

Ship Arrest as Security for an Arbitration Claim: Post the Arbitration (Amendment) Act 2011

In any maritime dispute, obtaining security for a claim is undeniably of high priority. Where a ship is arrested and judicially sold, the proceeds are used to pay off the claimants. If the arrested ship is released on provision of security then the security so provided can be looked to for satisfaction of any of any judgment subsequently obtained. Either way, the plaintiff's claim is secured before judgment is obtained i.e. a pre-judgment security. It cannot be denied that such pre-judgment security help prevent the problem often faced by the claimants of having to locate the shipowners' assets against which to enforce any judgment obtained due to the international nature of the shipping trade. In addition, with the security obtained before judgment, satisfaction of the claimants' claim will not be at a disadvantage in the event of any intervening insolvency on the part of the shipowners.

In recent years, maritime disputes are commonly referred to arbitration. Charterparties, bills of lading and shipbuilding contracts almost always stipulate for arbitration. Notwithstanding the arbitration agreement, the dispute is still a maritime dispute, and for the claimants the need to obtain security for the maritime disputes remains high priority.

In Malaysia, prior to the Arbitration (Amendment) Act 2011, a ship cannot be arrested as security for a maritime dispute that is referred to arbitration, which had led to an unsatisfactory position and making Malaysia an unattractive and unfavourable jurisdiction for ship arrest.

The Arbitration (Amendment) Act 2011 amends the Arbitration Act 2005 and empowers the Malaysian court that exercises admiralty jurisdiction to order the retention of vessels or the provision of security,

pending the determination of arbitration proceedings related to admiralty/maritime disputes. In particular, the Arbitration (Amendment) Act 2011 brings into force the amendments to Sections 10 and 11 of the Arbitration Act 2005.

Section 10 in its amended form reads as follows:

"10. Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed;

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit:

(A) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest:

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or

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(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(B) Subject to any rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order under subsection (2A) as would apply if it were held for the purposes of proceedings in the court making the order.

(C) For the purpose of this section, admiralty proceedings refer to admiralty proceedings under Order 70 of the Rules of the High Court 1980 [P.U. (A) 50/1980] and proceedings commenced pursuant to paragraph 24(b) of the Courts of Judicature Act 1964 [Act 91];

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court; and

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia." (own emphasis)

The amended Section 11 reads as follows:

"11. Arbitration agreement and interim measures by High Court

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for :

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) appointment of a receiver;

(e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court; and

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(h) an interim injunction or any other interim measure.

(2) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.

(3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia." (own emphasis)

These amendments now have the force of law. Hence, the newly set up Malaysian Admiralty Court dedicated to hear admiralty and maritime cases, can now order the arrest of a vessel in an admiralty claim as security for the satisfaction of any award given in any arbitration. It is also mandatory for the Courts to order a stay of the Malaysia proceedings after security has been obtained, unless exceptions apply. This allows for certainty that the arrest action does not replace the arbitration agreement / proceedings. There are also many ports both in East and West Malaysia making it convenient to track and arrest the vessels that come to port. Also of importance, is the speed and efficiency of the Admiralty Court in issuing the Warrant of Arrest, which should make Malaysia the favoured jurisdiction when one is considering ship arrest as security for any maritime claim including one that is subject to arbitration.

If Malaysia has always been viewed as a more economical jurisdiction for Ship Arrest in the South East Asia region, then (with this new amendment) we would likely see a sudden growth of Admiralty cases in Malaysia.

If you would like more information about this case or the topic, please contact Rahayu Abd Ghani at rahayu@jtjb.com

NEWS

Rahayu Abd Ghani



JTJB welcomes its newest addition to the JTJB Team with Rahayu Abd Ghani heading the Kuala Lumpur network office, Rahayu Partnership since 15 August 2011.

Rahayu graduated from the University of Newcastle-upon-Tyne with a Bachelor of Laws Honours Degree in 1996 and upon completing her Certificate in Legal Practice and being called to the Malaysian Bar in 1999, Rahayu started her practice in Messrs

L.Y. Leong & Partners, Subang Jaya where she gained experience specializing in shipping, admiralty and insurance cases.

She has been exposed to a full range of shipping, admiralty and insurance cases both contentious and non-contentious. She also handles civil, corporate and commercial cases.

Rahayu Partnership



Pic from left:

Alan Lim, Danny Chua (*Senior Partner, JTJB*), Dato' Jude P. Benny (*Managing Partner, JTJB*), Rahayu Abd Ghani, Ang Lay Ling, Joanna and Angeline.

EVENTS

High Tea Talk at Carcosa Seri Negara



In conjunction with the launching of JTJB Kuala Lumpur network office, Rahayu Partnership; the high tea talk at Carcosa Seri Negara on 19th October 2011 was a huge success. Attended by more than 70 people, comprising clients and friends from the Shipping industry, the mid afternoon event was well received especially during the presentations delivered by JTJB Managing Partner, Dato' Jude P Benny and Rahayu Abd Ghani, Principal Partner of Rahayu Partnership.

MC of the day, JTJB Senior Partner, Danny Chua introduced the speakers and their respective presentation :

1. Mediation, Arbitration and Litigation by Dato' Jude P. Benny, Managing Partner, JTJB
2. Recent Maritime Law Developments in Malaysia by Rahayu bt Abd Ghani, Partner, Rahayu Partnership

The Firm carries out a regular series of talks and industry focused seminars. It also conducts customized in-house seminars for our clients. For more information, please contact Alan Lim at alan_lim.kl@jtjb.com

UPCOMING EVENTS

Ship Arrest 2012

Following the successful Ship Arrest Seminar in 2010 organised by JBC Solution Sdn Bhd, Rahayu Partnership along with JTJB will be participating as expert speakers for the upcoming "SHIP ARREST 2012" in January 2012.

For more information, please contact Alan Lim at alan_lim.kl@jtjb.com

Other JTJB events

2012 will likely be a busy year for Rahayu Partnership and the JTJB Global Network, we will be involved in events such as:

- Ship Arrest 2012 by JBC Solutions Sdn Bhd
- Ship Financing 2012 by JBC Solutions Sdn Bhd
- Maritime Law & Practice, Jakarta 2012 by Global Conferences Ltd

- 4th Singapore Short Course by the Institute of Maritime Law, University of Southampton

- Posidonia Exhibition, Greece

For more information, please contact Alan Lim at alan_lim.kl@jtjb.com



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