



SHIP ARREST

Recent Developments in English Arrest Law

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Two criteria's for arresting in England

1. The claim comes within Section 20 of the Supreme Court Act 1981;
2. The ship to be arrested has sufficient connection to the claim. Not defined in our statutes.



Claims within Section 20 of the Supreme Court Act 1981

1. Claims about the possession or ownership of a ship;
2. Questions arising between the co-owners of a ship about possession, employment or earnings;
3. Any claim in respect of a mortgage or charge;
4. Any claim for damage received by a ship;
5. Any claim for damage done by a ship;
6. Any claim for loss of life or personal injury;
7. Any claim for loss of or damage to goods carried in a ship.



Claims within Section 20 of the Supreme Court Act 1981 – Cont..

8. Any claim arising out of an agreement relating to the carriage of goods in a ship or the use or hire of a ship;
9. Any claim for salvage services or towage of goods or materials supplied to a ship pilotage, general average, bottomry;
10. Any claim in respect of construction, repair or dock charges;
11. Crew wages;
12. Disbursements on account to a ship;



The Ship being arrested has to have sufficient connection with the claim

1. Sister ship arrests are permitted under English Law;
2. Associated ship arrests are not permitted under English Law.



English Arrest Law 2005 - 2006

Very few substantive developments in English arrest law during 2005/2006. One area which has come under scrutiny are the rights and obligations of a mortgagee who arrests fully laden ships.



The mortgagees' obligations right of arrest – and the obligations on it

1. Recent case of Anton Durbeck GmbH -v- Den Norske Bank ASA 2005;
2. This recent decision reinforces the view that the obligations and the duty of care owed by a mortgagee to third parties, when arresting ships – particularly fully loaded ships, is not that high.



Facts of the Case

1. The mortgagee arrested a ship in Panama for mortgage arrears. The law of the mortgage was English Law;
2. On board at the time was a perishable cargo of bananas;
3. The vessel was Cypriot registered. The consignment of bananas was going to Hamburg via Panama;
4. The vessel was eventually sold at auction.



Bananas? What Happened

1. There was no market in Panama;
2. The vessel was not able to proceed to Hamburg. Apparently its P&I certificates had expired and the mortgagee bank had no reason to renew them;
3. There was no possibility of transshipment



Result



The bananas disposed of after they had deteriorated.
The total loss to charterers shippers → 2.5 million euros.



The charterers tried to convince the English Court that the mortgagee was liable for that loss

1. First problem was whether the matter was subject to Panamanian or English Law?
2. If it was Panamanian law as the charterers wanted – there was a right to damages where a valid arrest was carried out if the arrest was done in bad faith or with the intention of harming the bill of lading holder;
3. It was this second limb of the rule that was appealing for the charterers.



4. The burden for the charterer in English Law was higher. He would have had to have shown that the arrest itself was carried out with bad faith – this is extremely difficult;
5. The English Court looked at the Panamanian position first. The court was unsympathetic. There was no evidence that the loss of the cargo was caused by bad faith or the banks desire to cause harm to the cargo interests;
6. The fact that the arrest was going to cause damage to the cargo was not enough.



7. There was no claim against the bank under Panamanian Law;
8. The bank were held to have had no choice. There was no P&I cover so the ship could not proceed to Germany. If she had made the journey she might have been arrested again and the bank might have been obliged to release her;
9. The bank was not in the wrong under English Law. The only question here was whether the bank would have been in a worst position by sailing to Germany. The answer was yes.
10. In the event the bank was not liable to the charterers for the loss.



Analysis

The English Courts are generally unsympathetic to third party interests when dealing with the obligations of a mortgagee in an arrest. Under English Law the bank/mortgagee is obliged to comply with any obligations entered into under any bills of lading. However, if a ship has no P&I certificates and the transshipment options are limited or non-existent – the bank's obligations are not onerous in any real sense of the word.



That approach is consistent with earlier cases:-

Den Norske Bank ASA –v- Acemex Management Co Ltd
(The Tropical Reefer) 2003

1. The facts were not dissimilar to the first case;
2. There was a consignment of bananas on board the vessel “Tropical Reefer” when the bank arrested in Panama. The bananas were originally destined for discharge in Germany. The bananas were eventually dumped overboard when they had deteriorated. The costs of dumping was borne by the bank who deducted them from the proceeds of sale from the ship.



The problem in this case:-

1. Was that the mortgage had been guaranteed by Acemex who were keen to ensure that they paid the minimum shortfall between the proceeds of sale and the total amount outstanding to the bank which was just over US\$800,000.
2. Acemex argued that the bank owed them a duty of care to minimise the losses that had been incurred. The figure of US\$204,140 could have been saved if the vessel had proceeded to Germany after the arrest instead of remaining in Panama.
3. In addition, the bank could have sold the vessel elsewhere and obtained a better price.



The English Court gave short thrift to both of these arguments

1. The vessel had been unable to proceed to Germany because it had no P&I cover;
2. There were no transshipment options;
3. The bank was entitled to sell the ship in Panama.



Summary

1. Although a mortgagee is obliged to complete a contractual voyage after an arrest the Anton Durbeck case does highlight that the obligations on the bank to do so are not as extensive as first thought. Particular difficulties arise for charterers/cargo interests when the transshipment options are limited or non existent. In that situation cargo interests and charterers are likely to find themselves out of pocket;
2. Banks/mortgagees are unlikely to be asked to sail a vessel to the intended discharge port by an English court following an arrest.