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Ship Arrest In Malaysia – The Law & Practice

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Ship arrest is an intricate mechanism in admiralty proceedings. It serves to obtain security for the satisfaction of any sum payable to or judgement in favour of the arresting party. In commercial reality, shipowners would want to avoid crippling interruptions to ship operations that may be caused by a ship arrest. As such, the threat of ship arrest will often pressure the shipowner to voluntarily furnish other securities pending resolution of the dispute.

The process of ship arrest begins with the issue of a writ *in rem*. After a writ has been issued, a statutory lien accrues and attaches on the ship. A statutory lien holder is entitled to assert against the world that the ship is security of his claim. Therefore, such person is entitled to arrest the ship even if there was a subsequent change in ownership.

This alert sets out the procedural and legal considerations relating to this topic.

Application For A Warrant Of Arrest

As stated, the arresting party may proceed to apply for a warrant of arrest after a writ has been issued. The procedural requirements are provided in O. 70 r. 4 of the Rules of Court 2012 (ROC). Contrary to the normal proceedings, an application for warrant of arrest is not required to be made via a notice of application. Instead, arresting party must file a *praecipe* together with an affidavit. It is important that the affidavit contain the particulars as set out in O. 70 r. 4, because the non-compliance is incurable and will render the warrant of arrest liable to be set aside.

In light of the recent decision in *The Matter of Ever Concord* (Ever Concord),¹ the law is now clarified as thus: the warrant of arrest is not a discretionary remedy, but is a right of the

¹ Premium Vegetable Oils Sdn Bhd v The Owners and/or demise charterers of the Ship or Vessel "Ever Concord" (IMO No.9033347) of the Port of Zanzibar, Tanzania, Admiralty in Rem No.WA-27CC-7-01/2020.

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plaintiff which will be granted so long as O. 70 r. 4 is complied with.

Execution Of The Warrant of Arrest

A warrant of arrest is valid for twelve months from the date of issue, which will be executed by the Sheriff, his deputy or his substitute. If there are difficulties in detaining the ship, the assistance of the Director of Marine may be sought. The Sheriff will then hold the ship in his custody until the ship is either released from arrest or sold by a court order. As such, it is a pre-condition to execution for the arresting party to furnish an undertaking to pay the fees and expenses that will be incurred when the ship is held in the Sheriff's custody.

If the cargo on board the ship is not under arrest, persons interested in the cargo may request the Sheriff to authorise steps to discharge the cargo. Alternatively, they can intervene in the maritime action and apply to the court for such discharge.

Following the arrest of the ship, any unauthorised interference with the property amounts to contempt of court. As such, it is common for the Sheriff to apply for court directions (known as Omnibus Order) so that he is authorised to take measures to preserve the ship, discharge the cargo, repatriate crews or to move the ship within the limits of the port in which she is lying etc.

Release Of Ship Under Arrest

Once arrested, a shipowner may seek for the arresting party's consent to release the ship. Such consent is commonly secured by the shipowners' furnishing of alternative security. The usual forms of security are bail, payment into court, letters of undertaking from Protection and Indemnity clubs and bank guarantees.

The parties can agree on the amount of security to be furnished. As a general rule, the security must be sufficient to satisfy the amount of the arresting party's claim with interest and costs on the basis of the arresting party's *reasonably arguable best case* (see *The Moschanthy*²). The

² The Moschanthy [1971] 1 Lloyd's Rep 37.

form and terms of security are generally a matter for the parties to negotiate.

Once the parties agree on the amount of security, it is a consensual private arrangement and the court will not lightly intervene. The exception is when there is oppression or abuse of court process involved.

For instance, the arresting party in *The Borcos Takdir*³ claimed that there was an inadequate estimation of the security needed. However, the application to vary the amount of security was denied. It was held that both parties mutually arrived at the agreed sum and the arresting party had the ability to ascertain the quantum with reasonable precision.

Setting Aside Warrant Of Arrest

Alternatively, a shipowner may apply to set aside the warrant of arrest on the basis that it was wrongly issued. The following are the common grounds to set aside a warrant of arrests:

- The writ underlying the warrant of arrest was set aside.
- Non-compliance with the O 70 r 4 of the ROC.
- Failure of the arresting party to disclosure material facts (in light of *Ever Concord*, full and frank disclosure is no longer a requirement).
- The arrest constitutes an abuse of court process.
- The arrest was effected outside the territorial waters of Malaysia.
- The ship was arrested without good and sufficient reason despite the existence of a caveat against arrest.

In addition, the shipowner may also claim for damages for such wrongful arrest if he can show:

- The maritime claim was decided in the shipowner's favour; or
- The arresting party acted in *mala fides* or *crassa negligentia*; and

³ The *Borcos Takdir* [2011] 6 MLJ 562.

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the shipowner suffered losses as a consequence of that wrongful arrest.

In this regard, the shipowner must show that the ship arrest itself was malicious, or that the arrest is in relation to a malicious claim. There must be some element of bad faith in the arresting party's conduct.

In *The Kommunar* (No. 3),⁴ the court succinctly exemplified the differences between *mala fides* and *crassa negligentia*. The former applies when “*the arresting party has no honest belief in his entitlement to arrest the vessel.*” The latter refers to situations where “*objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel.*”

However, ill-founded claims with no malice are not grounds to claim damages for wrongful arrest. The arrest is not malicious merely because the shipowner has a good defence against the maritime claim.

Where the 3 conditions are satisfied, the shipowner will be entitled to damages in respect of the reasonable and foreseeable losses suffered. Damages may include the overhead costs, salaries of the crew, loss of profit, insurance, and the costs incurred in procuring security to release the ship from arrest.

Conclusion

The decision to arrest a ship carries with it serious consequences, monetary and otherwise. The arresting party ought to take into account the amount of undertaking required and the exposure to potential liability for wrongful arrest before applying for a warrant of arrest.

Thus, it is a counsel of prudence to obtain experts' advice and legal opinion before applying for a ship arrest, which is described by the Court as ‘*an extremely draconian remedy*’.

Authored by Neoh Kai Sheng⁵

⁴ The Kommunar (No. 3) [1997] 1 Lloyd's Rep 22.

⁵ Kai Sheng is a former pupil with the firm's Dispute Resolution team. He read law at the University of Malaya.