The Arrest Conventions

International Enforcement of Maritime Claims

Edited by
Paul Myburgh

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Introduction

Dr Lushington famously observed in *The Volant*[1] that ship arrest offers 'the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment'. This quotation encapsulates several of the major themes explored in this book: the use (and abuse) of ship arrest as a means for maritime creditors to obtain security over highly mobile assets in whichever port they may find them; the need for maritime courts to use their potentially draconian powers of ship arrest wisely to achieve 'substantial justice' for both maritime claimants and defendant shipowners; and the efficacy and efficiency of the ship arrest regime in the enforcement of international maritime claims.

This book examines the two major international instruments dealing with ship arrest – the Arrest Conventions 1952[2] and 1999[3] – and their implementation and utilisation in domestic legal systems. It begins and ends with Chapters 1 and 13 providing a broad overview of international ship arrest. Prof Rhidian Thomas introduces the subject by analysing the concept of ship arrest and its development under both the Arrest Conventions and English admiralty jurisdiction and practice, and critically evaluates the availability, fairness and proportionality of ship arrest as an appropriate remedy for the enforcement of maritime claims. Prof Martin Davies surveys the future of ship arrest, concluding that the system is likely to survive future developments largely unchanged, but that the issue of how maritime courts treat corporate ownership structures of ships that put these security assets out of the reach of maritime creditors is in need of re-examination.

Chapters 2–6 provide more specific analyses of fundamental concepts that underpin the Arrest Conventions, or issues that have caused ongoing problems in this area. Assoc Prof Graham Bradfield analyses the arrest of associated ships (ships not owned by the defendant but associated through criteria of common control) with particular reference to the innovative South African reforms in this regard and the failed attempt to introduce the concept of associated ship arrest into the Arrest Convention 1999. This theme of arresting surrogate or associated ships is addressed in several of the chapters, and goes to the heart of the policy tensions that exist between broadening out the potential security asset base to assist maritime creditors, whilst avoiding undue interruption of international trade and achieving a just and commercially sensible result. Dr Anton Trichardt explores in depth the concept of ship arrest as providing security in and of itself, as well as the use of so-called 'security arrests'; both in the sense of the arrest of ships and their retention as security

[1] *The Volant* (1842) 1 Wm Rob 383, 387, 166 ER 616, 618. His dictum – if accurately reported – on the non-availability of a maritime lien for damage claims (ibid) did not, however, win favour with the Privy Council in *The Bold Buccleugh* (1851) 7 Moo PC 267, 283–84, 13 ER 884, 890 (PC).

[2] International Convention Relating to the Arrest of Sea-going Ships (adopted 10 May 1952, entered into force 24 February 1956) 439 UNTS 193.

[3] International Convention on the Arrest of Ships (adopted 12 March 1999, entered into force 14 September 2011) 2797 UNTS 3.

where there is a stay of proceedings in favour of a foreign forum selection clause, and in the more radical sense of the stand-alone security arrest allowed for in the South African legislation. Justice Steven Rares then examines the circumstances in which a maritime court may decline to exercise its jurisdiction following arrest: either because of a refusal to recognise and enforce foreign maritime claims; or on discretionary procedural or substantive grounds. Prof Kate Lewins dissects the vexed question of rearrest and multiple ship arrests which, once again, goes to Dr Lushington's remark about providing 'substantial justice' to the claimant without over-reaching and intruding unnecessarily on the property rights of the defendant shipowner. This theme is reinforced by Toh Kian Sing SC and Nathanael Lin, who discuss the issue of wrongful arrest of ships and related issues, such as the provision of counter-security by maritime claimants.

Chapters 7–9 provide contextual analyses of the Arrest Conventions and ship arrest. Assoc Prof Paul Myburgh examines the private international law (conflict of laws) issues thrown up by the institution and practice of international ship arrest and the lack of guidance on these issues provided by the Arrest Conventions. Prof Michael Tsimplis discusses the potential use of ship arrest and other regimes of detention and seizure of ships to address environmental liability claims, and the problems of adapting a twentieth-century international liability regime focused on commerce and property to twenty-first century concerns about sustainability and environmental pollution. Justice Belinda Ang explores from a Singapore perspective the palpable tensions that exist between the international ship arrest and cross-border insolvency regimes, with both regimes having very different agendas regarding the treatment and ranking of secured and general creditors and the resolution of claims arising from the failures of multinational shipping corporations. Needless to say, this is an issue that has risen to considerable prominence in recent years in the wake of the global financial crisis (or crises) and the collapse of major international shipping players.

Finally, Chapters 10–12 explore the theme of translating the Arrest Conventions into different domestic legal regimes. As Prof Francesco Berlingieri has pointed out, there are 'various degrees of uniformity in maritime law and various ways of reaching it'[4] – or, one might add, not reaching it. Drs Henning Jessen and George Theocharidis discuss issues surrounding the translation and implementation of the Arrest Conventions in Civil Law jurisdictions in Europe (with a particular emphasis on Germany and Greece) and in the context of the European Union. Dr Yingying Zou provides an insight into the transposition of the major elements of the Arrest Convention 1999 into the domestic legal regime of the People's Republic of China. Dr Bevan Marten explores the variety of ways in which different Anglo-Common Law jurisdictions have adopted or adapted the Arrest Conventions, either directly or indirectly through the machinery of the British Empire and later the Commonwealth.

Although all of the above chapters and topics have been organised thematically to provide the reader with a coherent overall picture of the Arrest Conventions and their role in the enforcement of international maritime claims, one of the strengths of this edited collection is that it brings to bear a broad range of different perspectives on the topic of ship arrest from highly experienced and expert academics, legal practitioners and judges

[4] Francesco Berlingieri, 'Uniformity in Maritime Law and Implementation of International Conventions' (1987) 18 *J Mar L & Com* 317.

from different jurisdictions. The reader will find in these pages articulate, independent and sometimes conflicting arguments regarding the pressing issues and problems surrounding international ship arrest. How does one deal with different ownership structures of ships, especially one-ship companies? Should the surrogate ship arrest concept be extended to cover seizure of associated ships or even non-maritime assets of the defendant? What are the appropriate roles of insolvency law and ship arrest law when the defendant shipowning company fails? What is the appropriate balance of convenience and justice between the conflicting rights and interests of creditors and financiers, the defendant shipowner and other involved third parties? And, given the transnational nature of the shipping industry, how should different foreign rights, commercial expectations and claims be dealt with justly and sensibly by the forum arresti? These different voices and views echo the stimulating and animated debates and discussions that followed the presentation of the contributors' draft papers at the colloquium held at the National University of Singapore that gave rise to this book, and provide proof of the illuminating and enduring value of conversations between academics, legal practitioners and judges – pilgrims all 'on the endless road to unattainable perfection'.[5]

[5] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 488 B–C (Lord Goff).