigation and prosecution of suspected Marpol/APPS violations and/or the unfair treatment of foreign seafarers in the United States, contact: info@chaloslaw.com.



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Singapore's National Hydrogen Strategy and What it Means for Shipping Industry Stakeholders by Joseph Tan Jude Benny LLP

One of the panel sessions at this year's Singapore Maritime Week explored the potential readiness for alternative fuel options such as hydrogen as well as the associated operational infrastructure challenges and opportunities.

Cleaner fuels are increasingly emerging as alternatives to the bunker fuels currently used to power vessels. One way to reduce carbon emissions in shipping is for vessels to run on more environmentally conscious fuels such as ammonia and green hydrogen, both of which do not produce carbon. Green hydrogen uses renewable energy combined with electrolysis, however, producing green hydrogen at scale is expensive and complex. In this article we explore Singapore's new hydrogen strategy and how it could impact a range of stakeholders across the shipping industry.

Addressing Climate Change and Achieving Net-Zero

In March 2022, Singapore's Energy Market Authority commissioned the Energy 2050 Committee to report on the feasibility of Singapore's power sector (which accounts for 40% of Singapore's carbon emissions) achieving net-zero emissions by 2050. The Committee noted that the entire energy value chain would have to undergo "transformational changes" and recommended that Singapore develop a national hydrogen strategy to provide clarity for companies and investors.

The fourth quarter of 2022 saw Singapore implement a series of initiatives to enhance its efforts in addressing the issue of climate change and in October 2022, Deputy Prime Minister and Minister of Finance Lawrence Wong outlined Singapore's national strategy to develop hydrogen as a major decarbonisation route.

"Hydrogen is now set to become a core component in Singapore's strategy to achieving net-zero, and is expected to supply half of the country's power needs by 2050," said Danny Chua, Senior Partner at JTJB.

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This is being achieved through nine strategies focused on three principles: supply, demand and grid.

Singapore's Hydrogen Strategy – The Five Areas of Government Focus

Singapore will take steps to prepare for hydrogen deployment domestically and work with partners to build a hydrogen supply chain in Asia. The national hydrogen strategy therefore comprises 5 key areas:

- Experiment with the use of advanced hydrogen technologies at the cusp of commercial readiness through pathfinder projects;
- Invest in research and development to unlock technological bottlenecks;
- Pursue international collaborations to enable supply chains for low-carbon hydrogen;
- Undertake long-term land and infrastructure planning;
- Support workforce training and development of Singapore's broader hydrogen economy.

"*If these core areas are followed, they should position Singapore strongly to establish itself as a regional hydrogen hub, potentially setting hydrogen standards and best practices globally,*" said Chua.

Potential Challenges of Adopting Hydrogen on Various Stakeholders

Singapore is in the early stages of establishing a clear route for the adoption of hydrogen. However, the speed at which the proposed strategy can be adopted will depend on several factors. Below are a few potential hurdles facing a range of stakeholders, from ship owners and brokers to logistics providers and ports:

- Ability to scale up production facilities (Australia and the Middle East are front-runners);
- Expense – as Singapore will import most of its low-carbon hydrogen;
- Switching to the mass deployment of hydrogen will require supply chain modifications and new infrastructure that will cost time and money. For example, Singapore lacks the infrastructure to support the transport, storage and use of hydrogen;
- Technologies are either in the early stages of development or have not yet been proven to work at scale;
- The safe and reliable use of hydrogen (and ammonia) in key end-use applications is yet to be proven;
- The current lack of international collaboration in areas such as carbon credits and renewable energy imports;
- The current lack of investment in digital technologies to allow supply, grid and demand to operate seamlessly;
- The lack of a global hydrogen supply chain.

Energy transition over the next thirty years is likely to be both dynamic and complex so Singapore will have to remain agile to pivot across different potential pathways. *"With the Government's strong support, and by focusing on creating a solid technology hub, building the necessary infrastructure and engaging in international participation, Singapore is well-positioned to navigate a successful path to safe, secure and sustainable energy solutions,"* said Chua.

For more information on this topic, please contact Danny Chua.

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Re-Arrest of Vessel Overturned by Western High Court of Denmark by Johannes Grove Nielsen & Camilla Søgaard Hudson, Bech-Bruun (Denmark)

The dispute originated from a towage agreement entered between a German towage company (the "German Towage Company") and a shipowner ("Shipowner") based on TOWHIRE terms. According to the agreement, the German Towage Company was responsible for towing Shipowner's vessel from Baie de Saint Brieuc in France to Rotterdam in the Netherlands. Due to adverse weather conditions, the tug deviated from the agreed sea route and sought shelter in Lyme Bay, England. The tug remained in the bay for four days.

The deviation led to a loss for the Shipowner and of course to a disagreement between the parties with regards to whether the deviation constituted a breach of the towage agreement. Shipowner argued that the German Towage Company had breached the contract by deviating from the agreed route. The German Towage Company argued that the deviation was justified as it was due to unforeseen bad (severe) weather.

Consequently, Shipowner presented a claim for damages and compensation for the expenses incurred for hiring another tug to complete the voyage.

When the German Towage Company refused to provide security for the claim, Shipowner in February 2020 initiated and was granted an arrest of the German Towage Company's tug in Rotterdam for the potential claim of about EUR 360,000 as well as for expected legal fees of about EUR 100,000 or 30 % on top of the claim which is standard in the Netherlands unless you provide evidence that this is not enough. Shipowner failed to do so.

On the same day, the German Towage Company initiated arbitration proceedings in London against Shipowner, in accordance with the arbitration clause in the towage agreement.

To release the tug, the German Towage Company provided a Club guarantee.

1. The re-arrest

Two years later, it turned out that Shipowner did not consider the security for costs as provided in the Club guarantee to be insufficient to cover Shipowner's expected total fees.

The increase in expected legal costs was informed to be a result of the complexity of the case and lengthy process of gathering evidence in the arbitration case which let the Shipowner to have not less than eight English lawyers from one English law firm involved in the dispute. Two years after the first arrest the expected legal costs had now increased to over EUR 700,000 or about 200% of the value of the claim.

As a result, the Shipowner, in the beginning of 2022, filed an ex parte petition with the bailiff's court in Aalborg, Denmark, to re-arrest the German Towage Company' tug currently based there, this time for an amount equal to the unforeseen, additional, legal costs of approx. EUR 600,000 or DKK 4,000,000, which the bailiff's court granted – all on an ex parte basis.

2. Challenging the arrest

The German Towage Company filed an appeal to the Western High Court of Denmark, claiming that the arrest was unjustified under Danish law.

Under the Danish Merchant Shipping Act and the 1952 Arrest Convention, a creditor cannot obtain multiple arrests for the same claim, if security has already been provided to lift the initial arrest. This is, unless the creditor can demonstrate that there is a "special reason". This is what is referred to as "good cause" in the arrest convention 1952 3(3).

The Shipowner argued in defense of the re-arrest that the original security provided by the German Towage Company was inadequate to cover the claim. Shipowner also emphasized that the reason for the security being insufficient was due to circumstances unknown to the Shipowner at the time of the first arrest. The Shipowner argued that the fact that the Shipowner was using no less than eight lawyers from

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one English law firm, and the fact that the legal bill would now be more than 200% of the claim itself was both quite normal and that special analysis of weather reports had taken a lot longer time than originally thought.

On the other hand, the German Towage Company argued that the work involved in the case had been very average and that there were indeed weather reports to be analyzed but that was known from the beginning, as the deviation due to bad weather was the key question of the matter. It was also argued that it was certainly not necessary to employ eight lawyers for this standard claim resulting in fees more than 200% higher than the claim itself.

The Western High Court of Denmark concluded that the Shipowner had not presented special reasons to the court which could give grounds for re-arrest. Thus, the re-arrest was overturned.

3. Conclusive remarks

A vessel can be arrested to secure a creditor's potential maritime claim. To have the vessel released, security is provided which normally includes a percentage on top of the value of the claim to cover interest and legal fees. A party can argue that such percentage is not adequate security.

Re-arrest for the same maritime claim is unusual and requires “special reason” under Danish law or “good cause” under the 1952 Arrest Convention. While not being able to calculate one's own legal expenses or foresee the use of eight lawyers on one case may be a reason, the Western High Court in Denmark concluded that it was not a very good reason and did not qualify as a “special” or justifiable reason as required under the Danish Ship Merchant Act and the 1952 Arrest Convention.

Bech-Bruun represented the German Towage Company after it was notified of the ex parte re-arrest, and consequently had the re-arrest set aside.



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Have All the Ever Given Related Claims in Egypt Been Successfully Resolved? by Essam Mustafa, Essam Mustafa Law Office (Egypt)

On Tuesday, March 23, 2021, while the Panama flagged ship “Ever Given” was crossing the Suez Canal, it veered off course, causing the blockage of one of the world's most important waterways. This led to a massive port congestion. Maritime navigation and international trade through the Suez Canal were disrupted for a period of six days.

The Ever Given’s incident was not a typical grounding accident, but rather a complete blockage of the international navigational passage. The ship was in constant danger, and the Suez Canal Authority (“**SCA**”) made tremendous efforts to refloat the ship and its cargo during the six day operation, without incurring any losses to the vessel.

The SCA demanded that the ship owners cover the expenses of re-floating and rescuing the ship. However, the ship owners refused to make the payment, which led to the SCA taking legal action by obtaining a precautionary ship arrest order to collect the expenses incurred by the SCA for the ship's re-floating operation.

The ship was arrested for approximately 3 months, but finally a settlement agreement was reached between the SCA and the ship owners. The ship owners agreed

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to pay the required compensation, and the ship was released.

At this point, everyone thought that all claims related to the Ever Given incident in Egypt were resolved. However, the damages caused by the Ever Given seem to have affected not only the SCA but also other parties, including the Egyptian fishing sector.

Environmental and fishing communities in Egypt sought compensation from "Ever Given" owners. For instance, SOLIMAN ADVOCATES - SUEZ, on behalf of one of Egypt's premier associations of owners of 300 mechanical fishing boats, has taken a bold step in filing a lawsuit in the Suez Court of the Arab Republic of Egypt against the owners and charterers of the vessel "Ever Given" for compensation over the destruction caused to fishing, due to the discharge of thousands of tons of sludge and residues in the waters of the Suez Canal (A maritime claim entitles ship arrest). SOLIMAN ADVOCATES explained that the irresponsible action has led to the emergence of invasive organisms like jellyfish, causing significant losses in fish production. In March 2021, the vessel closed the Suez Canal for about a week, and while floating, discharged sludge and BALLAST WATER. This has adversely affected many associations and individuals with interests along the Suez Canal.

It may be noted that SOLIMAN ADVOCATES has already filed two similar cases on behalf of two separate associations comprising 313 and 184 mechanical fishing boats before the courts of Suez, and these cases are currently under a judicial deliberation process. This landmark legal action by SOLIMAN ADVOCATES - aims to hold the parties responsible and accountable for their actions, protect the interests of the affected associations and individuals, restore the damages, and seek justice for the damages done to the fragile ecosystem of the Suez Canal.

Finally, it remains to be seen whether this marks the conclusion of all claims against Ever Given, or if there are still other outstanding claims that remain unresolved.



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Enforcement of English Judgments in the UAE by Adam Gray, Al Tamimi and Company

Ministry of Justice Opens the Door to Recognition of English Judgments in the UAE

On 13 September 2022, the UAE Ministry of Justice sent a letter to the Dubai Courts in which it raised a request upon the latter to “take the relevant legal actions regarding any requests for enforcement of judgments and orders issued by the English Courts, in accordance with the laws in force in both countries, as a confirmation of the principle of reciprocity initiated by the English Courts”.

This request was made further to the enforcement by the Supreme Court of England & Wales of the Dubai Court judgment in Lenkor Energy Trading DMCC v Puri (2020) EWHC 75 (QB) (Lenkor). The UAE Ministry of Justice informed the Dubai Courts in its letter that it considered that the principle of reciprocity had been “achieved” by the UK Supreme Court and it consequently recommenced that the Dubai Courts reciprocate and at the next opportunity to recognise and enforce a judgment of the English Courts before the Dubai Courts. The Ministry of Justice made specific reference to the UAE Civil Procedure Code, in which the doctrine of reciprocity is set out as a ground for recognition and enforcement of foreign judgments.

At this point, however, it would be premature to say that it is now possible for English court judgments or orders to be recognised and enforced in Dubai, or in the other Emirates of the UAE. The Ministry of Justice’s letter was a mere request or recommendation, and it has no binding effect on the courts. However, it is likely to be persuasive and carry some weight. The legal

community are now eagerly awaiting news of the first recognition and enforcement attempt by the holder of a final and unappealable English court judgment. It still needs to be tested and the letter does not constitute a change in UAE law and practice in and of itself. It merely represents a significant step in a new direction.

There is particular interest in how the UAE courts will treat an English court judgment which could have ordinarily had its merits decided by a UAE court. The current interpretation and application of the UAE Civil Procedure Law by the UAE courts is that it endows the UAE courts with jurisdiction despite the presence of a foreign law and jurisdiction clause, where the subject of the dispute would have otherwise fallen within the jurisdiction of the UAE courts according to its laws. The UAE courts routinely seize jurisdiction of the substantive claim regardless of an extant English law and jurisdiction clause in the subject contract.

Additionally, it is unclear how foreign court orders granting interim or declaratory relief will be enforced in the UAE where no direct equivalent order exists under the civil law system. For example, a 'World-Wide Freezing Order' is typically wider in scope than its closest equivalent, a precautionary attachment. Will the UAE courts apply the closest available remedy, or seek to apply the full terms of the English court order? Equally, it remains to be seen whether the UAE courts make any distinction between 'orders' and 'judgments. The Ministry of Justice's letter references English "judgments and orders" but it does not elaborate on whether, for example, "interim final orders" is intended to be included within that meaning.

It is also quite possible that the UAE courts would require evidence of reciprocity, regardless of the Ministry of Justice's letter confirming, in its opinion, that the principle of reciprocity has been achieved by the UK Supreme Court. Furthermore, it was a Dubai Court judgment that the English Courts enforced. The UAE comprises seven Emirates, some of which have independent judiciaries whilst others form part of a federal judicial system. Domestically, for example, Ras Al Khaimah, Abu Dhabi, and Dubai Courts will not be bound by each other's judgments. It is not inconceivable then, that one Emirate may recognise and enforce an English judgment and another not. It remains to be seen whether the principle of reciprocity will be deemed applicable to Dubai Court judgments only, some or all judgments of the UAE courts.

What this means for the Maritime Industry

From an international maritime law perspective this is nothing short of a major development. As our readers will be aware, the UK is arguably the leading forum in which maritime disputes are heard, regardless of the origin of the parties to the maritime dispute. Such is the reach of English law within the sphere of maritime disputes, and it is unlikely to change any time soon. Equally true is that the UAE is an ever-growing maritime hub, with substantial cargo traffic running through its ports, a healthy community of shipping companies registered onshore and in its freezones comprising shipowners, charterers, traders, freight-forwarders, importers, and exporters. The Emirate of Fujairah is also home to the region's busiest bunkering outpost. The UAE is undoubtedly the maritime leader within the Middle East region.

Yet there is a sharp contrast between the English and UAE legal systems. The former is built on hundreds of years of common law precedent and boasts specialist maritime courts. The latter is a civil law system with its roots in French and Egyptian law. The UAE Federal Maritime Code dates back to 1981 (with a new code expected), there is no specialist maritime court, and its judges are from various MENA jurisdictions, each with their own nuanced understanding and application of the law. The result has been that there has been little cooperation historically between the two maritime powers and their respective laws and practices are not easily harmonised.

No other Gulf State has established reciprocity with the UK courts. If the UAE and UK press ahead and establish a practice of mutual enforcement of final judgments, the UAE courts, or perhaps more narrowly the Dubai courts, will open a corridor between two maritime nation-leaders, which will enhance judicial connectivity and increase accountability of the

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international maritime community. The UAE's maritime players regularly include English law and jurisdiction clauses in their contracts and judgment debtors would no longer be able to avoid enforcement of English judgments in the UAE. English judgments would enjoy the same treatment and carry the same force in the UAE as foreign arbitration awards presently do under the New York Convention 1958. Claimants could seek security in the UAE in aid of English court proceedings without the challenge of enforcing against that security at the conclusion of the main proceedings. We often have enquiries from parties seeking to arrest a vessel in the UAE in aid of English court proceedings, however, our advice is that the claimant would not be assisted, even if the vessel arrest were obtained, because the UAE court would not recognise the final judgment and execute it against the secured vessel. Considering the Ministry of Justice's letter in September 2022, this hitherto obstacle may soon be removed.

Al Tamimi & Company are aware for matters with the courts as of 24th May 2023. Once updates of judgments have been announced we will publish articles on the same. Please subscribe to our mailing list at: https://www.tamimi.com/contact-us/subscribe/



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Upcoming Events

18th Annual ShipArrested.com Members' Conference



14-16 September 2023
The Grand Hotel Oslo
Oslo, Norway



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*This newsletter does not purport to give specific legal advice. Before action is taken on matters covered by this newsletter, specific legal advice should be sought. On **www.shiparrested.com**, you will find access to international lawyers (our members) for direct assistance, effective support, and legal advice. For more information, please contact info@shiparrested.com.*

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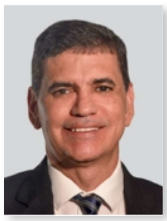
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