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Points to Consider if your Ship is Arrested



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It is not uncommon for Members' ships to be arrested. This article outlines several issues which Members should consider when faced with an arrest.

Is it a legitimate arrest pursuant to a court order or an unlawful detention?

An arrest is a court order detaining a ship in support of a “maritime claim” against a ship owner. Members should try to ascertain the nature of claim behind the arrest by reviewing the arrest papers served on board the ship. Such papers may include an order of court, warrant of arrest and an affidavit.

If there are no arrest papers or court order, the “arrest” is likely to be an unlawful detention. The Club is aware of some ports which detain ships without obtaining a court order or warrant of arrest. Such detention may be brought by errant claimants who have placed undue pressure on the local authorities. Technically, such detentions are illegal and are not considered an arrest. Members should inform the Club as soon as possible so that the appropriate assistance can be obtained either through local lawyers or correspondence. Members should also issue an appropriate notice of protest against the “arresting” party.

Does the arrest relate to a valid claim?

A ship can only be arrested for a “maritime claim”. What is a maritime claim depends very much on the local legislation in which the arrest will take place (see for example Senior Courts Act 1981 of UK and High Court Admiralty Jurisdiction Act for Singapore). Generally, the maritime claims under these local legal codes mirror those of the Arrest Convention^[1] and a party can arrest for maritime claims falling under the following categories:-

- Loss of life or personal injury caused by any ship or in connection with the operation of any ship
- Salvage
- Agreement relating to the use or hire of any ship whether by charterparty or otherwise
- Agreement relating to the carriage of goods in any ship whether by charterparty or otherwise
- Loss of or damage to goods including baggage carried in any ship
- General average
- Bottomry
- Towage
- Pilotage
- Goods or materials wherever supplied to a ship for her operation or maintenance
- Construction, repair or equipment of any ship or dock charges and dues
- Wages of master, officer, or crew
- Master’s disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owners
- Disputes as to the title to or ownership of any ship
- Disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship
- Mortgage or hypothecation of any ship

If the arrest is not in relation to the above claims, it is likely to be an unlawful detention and a notice of protest should be quickly issued, and again the Club notified to obtain further advice and assistance of local lawyers and correspondents.

[1] Although the 1999 Arrest Convention is more up to-date than the 1952 Arrest Convention, there are only 11 state parties to the 1999 Arrest Convention.

Can a ship be arrested in support of foreign arbitration and court proceedings?

Members engaged in legal proceedings should take extra precaution as their vessels may be targeted by opponents to obtain security.

Whether a ship can be arrested in support of foreign arbitration and court proceedings depend on the local legislation. In most common law countries, a ship can be arrested in support of foreign arbitration. As for foreign court proceedings, some common law jurisdictions like Singapore do not allow such arrests.

Can a ship be arrested to enforce an arbitration award or a court judgment?

Again, this depends on the local legislation. In common law jurisdictions, an arrest to enforce arbitration awards is technically not allowed. However, it has been held by the Hong Kong courts that an arrest would not be set aside if the claim is pleaded as one of the categories of “maritime claims” above. This is because the *in rem* cause of action against the vessel does not merge into the *in personam* award against the ship owner, and remains available so long as the award is not satisfied (See *Handytankers KS v MV Alas* [2014] KHCFl 1281 and *The Rena K* [1979] QB 337).

Is the arrested ship the “correct” one to arrest?

In the face of an arrest supporting a maritime claim, Members should check if the registered owner of the arrested ship is the entity liable *in personam* to the claimant. If so, then the ship is the “correct” ship to arrest. If not, Members may have a case of wrongful arrest against the claimants.

If the Member who is liable *in personam* is not the registered owner of the ship in connection with the dispute but is nonetheless the registered owner of other ships, the Member’s other ships can still be arrested. This is known as a sister ship arrest.

In several countries like South Africa, a wider scope of ship arrest (i.e. an associated ship arrest) is allowed. Ships of a separate company owned (whether directly or indirectly) by the Member who is liable *in personam* to the claimant may be targeted for an arrest. Usually Members can structure their corporate affairs by utilising one ship-companies to limit exposure. The associated ship arrest is designed to cut through this arrangement and to allow creditors to arrest vessels which are controlled but not necessarily directly owned by the same entity who controls the ship in connection with the dispute.

Is the ship off-hire during arrest?

In the event a ship is arrested, one of the key issues which arise is whether the ship is off-hire. The answer to this would depend on a number of factors.

First, one should check the off-hire clause under the charterparty to ascertain if an arrest is an “off-hire event.” Please note “arrest” is not an off-hire event under the NYPE 1946 Form but is an off-hire event under the NYPE 1993 and NYPE 2015 forms. Members should note that the wording of the relevant off-hire event under the NYPE 1993 and NYPE 2015 forms read “detention by the arrest of the vessel”. This means that the “illegal” detentions as mentioned in the preceding section would not be an off-hire event and hire should continue to be earned.

Secondly, another important point to note is a further proviso in the NYPE 1993 and 2015 forms which states that the arrest is not an off-hire event if “such arrest is caused by events for which the charterers, their servants, agents or subcontractors are responsible”. The Supreme Court decision of *The Global Santosh* [2016] UKSC 20 gave a useful definition of what type of arrests would fall under the above sentence. Not all arrests caused by events for which the charterers, their servants, agents or subcontractors are responsible will lead to the ship remaining on hire. In effect, not everything that a subcontractor does can be regarded as the exercise of a right or the performance of an obligation under the time charter. As such the ship will remain on hire only if the arrest is caused by charterer’s agents as a result of performing a delegated duty of the time charterer.

What should Members who are charterers do if the vessel they have chartered is arrested?

For Members who are charterers, there is usually nothing much charterers can do if the ship is arrested for a claim which is unrelated to the charter (e.g. a claim by another ship for damages arising out of a collision). Although the charterparty is likely to prescribe the charterer’s remedies during an arrest, charterer Members should immediately notify owners that the ship is off-hire (provided it is an off-hire event as prescribed under the charterparty) and should issue a notice of protest reserving their rights to claim for any loss or damage occasioned by the delays in the arrest.

Can owners claim that the arrest is wrongful?

Members whose ship are arrested may consider making a claim for wrongful arrest against the arresting party should the facts of the case allows it. Generally, a wrongful arrest of a ship refers to an arrest which is carried out with *mala fides* (bad faith) or *crassa negligentia* (gross negligence). This happens when an arresting party carries out an arrest of a ship without an honest belief that the arrest is legal or legitimate, or when they have failed to apply his mind to the legitimacy of the arrest but nonetheless proceed with it to put undue pressure on the owners.

In practice, it is often difficult for owners to succeed in a claim for wrongful arrest against an arresting party because there is a very high burden of proving malice.

Are there any actions to prevent an arrest?

Most jurisdictions allow owners to file a caveat against arrest in the court. A caveat against arrest places an obligation on the arresting party to notify the owners of the impending arrest before effecting the arrest. Essentially, it is akin to an early warning mechanism alerting owners to a potential arrest and allowing owners to voluntarily lodge security in order to avoid an arrest. Hence, if Members are aware of any potential claims against them which may lead to an arrest in a particular jurisdiction, they may wish to consider providing the security to prevent an arrest of their ship.

Alternatively, if the trading patterns of a ship are fixed such that Members are well aware of the ports which their ships usually call at, Members can also routinely conduct searches in the local court’s registry or database to ascertain if there are any new or potential claims, writs, court orders or arrest warrants issued against their ships. This method may however be too cumbersome and it is generally easier to file a caveat against arrest if such an option is available.

How do you release a ship from arrest - recommended security – P&I Club Letter of Undertaking

In the event a ship is arrested, owners will usually have to provide the appropriate security to obtain the release of the ship. Whilst there are numerous forms of security which can be provided (e.g. bank guarantees, bail bonds, insurance company's bonds and cash deposits) Members often ask the Club to provide security in the form of a Club letter of undertaking ("LOU"). Examples of standard form LOUs include the security issued in relation to Inter-Club Agreement claims as well as the Admiralty Solicitors Group ("ASG") 1 Collision Undertaking and the ASG 2 Collision Jurisdiction Agreement.

Advantages of using a Club LOU include:

- (i) speedy security in a negotiated amount,
- (ii) usually free of charge
- (iii) a negotiated choice of jurisdiction,
- (iv) avoidance of the delay, costs and inconvenience which an arrest inevitably causes, and
- (v) continuing security for the claimant without risk. (*The Oakwell* [1999] 1 Lloyd's Rep 249).

Courts in the United Kingdom, New Zealand, Canada, Singapore, Australia, Hong Kong and South Africa have all held that IG Club LOUs are sufficient and appropriate security which cannot be unreasonably rejected by claimants. However, there remain a number of civil law courts which refuse to recognise IG Club LOUs as an acceptable form of security, thereby forcing ship owners to resort to more time intensive methods such as obtaining a bank guarantee.

How can the Club support owners during an arrest?

As with all IG P&I Clubs, the provision of security on behalf of a Member is discretionary. However, in most cases the Club is usually willing to assist with the provision of security recognising the drastic effect arrests impose on its Members' trade. The preferred option is always a Club LOU, but of course before the security is provided there are certain prerequisites that need to be fulfilled. These include that the claim must usually be in respect of liability which is covered by the Club, and Members' calls must be fully paid up.

Details of the Club's rules concerning the provision of security can be found in Rule 28 of the Club's Class 1 Rules.

What is the quantum of security required to release a ship from arrest?

An arresting party is entitled to a quantum of security for his reasonably arguable best case (*The Moschany* [1971] 1 Lloyd's Rep 37). This is a low threshold and arresting parties generally have superior bargaining power and are entitled to obtain security for their claim plus an uplift for interest and costs.

The maximum level of security to be provided may vary from country to country depending on whether the owner has a right to limit under those statutes or Conventions applicable to that jurisdiction. Such limits will be born in mind when negotiating the quantum to ensure that it does not exceed the statutory limits of the local legislation. It is extremely unlikely that security will be provided in excess of the value of the arrested asset i.e. the ship.

Once adequate security is obtained, an arresting party is generally not entitled to re-arrest a ship to increase the quantum of security.

What matters to take note of after release?

As soon as adequate security is provided to the arresting party, the arresting party has to lift the arrest and release the ship.

However, Members should bear in mind that when a ship is arrested, other claimants may file a caveat against release. This would prevent the immediate release of the ship unless there is an order of court obtained by the arresting party or the owners. In order to secure a swift release of their ship, Members should take note of whether there are any caveats against release filed by other claimants. The appropriate course of action (i.e. to approach these claimants to offer security) should then be taken to ensure the expeditious release of an arrested ship.

Conclusion

In the event a Member's ship is arrested, the following steps should be considered:

1. Check if the arrest is legitimate order by the court or if it is an unlawful detention.
2. Check that the arresting party has a valid right to arrest by obtaining the arrest papers.
3. Check if the registered owner of the ship arrested is the entity liable *in personam*.
4. Check your charterparty to see if the ship is off-hire.
5. Contact the Club to see if security could be arranged so that the ship can be released.