



March 2016

The Rights and Wrongs of Ship Arrest in Ireland

■ Conventions

One of the main things worth bearing in mind when considering the arrest of a ship (or a sister ship) in the Republic of Ireland (ROI) is the applicability of the various arrest conventions. Whereas the ROI is party to the Arrest Convention of 1952 and has given effect to it in its legislation, it is not a party to the 1999 Arrest Convention, and nor indeed is it a party to the Maritime Liens and Mortgages conventions of 1926 and 1993. On the one hand, this necessitates a certain degree of caution when considering an arrest, but nonetheless, the sanctions in place for the perpetrators of wrongful arrests can be said to be less severe than those for many other jurisdictions, as will be seen below.

Accordingly, the ships of both Convention states and non-convention states can be arrested in ROI, for the maritime claims enumerated in Article 1 of the Arrest Convention 1952, *and not otherwise*. In addition a sister ship not registered in a 1952 Convention State may not be arrested in ROI, as was held in **Constante Trading Limited v. The owners and all persons claiming an interest in the M.V. Kapitan Labunets** (The Kapitan Labunets).

In this case the defendant owner was a company with its principal place of business in the Ukraine (which was not a party to the 1952 Convention) and flew its flag. The plaintiff maintained that the defendant ship owner was indebted to it in respect of services rendered to sister ships of the Kapitan Labunets. Subsequently, the

For further information on any of the issues discussed in this article please contact:



Paul Gill

DD: +353 (0)1 673 1865

paul.gill@dilloneustace.ie



David Kavanagh

DD: +353 (0)1 673 1788

david.kavanagh@dilloneustace.ie

defendant company brought a motion seeking the release of the vessel.

It was held by the High Court in granting the relief sought,

1. That the Act incorporating the 1952 Convention into Irish law merely did that, and did not otherwise extend the domestic law of the State.
2. That the arrest of a ship for the debts of a sister ship was not a concept that existed in the domestic law of the State prior to the adoption of the Convention of 1952.
3. That, accordingly, sister ship arrest existed in the domestic law of the State only insofar as it was specifically authorised by the Convention. Further, that the Convention did not purport to authorise the arrest of a sister ship flying the flag of a State not party to the Convention.
4. That an international convention or treaty could not lawfully bind, to its detriment, a state which was not party to it, save only by the inclusion of terms therein comprising a re-statement of universally accepted provisions of customary international law.
5. That sister ship arrest was not a universally accepted provision of customary international law.
6. That, accordingly, a ship flying the flag of a state not party to the Convention of 1952 was not liable to arrest, in respect of the debts of its sister ship, under the Convention, or otherwise Irish law.
7. And therefore, the arrest of the M.V. Kapitan Labunets was unlawful.

The appeal to the Irish Supreme court failed. Nevertheless it was something of a surprise outcome as it ran contrary to internationally acknowledged academic texts. Accordingly, it is the wise practitioner who “looks before he leaps”, prior to a sister ship arrest, in ROI.

Security for Arrest, and Sanction for Wrongful Arrest

In order to obtain an Order for Arrest in ROI, the claimant’s solicitor is required to give an undertaking to indemnify the Admiralty Marshal in respect of all charges and expenses that may be incurred incidental to arresting the vessel, or any claim made against the Admiralty Marshal in connection with such arrest or detention. In the event that such charges are not recovered from the Defendant, the Plaintiff’s solicitor remains liable for them.

In order to maintain proceedings, and therefore an Admiralty arrest in ROI, the arresting party may be required to give security for costs if it is domiciled outside the state or is a company, provided that the arrestor’s inability to provide security for costs has not been caused by the alleged wrong complained of. So the rules in this respect are not peculiar to actions *in rem*.

Where an arresting party seeks to maintain an arrest in ROI as security for the satisfaction of any judgement which may eventually be pronounced by a foreign court or in arbitration, the ROI Admiralty Court may make such an order to that effect if the judgement may be enforced in ROI (say, under EC Regulation 2015/2012) and in doing so may, under the Jurisdiction of the Courts (Maritime Conventions) Act 1989, Section 5 (5), “**attach such condition to the Order as it thinks fit, in particular conditions relevant to the institution and prosecution of the relevant arbitration or legal proceedings**” In the UK, similar legislation has been interpreted to allow the court to require an undertaking as to damages.

In relation to wrongful arrest in ROI, if the claim for which the vessel has been arrested is subsequently rejected by the court hearing the case on its merits, the arrestor cannot be liable in damages by reason of the mere rejection of the claim. It would only be liable if proof were given to the Court of bad faith, negligence, or malicious instigation of the claim. In other words, negligence *simpliciter* in bringing the claim, is excluded. The position is similar if the vessel is arrested pursuant to a decision by a court of first instance, but the arrest is subsequently repealed by a higher court without deciding on the merits of the claim. Even if the arrest claim was not against the owner of the ship, and could not be enforced against that ship under the law of the state where the vessel was arrested, the arrestor would not be liable in damages except in cases of bad faith, gross negligence or malice. Should the arrest claim turn out to have been grossly exaggerated, the arrestor would not be liable in damages to the owner of the ship for the extra cost of the security required (on the basis that the amount of the security, if disputed, will be fixed by the Court at the time of the application for the release of the ship upon the giving of the security), nor for losses incurred by the owner by reason of the delay caused by the greater time required to procure the security, nor indeed for losses incurred as a result of the owner being unable to provide the excessive security. Even if the party liable for the arrest claim is largely solvent and it is possible to enforce judgements or arbitration awards against him (for example, if he owns many ships - not under separate corporate veils, - which call regularly at ports where enforcement can take place) the arrest cannot be considered wrongful as a result, so as to attribute liability to him under ROI national law.

There are, however, circumstances in which under ROI law, an arresting party can be held liable in damages for the wrongful arrest of a ship. Section 47 of the Admiralty Court (Ireland) Act provides that “**The party at whose instance any property is arrested under a Warrant of the High Court of Admiralty shall be liable to be condemned in all costs and expenses occasioned thereby, and in damages for detention of the property, unless he shows to the satisfaction of the Court that he could not, without such arrest, have obtained bail or other security for the sum in which the cause is instituted, or that he had otherwise good and sufficient reason for having caused the issue and execution of the warrant of arrest**”. However, it is worth noting that ROI national law does not provide for a penalty or other sanction to be levied on the arrestor, separate and distinct from damages, if he is held liable for the arrest.

As can be seen from the above, apart from a case in which Section 47 applies, it would take little

short of egregious tactics or behaviour on the part of an arresting party to attract court censure or sanction in a case of wrongful arrest.

Dillon Eustace
March 2016

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2016 Dillon Eustace. All rights reserved.