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Demystifying Ship Arrest

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Not too long ago, the nation sat captivated as the luxury superyacht, the *Equanimity*, sailed into the waters of Malaysia and docked at Boustead Cruise Terminal, Port Klang¹. The vessel, owned by businessman, Low Taek Jho, or better known as Jho Low, had finally been arrested and brought home to be dealt with accordingly.

For weeks and months thereafter, much fanfare surrounded the vessel, till it was finally sold to Genting Malaysia Berhad for about half-a-billion ringgit and renamed *Tranquility*². What Malaysians and the world had witnessed with this episode is quite simply, the workings of an *action in rem*. An *action in rem* is unique in that it is only available under the Admiralty jurisdiction of both, the High Court of Malaya and the High Court of Sabah and Sarawak. As such, public understanding of this action may be limited.

This alert seeks to demystify the workings of an *action in rem* and provide a general understanding of the laws surrounding this action and the procedure involved.

What Is An Action In Rem?

Simply put, an arrest is an *action in rem*. An *action in rem* is an action against property. This contrasts with an *action in personam*, which is the usual sort of action against a named Defendant. As stated earlier, an *action in rem* is unique to only the Admiralty Jurisdiction of both the High Courts. As such, the Admiralty Jurisdiction is empowered with two distinct modes of action: *action in personam* and *action in rem*.

However, to understand the significance of an *action in rem*, one needs to first comprehend the nature of the maritime business.

¹ <https://www.straitstimes.com/asia/se-asia/equanimity-to-dock-at-port-klang-boustead-cruise-centre-at-noon-tuesday>

² <https://www.thestar.com.my/news/nation/2020/01/10/half-a-billion-ringgit---jho-low039s-superyacht-equanimity-paid-for-in-full-by-genting>

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From a general perspective, a vessel's value lies in the amount of income it is able to generate throughout the duration of its lifetime. Being a vehicle of the seas, it is capable of plying the vast oceans and serving in the waters of any country. Hence, the general business model of most shipowners is to have their vessel serve one charterer after another till the ship is finally scrapped.

Another common feature of the maritime industry is the fact that vessels are usually owned by single ship owning companies. This is largely due to the belief, that most companies seek to avoid a sister ship arrest. As such, the vessel may be the only asset the said ship owning company. Thus, in total there is ample room for abuse, and it goes without saying – abused it has been.

In order to overcome this conundrum, it has been historically resolved that in select cases, the ship shall be considered the Defendant. This is because from a logical perspective, considering the vessel is already within the jurisdiction, action can be taken against her under the laws of that specific jurisdiction. In so doing, the need to establish jurisdiction is assuaged. Consequently, the shipowner is then left with the option of either surrendering the vessel to the mercy of the Claimant or to proceed to apply to challenge the arrest.

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Laws Governing An Arrest Of Vessel

Despite the fact that Malaysia lies in the center of one of the busiest trade routes in the world and, has an active maritime presence, has yet to ratify a single international convention concerning Admiralty practice, including arrest. Much of the powers of arrest are derived from the United Kingdom's Senior Court Act 1981 (previously known as Supreme Court Act 1981) which is incorporated into Malaysia vide section 24(b) of the Court of Judicature Act 1964.

The UK Position And The Arrest Convention 1952

Given the international nature of the maritime industry and consequentially, the various legal jurisprudence a vessel may be subjected to, it is only expected that some harmonisation of the laws is attempted. To that extent, the

industry is replete with international conventions governing various aspect of admiralty practice. One such convention, is the International Convention Relating to the Arrest of Sea-Going Ships 1952 (Arrest Convention 1952).

The Arrest Convention 1952 was intended to, amongst others, harmonise the divergent approach taken by civil and common law jurisdictions on the issue of arrest of vessels³. To a large extent, this convention was successful in reconciling the difference between the two jurisdictions and striking a balance between the varying interest involved. This is in no measure due to the relatively large amount of support the Convention garnered – evinced by the fact that the convention was ratified or acceded by over 70 countries, the United Kingdom being one of them.

Initially, the United Kingdom enacted the Administration of Justice Act 1956, which only partially implemented the Arrest Convention 1952. However, this changed in 1981, with the SCA, when the United Kingdom recognised the Convention, in particular through Sections 20 to 24⁴.

Thus, in Malaysia, an arrest of a vessel may be made based on any one of the claims stipulated in Sections 20(2) and 21 of the Supreme Courts Act 1981. Section 20(2) provides a list of maritime claims for which a vessel may be arrested, namely:

- a) any claim to the possession or ownership of a ship or to the ownership of any share therein.
- b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship.
- c) any claim in respect of a mortgage of or charge on a ship or any share therein.
- d) any claim for damage done by a ship.

³ Mahin Faghfour, International Convention on Arrest Of Ships (2020), United Nations Audiovisual Library of International Law <https://legal.un.org/avl/pdf/ha/icas/icas_e.pdf>

⁴ Kawasaki Kisen Kaisha Ltd v Owner of the Ship or Vessel "Able Lieutenant" (2002) 6 MLJ 433

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- e) any claim for damage received by a ship.
- f) 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 default of:
 - i. the owners, charterers or persons in possession or control of a ship; or
 - ii. the Master or crew of a ship or of any other persons for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a 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.
- g) any claim for loss of or damage to goods carried in a ship.
- h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.
- i) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under Section 87 of the Civil Aviation Act 1982 of the law relating to salvage to aircraft and their apparel and cargo).
- j) any claim in the nature of towage in respect of a ship or an aircraft.
- k) any claim in the nature of pilotage in respect of a ship or an aircraft.
- l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance.
- m) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues.

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- n) any claim by a Master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages).
- o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.
- p) any claim arising out of an act which is or is claimed to be a general average act.

Where else, Section 21 provides for the modes in which the Admiralty jurisdiction may be exercised based on 3 groups of claims that can be enforced by an *action in rem*, namely those in respect of the ownership and possession of the vessel, those arising from maritime liens and those in respect of other claims.

How Are Vessels Arrested?

From a procedural aspect, arrest of vessels in Malaysia is done in accordance with Order 70 of the Rules of Court 2012. Before commencing an arrest, an applicant must first conduct a search of the caveat book. A caveat book is simply a book kept in the Registry in which caveats issued under Order 70 are entered. Upon confirmation that there are no caveats in place against the arrest of the particular vessel, an applicant can then proceed with the arrest. However, even if there was a caveat, the issuance of a warrant of arrest is not prevented though it may be challenged for wrongful arrest.

An application for arrest begins with filling of a writ in Form 146. The warrant is then obtained by filing a *praecipe* in Form 148 supported by an affidavit. Additionally, a *praecipe* must also be filed in accordance with a set form, requesting the issue of a warrant. In most cases, applications for arrest are granted relatively quickly owing to the fact that Malaysia now has a dedicated Admiralty High Court.

Upon the issuance of the warrant, the party upon whose application the warrant was issued may then proceed to arrest the vessel if the vessel is within our territorial waters.

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An arrest can only be done by the Sherriff and/or his officers. Service of the warrant is affected by affixing a copy of the warrant on the mast or a superstructure of a vessel and leaving a copy in its place. Usually, this copy is also affixed to the windows of the bridge.

Upon arrest of the vessel, the vessel comes under the custody of the Admiralty court. Thus, it is usually immobile and remains at the location of arrest unless ordered otherwise by the court. Any attempt to move or navigate the ship without the court's permission is an act of contempt.

What Happens After Arrest?

Generally, there are 2 possible outcomes after an arrest. One possibility is the release of the vessel under arrest upon security being provided or, secondly the vessel may be sold via judicial sale.

1. Release of vessel following payment of security.

Given the nature of the marine business as expounded earlier, prolonged detention of a vessel is detrimental and likely to cause losses. These losses are not just in terms of the revenue generatable by the vessel but also in terms crew wages, wear and tear of the vessel, berthing charges and so forth. As such, in practice, most shipowners will seek to have the vessel released as quickly as possible.

The vessel under arrest may be released, upon the Defendant furnishing an acceptable security for the claim. This security may be in the form of a bank guarantee, a letter of undertaking from a reputable P&I Club or, the exceedingly rare, bail bond or a payment into court.

Upon the provision of security, the vessel is usually released. The release papers will be filed by the arresting party and following this, the vessel is usually released immediately.

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2. Judicial Sale

Alternatively, a vessel may be released from arrest after a judicial sale. Thus, where a party either abandons the vessel or fails to come up with sufficient security, the court may order the vessel be sold, as it was the case with the Equanimity.

Judicial sale can also be affected at any stage of the case, even where the merits of the claim has not been decided. The rationale in this instance is simply this - keeping the vessel under arrest, at times, may incur increased expenditure. This in turn diminishes any amount potentially recoverable from a judicial sale. Thus, in these cases, the vessel is usually sold, and the amount obtained, which is paid into court, generally replaces the vessel.

In both instances, payment of the proceeds is only made payable to a claimant who has obtained a favorable judgement and after the determination of the order of priorities between the competing claims. A judicial sale extinguishes all claims and encumbrances on the vessels and provides the purchaser with a clean slate.

Conclusion

Arrest of a vessel is advantageous wherein it hits at the economic heart of a vessel. Thus, most shipowners when faced with an arrest will seek to either settle the arresting party's claim or provide security for the release of the vessel. This makes it a powerful tool in the arsenal of any maritime lawyer or a potential claimant. It is hoped that this alert has helped in simplifying the arrest process to the uninitiated. It must always be borne in mind that with great powers comes great responsibility and instances of wrongful arrest are not foreign to Malaysia. Thus, claimants are always advised to seek legal advice before commencing an arrest.

Authored by Kuhan Manoharan, associate from the firm's Shipping & International Maritime practice.

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