

EXECUTING SHIP ARRESTS IN MALAYSIA

Ship arrest is a unique and powerful feature in admiralty practice, whereby claimants can arrest a ship before judgment is obtained in a suit as a security for the claimant's claim. This feature follows the same position as in England by virtue of Section 24(b) of the Courts of Judicature Act 1964 which grants jurisdiction to the High Court of Malaya the same jurisdiction and authority in relation to admiralty matters as the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 (now known as the Senior Courts Act 1981) ("**SCA 1981**"). The in personam jurisdiction of the Malaysian Admiralty Court jurisdiction also covers logistics, ports and related claims.

In executing a ship arrest, two points must be considered:

- 1) whether the claims falls under one of the heads of arrest prescribed in Sections 20(2) SCA 1981 i.e. claim criteria; and
- 2) whether the person or entity who would be liable in *personam* is the owner or the person who is in control or possession of the ship (either registered owner, beneficial owner or demise charterer) at the time when the offending act or omission arose, and remain so during the issuance of the writ i.e. connection with the shipowner.

Arrest is as of right. Which means that once claimant can prove that the property (the ship) is within the scope of an action *in rem* and all procedures to arrest (the ship) has been complied with, it is the claimant's right to arrest the ship and there is no judicial discretion. [1]

The claimant's right for an arrest warrant is established in the case of **Premium Vegetable Oils Sdn Bhd v The Owners and/or Demise Charterers of The Ship or Vessel 'Ever Concord' of The Port of Zanzibar, Tanzania [2021] 9 MLJ 936 ("Ever Concord")**, Malaysia follows the current English position and has done away with the requirement of full and frank disclosure which was otherwise required in making ex parte applications.

In **Ever Concord**, the court held that the Plaintiff had satisfied the requirements under O 70 r 4(6) and (7) of the Rules of Court 2012 and there is no requirement for a full and frank disclosure by the applicant for an issuance of warrant of arrest.

The current English position is cited in **The Varna [1993] 2 Lloyd's Law Rep 253**, CA (Eng). The law in this area was examined in **Ever Concord** by His Lordship Atan Mustaffa JC (as he then was) which His Lordship compares Malaysian law as well as Singapore law and confirmed the correct position under Admiralty Law in Malaysia is that established by The Varna.

Further, His Lordship also mentioned the Court of Appeal case of **Owners and/or other persons having interest in the ship/vessel 'JHW Sapphire' (IMO No 9541083) registered in Port Klang, Malaysia v Thaumaz Marine Ltd (Civil Appeal No W- 02(IMO) (ADM)-1327-07 of 2017)**, which is the **unreported** case overruling its High Court[2] decision. His Lordship elaborated that the Court declined to follow the High Court case of JHW Sapphire, which was overruled by the Court of Appeal:

*"[41] I respectfully **decline to follow the more recent High Court case** of the JHW Sapphire cited by the defendant as the authority that full and frank disclosure is required in an affidavit leading to the warrant of arrest as this decision was reversed by the Court of Appeal in Civil Appeal No W-02(IMO)(ADM)-1327-07 of 2017. As for The Permata Arau 1, the High Court referred to decision in The MV 'Win Moony' in arriving at the conclusion that the warrant of arrest is dismissed for non-disclosure of material facts. The MV 'Win Moony' was decided pre-2012 before the ROC was in effect."*

Therefore, the requirement of full and frank disclosure in applying for warrant of arrest in Malaysia is not applicable.

To apply for a Warrant of Arrest, an application must be made to the Court for the issuance of the Warrant of Arrest before an arrest can be executed on board a ship. This is done by filing, among others, a Warrant of Arrest and affirming an affidavit leading to the Warrant of Arrest, in compliance with **Order 70 rule 4(6) and (7) of the Rules of Court 2012:**

- a) Name, address and occupation of the applicant for the warrant;
- b) The nature of the claim or counterclaim in respect of which the warrant is required and that it has not been satisfied;
- c) The nature of the property to be arrested and, if the property is a ship, the name of the ship and the port to which she belongs;
- d) The amount of security court, if any;
- e) Whether the ship against which the action is brought is the ship in connection with which the claim in the action arose;

f) That in the belief of the deponent the person who would be liable on the claim in action in personam was, when the cause of action arose, the owner or character, or in possession or control, of the ship in connection with which the claim arose and was also, at the time of the issue of the writ, either the beneficial owner of all the shares in the ship against which the action is brought or the charterer of the ship under a charter by demise; and

g) The grounds of the deponent's belief.

Once an application is made, the Court will fix a hearing date, which can be done typically within 1-2 days from the date of the application. If the ship is already in Malaysian waters, the Warrant of Arrest can be served on board typically within the same day or the next day, by the Sheriff of the Admiralty Court accompanied by the arresting party's solicitor.

Once the ship is arrested, the ship falls within the Sheriff's custody. Any movements and activities of the ship must obtain the Sheriff's permission. Throughout the period of arrest, the arresting party has to appoint an agent via Omnibus Application (which is an ex-parte application made within 10 days from the date of the arrest). The agent acts on behalf of the Sheriff in taking care of the well-being of the ship and her crew. Any costs incurred in the service of the agent can be reimbursed if the ship is subsequently sold via judicial sale.

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1. English case of Stallion Eight Shipping Co. SA v NatWest Markets plc (formerly known as The Royal Bank of Scotland plc) [2018] EWCA Civ 2760 / The MV Alkyon.
 2. Overturning Thaumaz Marine Ltd v Owners and/or other persons having interest in the ship/vessel 'JHWSapphire' (IMO No 9541083) registered in Port Klang, Malaysia [2017] MLJU 2102. Unfortunately the Court of Appeal did not render a written judgement. Our Shipping Partner Philip Teoh acted for the successful appellant at the Court of Appeal.

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