

# Pre-action security: advantages of South Africa in an uncertain market

November 23 2016

Shipping & Transport, South Africa

- 🔍 Introduction
- 🔍 Security arrest
- 🔍 Associated ship arrest
- 🔍 Comment

## Introduction

The existing state of the shipping market has led to an environment characterised by low to moderate value maritime claims coupled with high legal enforcement costs in relation to value. In many cases, this has left claims managers uncertain as to whether they should pursue debtors.

This dilemma is faced by all maritime creditors, including shipowners, charterers, cargo interests and service providers.

The market is not set to improve in the short term; as reported by Moody's in June 2016, the outlook for the global shipping industry over the next 12 to 18 months is negative. By way of illustration, a recent publication by the Shipowners Club stated that:

*"The declining state of the market has led to very difficult trading conditions for vessel operators. Record numbers of vessels are in layup with charterers slashing rates or terminating charterparties altogether. Unfortunately, many analysts predict the oil price will not increase significantly in the near future and, as some vessels approach the end of charter periods, owners are asking questions about layup or looking elsewhere for new business."*

Against the background of this bleak picture, South Africa is one of the few admiralty jurisdictions which offers an opportunity for maritime claimants of all types to gain an advantage by obtaining security for claims before having to commence legal proceedings – whether by way of court action or arbitration.

## Security arrest

Generally referred to as the 'security arrest', South African courts can, in accordance with Section 5(3) of the Admiralty Jurisdiction Regulation Act, order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding in South Africa or elsewhere if the person seeking the arrest has a claim enforceable by:

- an action *in personam* against the owner of the property concerned; or
- an action *in rem* against such property.

The power of this remedy is enhanced by the associated ship arrest, which – in principle – permits the arrest of an associated ship of that to which the underlying claim relates.

## **Associated ship arrest**

An associated ship arrest exceeds the traditional sister ship arrest by allowing a claimant to pierce the corporate veil of ship owning entities to determine whether two ships are under the same ownership or control.

Further, in the case of claims against charterers, a charterer of the ship to which a claim relates is deemed to be the owner of that ship for the purposes of the associated ship arrest. This means that ships which are owned or controlled, directly or indirectly, by the charterer or its holding company may be susceptible to arrest.

The amount of security to which an arresting party is entitled (in exchange for the release of the arrested property) is the lesser of the value of the property arrested and the value of the claim. Thus, in cases where the value of the arrested property exceeds the value of the claim (as is often the case in ship arrests), the claimant can seek:

- security for the value of the capital claim;
- interest for the anticipated period of the arbitration or court proceedings; and
- the anticipated legal costs of those proceedings.

## **Comment**

By entering into arbitration or court proceedings with security in hand, a claimant has the comfort of knowing that it has something tangible on which to draw down when enforcing a successful award or judgment. Further, the claimant will also have leverage to negotiate a favourable early settlement of the claim and thereby keep legal costs to a minimum, thus making it an attractive solution to the existing dilemma faced by claims managers.

*For further information on this topic please contact Jeremy Prain at Bowmans by telephone (+27 21 480 7800) or email ([j.prain@bowman.co.za](mailto:j.prain@bowman.co.za)). The Bowmans website can be accessed at [www.bowman.co.za](http://www.bowman.co.za).*

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Jeremy Prain