In the maritime industry, as with any other commercial activity, disputes and claims can arise between parties. This can occur where goods and services are provided to foreign ships on the credit of the ship alone, and payment is not made. At other times, the ship can also be the instrument of loss, as for example, the ship damages other property in a collision, or where goods are damaged or lost in the course of carriage by a ship.

When a claim is brought against a shipowner, it is often the case that the shipowner is situated outside the jurisdiction of the claimant, with no assets other than the ship in connection with which the claim arose. Accordingly, even if the claimant is successful in his claim against the shipowner and manages to obtain judgment, the claimant may have difficulty enforcing his judgment as a ship is easily moved. In addition, an unscrupulous shipowner may even sell his ship to avoid its seizure to satisfy any judgment against him.

To deal with this, many jurisdictions provide the remedy of ship arrest for maritime claims. This enables maritime claimants to obtain security for their claim, to ensure that the shipowner does not deprive the claimant of the fruits of his litigation by moving the ship out of jurisdiction in order to evade enforcement proceedings.

The arrest of a ship often has a crippling effect on the shipowner. Once his ship is arrested, a shipowner has to provide the claimants with security for their claim, in order to free the ship. This means that he will come under financial pressure to come up with millions of dollars worth of security, in some cases, within a short space of time, as he would be suffering losses for every moment the ship is under arrest. If he fails to release the ship quickly, that itself may well bring about claims for delay in the shipment of cargo.

If the shipowner fails to provide security, his ship might be sold by the court in a judicial sale. The ship will be sold even if the shipowner disputes the claim and defends it, prior to final judgment. Therefore, a shipowner who wins his case may still lose his ship through arrest, with no recourse against the claimant.

To check any possible misuse of the right of arrest, courts in many maritime jurisdictions have developed the principle of ‘wrongful arrest’ which allows the court to award damages against parties who have arrested a ship under circumstances which are considered ‘wrongful’. However, in developing and applying the principle, the courts have had to balance the needs and interest of the claimants and the shipowners.

If the principle of ‘wrongful arrest’ is too widely defined, it may undermine the claimant’s right of arrest by exposing him to damages for wrongful arrest, should his decision to arrest turn out to be wrongful. However, the right of arrest should not be made so onerous that claimants are afraid to make use of the legitimate right of arrest because of the potential exposure to damages for wrongful arrest. On the other hand, if the principle is defined too narrowly, shipowners may not be adequately protected against abuse of the right of arrest.

Given the consequences of wrongful arrest, this article seeks to examine what amounts to ‘wrongful arrest’ under Singapore law.
What Is ‘Wrongful Arrest’?

Wrongful arrest of a ship refers to an arrest which is carried out with *mala fides* (in bad faith) or *crassa negligentia* (gross negligence) implying malice. It occurs when an arresting party carries out an arrest of a ship without an honest belief that the arrest is legitimate, or when he has failed to apply his mind as to the legitimacy of the arrest, but nevertheless proceeds with the arrest, for example, in order to put pressure on the shipowners to accede to his demands.

**Bad Faith Or Malicious Negligence**

But how does one decide whether the arresting party has acted in bad faith or with malicious negligence? The leading case on this in Singapore is the Court of Appeal decision of *The Kiku Pacific* (1999) (the ‘Kiku Pacific case’).

In the *Kiku Pacific* case, the Court of Appeal framed the tests for bad faith and gross negligence implying malice as follows:

- In bringing the action, did the arresting party know or honestly believe that they could not legitimately arrest the ship? If so, this implies malice.
- In bringing the action, did the arresting party fail to apply their mind as to whether they could legitimately arrest the ship, but nevertheless proceeded to do so to put pressure on the shipowners to accede to their demands? If so, this implies gross negligence implying malice.

However, bad faith and gross negligence are ultimately dependent on the particular facts of each case, and it may perhaps be useful to review a few leading cases in Singapore to ascertain when bad faith and gross negligence have been found, and when they have not.

**The Kiku Pacific**

In the *Kiku Pacific* case, the shipowners had claimed that the arresting party had acted in bad faith and / or with gross negligence. They relied on the following assertions in order to establish this:

- At the time of the arrest, the arresting party’s claim against the shipowners arose from a form of security that did not exist under Singapore law.
- The arresting party’s lawyers had made many changes to the facts on which they had based their claim, and this showed that they knew that their claim was groundless.
- The arresting party had been offered security (in terms of a P&I Club letter of undertaking) by the shipowners for the claim. They rejected the offer, and chose instead to arrest the ship. However, they later accepted a letter of undertaking as security which was in terms similar to that offered previously, with only the jurisdiction of the claim being different.

In that case, the Court held that the claimants had not acted in bad faith or with gross negligence implying malice and dealt with each of the shipowners’ assertions:

- It was not persuaded that there was evidence that at the time of the arrest, the arresting party’s claim had been based solely on a form of security that did not exist under Singapore law. As it could not be shown that the arresting party had acted without a basis for its claim, the Court could not find that it had acted in bad faith or with gross negligence on this ground.
- The fact that the claimants’ lawyers made changes to the facts on which they based their case did not imply that there was bad faith or gross negligence as the facts were complicated and required a relatively complex analysis of contractual matters.
- In respect of the failure to accept the security when it was first proffered, the Court found that the subsequent acceptance of a similar undertaking with Singapore jurisdiction did not in any way taint the initial rejection of a similar security with bad faith or gross negligence, as on the facts, they were entitled to so act.
The AA V

The case of The AA V (2001) was a case where bad faith and / or gross negligence was found. In that case, the arresting party had supplied bunkers to a ship. The bunkers were not paid for, and the arresting party arrested the ship as part of its proceedings for a claim for the price of the bunkers supplied.

However, when the facts were examined, the Singapore High Court found that the contract to supply the ship with bunkers had in fact been made with a third party, and not with the shipowner. In fact, the Court found that most of the bunkers ordered had actually been loaded onto another vessel and not the ship that had been arrested. The arresting party had not only known of these facts, but had tried to conceal the true situation from the Court.

The Court therefore found that the arresting party had acted in bad faith. In addition, even if there was no bad faith, the arresting party's knowledge of the facts should have cast doubts in its mind as to its right to arrest the ship, and that they went ahead to arrest it regardless showed recklessness.

The AA V is perhaps a clear case of bad faith and recklessness by the claimants and demonstrates the type of abuse that the shipowner is exposed to and which the principle of wrongful arrest was designed to combat.

The Trade Resolve

The Trade Resolve (1999) was a case where a ship was arrested while it was anchored outside Singapore’s territorial waters. The shipowners challenged the arrest as wrongful. In the circumstances, the Singapore High Court found that the claimants had acted in bad faith. The claimant had arrested the ship outside Singapore’s territorial waters even though the letter of authorisation issued to the arresting party by the Court clearly authorised them to arrest the ship only within port limits.

The Evmar

It is perhaps worth mentioning the oft-cited case of The Evmar (1989). In this case, the Court held that the test for wrongful continuation of arrest is the same as that for wrongful arrest. Accordingly, the issues discussed above in relation to wrongful arrest and how it is to be determined would apply equally to the wrongful continuation of an arrest which was initially carried out properly.

In this case, the continued arrest of the ship was held to be wrongful as the claimant had refused to release the ship even after the shipowners had capitulated and provided the arresting party with security on the exact terms requested by the claimant. Instead, the claimant demanded for security in another form. Such conduct was considered at least maliciously negligent, and wrongful.

Conclusion

The decision in the Kiku Pacific case is a welcome clarification on the circumstances in which an arrest is wrongful. However, it affirms a relatively narrow approach of what constitutes wrongful arrest, and applies a rather high burden of proving malice. It is arguable that the decision empowers claimants with weak claims to ‘try their luck’ by arresting a ship to see if the shipowners will settle their otherwise weak claims.

This position is, however, not unique to Singapore. It is consistent with the position in other Commonwealth jurisdictions, such as England, Canada, Hong Kong and New Zealand.

However, Australia has departed from this position by virtue of legislative changes. Section 34(1)(a)(ii) of the Australian Admiralty Act 1988, No 34 of 1998 appears to provide a lower threshold for ‘wrongful arrest’, in that a party may recover damages arising out of the arrest of property if the arrest was obtained ‘unreasonably and without good cause’, rather than with malice. It remains to be seen whether Singapore will follow suit.
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Errata

The Editorial Board apologises for an error in the last issue of Lawlines, Volume 3 Issue 2. The author of the article ‘Arrest Of Ships In China’ is Lin Ying, a Foreign Lawyer attached to the Admiralty & Shipping Practice Group.