



Legal Update – June 2014

Obtaining Security for Maritime Claims – Ship Arrest in Malaysia

Malaysia is located in the lower region of Southeast Asia, between Thailand on the north and Singapore and Indonesia on the south. At present there are seven major container ports, namely, Port Klang (which consists of the South Port, North Port and West Port), Penang Port, Johor Port, Port of Tanjung Pelepas, Kuantan Port, Kemaman Port, and Bintulu Port. All these federal ports are equipped with modern facilities.

Amongst these federal ports, Bintulu Port is the only port which handles liquefied natural gas. Port Klang and the Port of Tanjung Pelepas are ranked amongst the top 20 container ports in the world. Port Klang is widely acknowledged as the national load centre and the transshipment centre, whereas Port of Tanjung Pelepas is recognised as a regional transshipment hub.

Overview of ship arrest in Malaysia

Ship arrest is an effective method to impose pressure on the ship owners to settle a maritime dispute with the arresting party amicably and expeditiously. The requirement of the provision of security to satisfy the in rem suit judgment or arbitration award also ensures that the claimant's prospects of recovery would not be hampered by any transfer of ownership in the ship or any financial impecuniosity of the ship owner in due course.

Malaysia had set up an Admiralty Court in the Kuala Lumpur Court Complex in the year 2010 to adjudicate maritime disputes. The Admiralty Court provides parties in dispute with the option, by consent, to have all claims dealt with expeditiously at one centralised point and before judicial personnel of the relevant experience and expertise.

It must be highlighted that prior to 1 July 2011, a ship arrest can only be effected in Malaysia for security to satisfy a judgment obtained for an in rem suit. With the introduction of section 10(2A) of the Arbitration Act 2005, it is now possible for ships to be arrested by the claimant to obtain security for the maritime arbitration award in Malaysia.

A. What are the types of claims which allow you to arrest a ship in Malaysia?

Section 24(b) of the Courts of Judicature Act 1964 provides that the admiralty jurisdiction of the Malaysian High Court is the same as that provided under United Kingdom Supreme Court Act 1981, without prejudice to the generality of civil jurisdiction of the High Court.

In other words, a vessel may be arrested in Malaysia should the arresting party's claims fall under the provision of Section 20(2) and Section 21 of the United Kingdom Supreme Court Act 1981. The list of claims are exhaustive as follows:

- a) claim in respect of possession or ownership of a ship;
- b) question arising between co-owners of a ship as to possession, employment or earnings of that ship;
- c) claim in respect of a mortgage of or charge on a ship or any share therein;
- d) claim for damage done and damage received by a ship;
- e) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or

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- default of the owners, charterers or persons in possession or control of a ship or the master or crew of a ship, or any other persons for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- f) claim for loss of or damage to goods carried in a ship;
 - g) claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
 - h) claim in the nature of salvage;
 - i) claim in the nature of towage of a ship;
 - j) claim in the nature of pilotage of a ship;
 - k) claim in respect of goods or materials supplied to a ship for her operation or maintenance;
 - l) claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
 - m) claim by a master or member of the crew of a ship for wages;
 - n) claim by a master, ship, charterer or agent in respect of disbursements made on account of a ship;
 - o) claim arising out of an act which is or is claimed to be a general average act;
 - p) claim arising out of bottomry;
 - q) claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

B. What other requirements must be fulfilled for ship arrest?

Apart from the types of claims stated above, the arresting party must also satisfy the following requirement in order to arrest a ship:

- a) The claim arises in connection with a ship;
- b) For the claim in an action personam, the person who would be liable ('the relevant person') was, when the cause of the action arose, the owner or charterer of, or in possession or control of, the ship; and

- c) For action in rem brought against the ship, at the time when the action is brought, the relevant person is either the beneficial owner of the ship or alternatively, the charterer of the ship under a charter by demise or any other ship of which the relevant person is the beneficial owner of the same.

C. Can a sister ship or associated ship be arrested?

A sister ship can be arrested in Malaysia but an associated ship cannot be arrested in Malaysia.

D. Does the arresting party have to provide counter-security to the Courts in order to obtain an arrest of the vessel?

There is no requirement for the arresting party to provide counter security to the Court in Malaysia to carry out a ship arrest. However, the arresting party is required to furnish a sum of RM 15,000.00 to the Court as the Sheriff's deposit. All fees and expenses incurred while the arrested ship is under the Sheriff's custody will be deducted from the Sheriff's deposit of RM 15,000.00 and the remaining amount will be refunded to the arresting party after the arrested ship is released.

The arresting party must make payment of the sheriff's deposit in the sum of RM 15,000.00 to the Court prior to the extraction of the Warrant of Arrest. The Warrant of Arrest will only be issued by the Court after the bank draft of RM15,000 is deposited with the Court. The Court may, as necessary, request that the arresting party put forward a further deposit should the expenses incurred during the arrest of vessel exceed the sheriff's deposit.

E. How long does it take to arrest a ship?

An in rem action for a ship arrest is commenced by way of writ. After filing the writ together with the arrest papers, the Court will fix a hearing date for the arresting party's solicitors to appear before the Judge to obtain the warrant of arrest to arrest a ship. Such an application is ex parte in nature.

The arresting party is required to carry out a search in the caveat book to ascertain whether there is a caveat against arrest of the ship. The fact that there is a caveat against the arrest of the ship in force does not, in itself, prevent the issuance of a warrant to arrest the ship by the Court. However, in the event that the Court subsequently finds that the ship was arrested without good and sufficient

cause, the party who procured the caveat will be entitled to damages in respect of the loss suffered as a result of the arrest.

The court will grant the Order for Warrant of Arrest if it is satisfied that the claim is valid and all the papers are in order. As mentioned above, the arresting party must pay the sheriff's deposit in the sum of RM 15,000.00 to the Court prior to the extraction of the Warrant of Arrest.

Under usual circumstances, a warrant of arrest can be obtained within 48 hours.

F. The arresting party must provide full and frank disclosure

Failure to provide full and frank disclosure of the material facts known to the arresting party may result in the setting aside of the warrant arrest. In the case of **Tamina Navigation Ltd v The Owner Of The Cargo Laden On Board The Ship Or Vessel MT "Swallow" (Newick Shipping Limited – Interveners) [2003] 8 CLJ 762**, the Warrant of Arrest was set aside by the Court on the basis that the Plaintiff had failed to disclose the material fact pertaining to the arbitration proceedings in London and that the purpose of the arrest of the vessel was to obtain security for it.

In light of the above, and out of an abundance of caution, it is imperative for the arresting party to provide full and frank disclosure of all material facts of the claim and grounds which give rise to the arrest of the ship in the affidavit in support of the arrest, enclosing all the relevant supporting documents in the process.

The affidavit must also state details such as the name of the ship to be arrested, the port to which she belongs, the amount of security sought, whether the ship which the action is brought is the ship in connection with the claim in the action arose and etc.

G. Provision of security by the shipowner for release of vessel

In order to prevent losses caused by the prolonged detention of the ship, the shipowner will (almost certainly) seek to have the vessel released as soon as possible. This is usually done by providing security into the Court or by settling the arresting party's claim amicably. The usual forms of security are bail, letters of undertaking from a profit and indemnity club and bank guarantees.

H. How long does it take for the release of vessel?

The arresting party will have to file the release papers to the Court to release the arrested ship in the event their claims are settled by the shipowner. The solicitors are not required to attend hearing for the release application. The order for release can be obtained within 24 hours.

However, if a caveat against release has been entered against the ship by the other party, the ship will not be released. The arresting party will have to file an application to lift the caveat against release.

I. Where can we arrest?

We can arrest the vessel so long as she is in Malaysia waters, whether within port limits or off port limits.

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