Ship Arrest in Saudi Arabia (Introduction to the Domestic Practice)

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By contrast, the KSA domestic maritime practice has ensured that the arrest of ships in KSA is somewhat of an enigma for many international carriers, insurers, and traders. This article considerss, the complex maritime practice for ship arrest in KSA.

Background

The basic tenets of KSA maritime practice rest on section two of the 1931 Commercial Court Law ('CCL'). The CCL has been amended over the years most notably by the newly enacted Enforcement Regulations ('ER') that now govern the procedure for arresting ships.

Further, amendments by the 2007 promulgated Judiciary Regulations have rendered the Kingdom without a devoted maritime court. Instead the commercial courts (circuits) are delegated with reviewing the merits of substantive maritime claims and ship arrest measures, while the enforcement courts oversee the interlocutory sale of arrested ships. Furthermore, all vessels sailing a predetermined course to KSA, whilst anchored in its territorial waters, are subject to the national jurisdiction of the KSA domestic courts, regardless of the ship's nationality or flag. However, not all sea going ships are arrested in the same way. Military and official ships, governmental owned vessels and vessels used in port support services are excluded from the subject matter jurisdiction of the KSA commercial and enforcement courts.

Although the kingdom is a signatory party to multiple international conventions on regional and international maritime and admiralty law, it has not ratified the 1952 International Convention Relating the Arrest of Seagoing Ships, the 1999 International Convention on the Arrest of Ships, or the International Convention on Maritime Liens and Mortgages of 1993. In abstract the lack of similar safe-harbour laws may be alarming to some, but in reality many of the industry's safe-guards are put in-check either by domestic law as we demonstrate below, or in private practice as financers and businessmen would be aware of.

Treatment and Ranking of Maritime Debts

There are two categories for liens; one for the threshold liability that may extend to cover all of the debtor's sea going assets, the other is for the hiked liability that attaches the debt or lien to a certain pre-determined asset. Under the general rules of KSA civil liability, debtors are presumed to be personally liable for their own private assets. This concept creates the threshold or minimum standard for securing debt obligations that are naked or fully exposed, namely; lacking backup collateral. By the same token maritime debtors are also presumed liable for debts connected to their ongoing sea trade; however, the standard for treating a lien varies accordingly.

Creditors holding naked or exposed lines may direct arrest actions in-personam against all of their debtor's sea going assets irrespective of whether they are the owners or charters of the vessel. However, in case of a registered mortgage the standard is elevated to premium collateral in the form of an attached in-rem

lien that grants creditors supremacy over the mortgaged vessel itself, without having to establish a personal connection with the debtors or holders of the vessel. Quasi-mortgage liens – liens that are in a position of a mortgage by rule of law – also warrant debtors with an in-rem right on the vessel. Bareboat and time charterer agreements are two extreme examples of quasi mortgage liens that entitle the owners of a ship with a direct claim over their vessel, its machinery, its equipment, its freight allowance and its cargo, ahead of other debtors.

The main advantage of establishing in-rem jurisdiction is that it renders creditors immune to subsequent transactions that may produce adverse affects to the value of the underlying vessel, such as taking another mortgage or selling the vessel unless stringent conditions and certain disclosures and procedures are met. For example, creditors holding real mortgages are required to officially register their debts with the Ministry of Transport in order to be benefit from such protection against subsequent creditors.

Overall, there are eleven different liens specified in article 154 of CCL in the following order: 1) claim expenses as well as the expenses resulting from the interlocutory sale of the vessel, 2) pilot, anchorage, and docking fees, 3) watchman and custodian charges, 4) storage expenses, 5) expenses for safekeeping, 6) registration and administrative fees and crew charges, 7) pre-voyage resupply loans, 8) the sale price for the vessel as well as monies owed to foreign creditors, 9) in-voyage resupply loans, 10) insurance premium; and 11) salvage and insurance charges for the general average.

Arrest and Re-arrest

The court will serve its orders upon a certain ship through delegating the pertinent authorities, i.e. the port director or the coast guard.

Since the arrest procedure is unusually expedited the ER has a number of counter checks and balances that equalise between the claimant’s positions and limit frivolous claims. First, the underlying right should be connected to a maritime debt that is both mature and prima facie credible. Second, creditors should be acting in good faith and are expected to file following substantive claims within a maximum of 10 working days (averaging two weeks) from the date of obtaining the arrest order. Third, creditors are required to deposit a monetary security in the form of a rectified cheque or a bank guarantee with the court. The court enjoys full discretionary powers to determine whether an arrest is possible and the level of security by considering a number of factors. These factors often include one or more of the following: the amount of the debt owed, the ratio of the debt with the value of the vessel, the cost for arresting and maintaining the vessel and/or its cargo in port and the practicality and risk for the arrest.

Re-arrest of a ship directly depends on the cause for foregoing the prior action. Re-arresting a ship is not possible when the arrest action was removed by force of law, i.e. neglecting to follow it with a substantive action. That being said, the court will consider re-arresting a ship and even sympathise with the creditor he were to drop his prior action in goodwill with an obvious example being where settlement negotiations have commenced but were unsuccessful.

Arresting sister ships reverses the in-rem jurisdiction back to in-personam under exceptional circumstances. If so, then the arrest of a sister ship might be possible (without being guaranteed) providing that both ships are owned by the same debtor, there are valid concerns that the transaction would jeopardise the rights and position of the creditor and that the ship is at real threat of diminishing in value.

Release and Wrongful Arrest

Release of a ship can occur in one of three stages; the initial stage, the Court of First Instance stage, and the Court of Appeal stage. Debtors are urged to promptly respond to arrest actions, particularly during the earlier stages of an arrest while they have the better chance for diffusing the action with minimum casualties.

The risk of an arrest in the initial stage can be mitigated by making diligent efforts to verify the threat of arrest by obtaining legal advice followed by efforts to negotiate with the arresting party. However if the ship was in fact arrested, then debtors would be required to seek its release along with personal indemnity from the claim. Prudent debtors are expected to respond within the abovementioned 10 day window as failing to do so would only increase their losses. In order to release the vessel from arrest, debtors should first provide a counter security and then dispute the arrest. The counter security would also be determined by the court, but most likely it would be of an equal amount to that of the arrest security and issued in a similar fashion. If the release was unsuccessful, debtor may contest the court order for arrest by appealing to the Court of Appeal within 30 days from the order of arrest.

In general, debtors may defend against an arrest by disputing the lack of jurisdictions, lack of conditions to maritime debts, impracticality of an arrest or expiration of the time bar. Intuitively, the better approach is to prevent an arrest action from occurring in the first place by providing creditors with alternative options or collateral to cover the underlying debt. Personal guarantees, such as escrow accounts and Letters of Undertaking ('LOU'), are not accepted by the court at the moment; however this does not completely rule them out of practice. Escrow accounts are widely used in substantive law suits, rendering it an available recourse at the disposal and mutual agreement of the parties outside the courts scope of review.

Wrongful arrests are rarely compensated by courts due to the principle of judicial immunity and the prudency assumption on the end of debtors. However, it would be possible for debtors to recover actual and direct damages if they can prove for certain that the arresting creditor has acted in bad faith and falsified the information or documentation submitted with the request for arrest.

In conclusion, in our view KSA maritime practice is healthy and functioning well but there are many nuances that need to be understood by all stakeholders. Going forward we anticipate the potential for further legislative changes and we shall provide an update as they occur and when such changes are effective. In the meantime, we hope this article has unravelled some of the ambiguity shrouding the practice of ship arrest on Saudi shores.