MARITIME REFORM
Arrest for Arbitration*

I congratulate the Bar Council for including a session in this Conference on Maritime Law, with particular focus on Maritime Reform.

2. Malaysia has a vision of becoming a maritime nation. Central to this vision is the efficacy of its maritime laws; the framework within which the dynamics of maritime trade evolves. The passing of substantive laws, and the implementation and enforcement of these laws, are fundamental to the continued growth of the maritime industry in Malaysia, and the increased confidence in Malaysia as a true maritime nation, for they reflect a genuine commitment to the maritime cause.

A. Arrest for Security

3. Obtaining security for a claim is high priority in a maritime dispute. The arrest of a ship is an exceedingly potent right conferred upon maritime traders. This right evolved largely from the international nature of shipping trade, with ships moving continually from port to port, utilizing services and creating obligations in short intervals of time, and departing from such ports leaving behind no assets upon which unfulfilled obligations can attach.

4. The right of arrest in many countries are derived from provisions of international conventions; particularly *The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels* 1952, commonly known as *The Arrest Convention*.

B. The Arrest Convention

5. *The Arrest Convention* opens by recognizing the desirability of determining by agreement uniform rules of law relating to the arrest of sea-going ships, and is concluded for that purpose. *The Arrest Convention* identifies the categories of claims that are recognized as maritime claims. These include, amongst others, claims arising out of damage and loss of life caused by a ship; agreements relating to the carriage of goods in a ship, or for the use or hire of a ship; goods supplied to a ship for her operation; the construction or repair of a ship; wages of master or crew.

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6. *The Arrest Convention* defines arrest as the detention of a ship by judicial process, to secure a maritime claim, and prescribes for the arrest of the particular ship in respect of which the maritime claim arises, or of a sistership, being a ship in the same ownership. It permits the release of the ship from arrest upon sufficient bail or other security being furnished.

7. Article 7 of *The Arrest Convention* states the circumstances in which the Courts of the country arresting the ship may proceed to determine the case on its merits. It is clear that the primary purpose of *The Arrest Convention* is to regulate the ability to arrest ships, whether or not the arresting country has jurisdiction to hear the dispute on its merits:

> *"Article 7*
>
> *(1)* ***The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits****;*
>
> - ***if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts;***
>
> - ***or*** *in any of the following cases namely;*
>
> *(a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;*
>
> *(b) if the claim arose in the country in which the arrest was made;*
>
> *(c) if the claim concerns the voyage of the ship during which the arrest was made;*
>
> *(d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910;*
>
> *(e) if the claim is for salvage;*
>
> *(f) if the claim is upon a mortgage or hypothecation of the ship arrested.*
>
> *(2)* ***If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide;*** *and the Court or other appropriate judicial authority of the country in which the arrest is*

> *made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.*
>
> *(3) If the **parties have agreed to submit the dispute** to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or **to arbitration, the Court** or other appropriate judicial authority **within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.** …"*
>
> *(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security. …"*
>
> (emphasis mine)

8. So it is that the arrest of a ship by one country, whilst substantive proceedings on the merits of the case is tried in another jurisdiction or forum, was envisaged and endorsed by *The Arrest Convention*. The arrest of ships was intended to lend efficacy to the legal system of recovery of maritime debts, and enforcement of maritime claims.

C. The Malaysian Admiralty Jurisdiction and *The Supreme Court Act* 1981

9. Whilst Malaysia has not acceded to, nor ratified, *The Arrest Convention*, we have by an unusual method adopted a means to arrest ships to provide security for maritime claims. The Malaysian *Courts of Judicature Act* 1964, by Section 24 provides that:

> *"24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include –*
>
> *…*
>
> *(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England **under the United Kingdom Supreme Court Act 1981;** …"*
>
> (emphasis mine)

10. The United Kingdom adopts *The Arrest Convention*. *The Supreme Court Act* 1981 of England, and its precursor *The Administration of Justice Act* 1959, provide the legal framework within the United Kingdom for the implementation of *The Arrest Convention*. *The Supreme Court Act* 1981 therefore, identifies categories of claims that are classified as maritime claims, similar to that particularized in *The Arrest Convention*. Section 20 of *The Supreme Court Act* 1981 provides as follows:-

> *"Admiralty jurisdiction of High Court*
>
> *20. (1) The Admiralty Jurisdiction of the High Court shall be as follows, that is to say –*
>
> ***(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);***
>
> *(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);*
>
> *(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and*
>
> *(d) **any jurisdiction connected with ships** or aircraft which is **vested in the High Court apart from this section** and **is for the time being by rules of court** made or **coming into force after the commencement of this Act** assigned to the Queen's Bench Division and directed by the rules to be **exercised by the Admiralty Court**.*
>
> *(2) The questions and claims referred to in subsection (1)(a) are –*
>
> *(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;*
>
> *(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;*
>
> *(c) any claim in respect of a mortgage of or charge on a ship or any share therein;*
>
> *(d) any claim for damage received by a ship;*
>
> *(e) any claim for damage done by a ship;*
>
> *(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment,….*
>
> *(g) any claim for loss of or damage to goods carried in a ship;*
>
> *(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;*

(j) any claim –

(i) under the Salvage Convention 1989;

(ii) under any contract for or in relation to salvage services; or

(iii) in the nature of salvage not failing within (i) or (ii) above;

or any corresponding claim in connection with an aircraft;

(k) any claim in the nature of towage in respect of a ship or an aircraft;

(l) any claim in respect of pilotage in respect of a ship or an aircraft;

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

(o) any claim by a master or a member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(q) any claim arising out of an act which is or is claimed to be a general average act;

(r) any claim arising out of bottomry;

(s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty."

(emphasis mine)

11. *The Supreme Court Act* 1981, by Section 21 thereof, stipulates the instances when an action *in rem* may be commenced against a ship, which action lays the foundation for the arrest of that ship pursuant to the rules of the High Court.

12. It is to be observed that the admiralty provisions of *The Supreme Court Act* 1981 are not limited to the procedure of arrest, nor do they embody Article 7 of *The Arrest Convention*. Instead, *The Supreme Court Act* 1981 provides that the High Court shall have jurisdiction to ***hear and determine any questions*** pertaining to a maritime claim, *i.e.* the jurisdiction to try all maritime claims on its merits.

13. Whilst *The Supreme Court Act* 1981 is consistent with the first part of Article 7 of *The Arrest Convention*, which recognizes the domestic laws of a country governing jurisdiction, it does not empower the High Court to arrest a ship in circumstances where the maritime claim is to be heard and determined by another forum.

14. The provisions of Sections 20 and 21 of *The Supreme Court Act* 1981 pertaining to the admiralty jurisdiction of England are, by our *Courts of Judicature Act* 1964 expressly incorporated as Malaysian law. By this indirect method, Malaysia gives effect to *The Arrest Convention*, which is generally adequate as a means of obtaining security in Malaysia for maritime disputes litigated in the Malaysian Courts.

15. Nevertheless, not only does it draw comment that Malaysia, as a sovereign state 50 years from independence, finds it necessary to adopt in this fashion the specific legislation of another country, this means of providing legal rights in Malaysia does have its limitations and complications; as illustrated in the context of maritime arbitration.

D. Arrest for Arbitration

16. The trend to resolve disputes by arbitration cannot be ignored. Maritime disputes especially, are commonly referred to arbitration. Charterparties, bills of lading and shipbuilding contracts almost always stipulate for arbitration. Notwithstanding, the arbitration agreement the dispute remains a maritime dispute, and security for the maritime disputes remains high priority.

17. Yet, in Malaysia a ship cannot be arrested as security for a maritime dispute that is referred to arbitration. This is the inherited legacy of *The Supreme Court Act* 1981, which had led to an unsatisfactory position in England until the early 1980s, as recognized in the English Court pronouncements in a series of cases[1].

18. The position then in England was as expressed by the English Court of Appeal in *The Andria* and *The Tuyuti*.

[1] *The Cap Bon* [1967] 1 Lloyd's Rep 543
The Golden Trader [1975] 1 QB 348
The Rena K [1979] 1 All ER 397
The Andria (later known as *The Vasso*) [1984] 1 All ER 1126
The Tuyuti [1984] 1 QB 838

19. In *The Andria*, the claimant had filed a Writ in Rem. Prior to service of the Writ, the parties agreed to refer the dispute to arbitration, and arbitration was thereafter actively pursued. The Defendant sold *The Andria*, the only ship belonging to the relevant shipowner. The Plaintiff anxious of its ability to realize payment on any award it might obtain in the arbitration, proceeded to serve the Writ in Rem and Warrant of Arrest on *The Andria* when she next entered the jurisdiction. The Defendant furnished security to obtain the release of the ship from arrest, and later applied to Court for the discharge of security. The English Court of Appeal confirmed that the High Court's Admiralty jurisdiction to issue a warrant of arrest was to be exercised in support of the Court's jurisdiction ***to hear and determine the maritime claim***; and was not to be invoked to provide security where the substantive claim was not to be determined by the arresting Court. Robert Goff LJ had this to say:

> *".. **We have to consider the propriety of an arrest obtained in such circumstances; and we think it right to approach that question in the context of the general principles governing the relationship between proceedings in arbitration and actions (in particular, actions in rem) in court.***
>
> *The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem) procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of course, have certain consequences. For example, if an action is begun, the other party may apply for a stay of proceedings. Generally speaking, the court's power to grant a stay in such a case is discretionary; though of course in cases falling within s 1 of the Arbitration Act 1975 the court is bound to grant a stay. Again, if a party actively pursues proceedings in respect of the same claim both in the court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the court; if so, the court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim: see The Cap Bon [1967] 1 Lloyd's Rep 543.*
>
> *Next, let it be supposed that, before the court has granted a stay of proceedings under the Arbitration Acts, the plaintiff has obtained security by the arrest of a ship in an action in rem. If the stay is granted in the exercise of its discretionary power under s 4 of the Arbitration Act 1950, the court may require, as a condition of granting a stay, that alternative security should be made available to secure an award made in the arbitration proceedings see The Golden Trader [1974] 2 All ER 686, [1975] QB 348. If a mandatory stay is granted under s 1 of the Arbitration Act 1975, no such term can be imposed. But it has been held by Brandon J that, where it is shown by the plaintiff that an arbitration award in his favour is unlikely to be satisfied by the defendant, the security available in the action in*

> *rem may be ordered to stand so that, if the plaintiff may have thereafter to pursue the action in rem (possibly using an unsatisfied arbitration award for the purpose of an issue estoppel) the security will remain available in that action: see The Rena K [1979] 1 All ER 397, [1979] QB 377. (We have not had to consider the principle in that case, and we have not heard argument on the point; however, we proceed on the basis that that principle is sound).*
>
> *However,* ***on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, e.g. arbitration proceedings. The time may well come when the law on this point may be changed: see s 26 of the Civil Jurisdiction and Judgments Act 1982, which has however not yet been brought into force. But that is not yet the law****. It follows that, if a plaintiff invokes the jurisdiction of the court to obtain the arrest of a ship as security for an award in arbitration proceedings, the court should not issue a warrant of arrest. …"*[2]
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> (emphasis mine)

20. Hence, the position in England was that where there was either an arbitration agreement, or arbitration was actively pursued, an arrest of a ship as security was vulnerable to challenge. A significant derogation of the fundamental right to security of a maritime claimant.

E. *The Rena K* Principle

21. Several consequences could result dependant on whether the arbitration agreement was domestic or non-domestic, and whether arbitration had commenced before the ship was arrested. Often, what became known as *The Rena K* principle had to be applied to justify an arrest in the context of an arbitration.

22. *The Rena K* principle finds its roots in Brandon J's pronouncement in *The Rena K*; a case in which a ship was arrested, and an application for a stay of the *in rem* proceedings filed by the Defendant for the reason that there was an agreement to refer the dispute to arbitration. The Defendant sought the discharge of security furnished for the release of the ship from arrest, consequential upon the stay of proceedings. Brandon J discusses in detail the prescribes of the laws on stay of proceedings for arbitration, and the arrest of ships as security.

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[2] *The Andria* [1984] 1 All ER 1126, at pages 1135 - 1136

23. It was therefore, the case that in a non-domestic arbitration agreement, where the grant of a stay is mandatory (as under Section 6 of the Malaysian *Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act* 1985), the High Court did not retain a discretion to impose terms upon which a stay is granted. Hence, the provision of security could not be imposed as a term on which the *in rem* proceedings were stayed. Since an arrest of a ship was only capable of being maintained as security for a maritime claim that was to be determined by the arresting Court, it was necessary pursuant to *The Rena K* principle to establish that any stay of the *in rem* action granted was likely to be lifted at a subsequent time, resulting in the *in rem* action being heard eventually to conclusion. Security by arrest of the ship was then justified in its retention, towards a potential judgment in the *in rem* action.

24. The likelihood of the stay not being final was established by proving that the Defendant was financially unsound and therefore, any arbitration award may well remain unsatisfied, which would require the stay to be ultimately lifted and judgment entered against the ship at a future date.

25. This position in law made the arrest of a ship in the context of an arbitration agreement very difficult.

26. Brandon J, whilst propounding the ingenious *The Rena K* principle, commented on the desirability for Parliamentary intervention:-

> *"The* ***conclusion on the jurisdiction point which I reached*** *in The Cap Bon and followed in The Golden Trader* ***was****, from the point of view of what I believe that the law on the matter ought to be, as distinct from what I felt obliged to hold that it was,* ***an unsatisfactory conclusion****.*
>
> ***I say this for two reasons****. The first reason is that I think that, quite apart from any international convention relating to the matter to which the United Kingdom is a party, the court should have power, when it grants a stay, on the ground that the dispute should be decided by another tribunal, of an action in rem in which security has been obtained to retain such security to satisfy any judgment or award of the other tribunal. When the grant of a stay is discretionary, as in domestic arbitration cases, foreign jurisdiction clauses cases and vexation cases, the court can get round the lack of such power, and has in practice got round it, by using the alternative security method. It would, however, be more satisfactory, in my view, even in those cases, to use the retention method, which is both more simple and direct, and which is, I believe, commonly used in other jurisdictions.*
>
> *The second reason is that* ***art 7 of the Brussels Arrest Convention, to which the United Kingdom is a party, contemplates that a court, which stays an action on the ground that the dispute should be decided by another tribunal, will have power to retain any security obtained in the action for the purposes mentioned above****. I drew*

> *attention to this fact, as I said earlier, in the course of my judgment in The Golden Trader. I further thought it right to point out at the end of my judgment in that case that, if the view on the jurisdiction point which I had formed was correct,* ***this court did not have the power which the convention contemplated that it would have, and this was a situation which could not be regarded as satisfactory and which it would be desirable for Parliament to remedy****....''*[3]
>
> (emphasis mine)

F. Section 26
The Civil Jurisdiction and Judgment Act 1982

27. England cured this deficiency by bringing into effect on 1st November 1984, Section 26 of *The Civil Jurisdiction and Judgment Act* 1982, which provides that:-

> *"Security in Admiralty proceedings in England and Wales or Northern Ireland in case of stay, etc.*
>
> *26. (1) Where in England and Wales or Northern Ireland* ***a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration*** *or to the determination of the courts of another part of the United Kingdom or of an overseas country,* ***the court 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*** *or judgment which –*
>
> *(i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and*
>
> *(ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or*
>
> *(b)* ***order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment****.*

[3] *The Rena K* [1979] 1 All ER 397 at page 413

> *(2) Where a court makes an order under subsection (1), it may attach such conditions to the order as it thinks fit, in particular conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings.*
>
> *(3) Subject to any provisions made by 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 made by a court under subsection (1) as would apply if it were held for the purposes of proceedings in that court.*** *…"*
>
> (emphasis mine)

28. Section 26 of *The Civil Jurisdiction and Judgment Act* 1982 appears to have successfully curtailed attempts to thwart the right to security for arbitration, as seen in the decisions of the English Courts on the construction and ambit of Section 26, giving the spirit of Section 26 full effect, beyond the letter of the section[4].

29. Unfortunately, the position in Malaysia remains unremedied.

30. The attempt to assert that Malaysia too, obtains the benefit of the current English laws on arrest, including Section 26 of *The Civil Jurisdiction and Judgment Act* 1982 was unsuccessful.

G. *The Vinta*

31. In *The Vinta* (1993) (unreported); a dispute had arisen under a charterparty, which was referred to arbitration for determination, in accordance with the terms of the charterparty. The counterclaiming party in the arbitration arrested *The Vinta* when she entered Malaysian waters, as security for their claim in arbitration. The Defendant applied for the stay of the Malaysian proceedings, and the release of the ship from arrest. In the Malaysian High Court, Shaik Daud bin Md. Ismail J stayed the Writ in Rem upon the application of the Defendant shipowners, but allowed the arrest of the ship to continue unless equivalent security was furnished. On appeal, which at that relevant time in 1993 was directly to the Malaysian Supreme Court, the arrest was set aside and the security furnished ordered cancelled. The Supreme Court further awarded damages for the wrongful arrest of *The Vinta*, to be assessed and paid by the arresting party to the Defendant shipowners.

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[4] *The World Star* [1986] 2 Lloyd's Rep 274
The Jalamatsya [1987] 2 Lloyd's Rep 164
The Bazias 3 [1993] 2 All ER 964

32. Though no grounds were delivered by the Supreme Court, the notes of proceedings before the High Court are indicative of the submissions made on behalf of the respective parties. In deciding for the shipowners on appeal, it can be assumed that the Supreme Court found that Section 26 of *The Civil Jurisdiction and Judgment Act* 1982 of England, and the liberalization of the laws on arrest for arbitration that came with it in England, did not apply in Malaysia for the reason that Section 24 of the Malaysian *Courts of Judicature Act* 1964 limited the applicable admiralty jurisdiction in Malaysia specifically to the provisions of the English *Supreme Court Act* 1981 alone, and did not extend to encompass all other relevant provisions of law in England that supplemented the English admiralty jurisdiction.

33. Whilst I have reservations on this reasoning (since *The Supreme Court Act* 1981 by Sections 20 (1) (d) may be construed as having preserved the application of any other laws vesting jurisdiction in the High Court in connection with ships), *The Vinta* underscores the problems with the current Malaysian legislation, and the limitations it imposes in the adoption and implementation of maritime laws.

34. Not only is a maritime claimant's right to obtain security for its maritime claim uncertain once it proceeds to arbitration, the maritime claimant is further exposed to the risks of having to pay damages to the shipowner, if the arrest is set-aside; a consequence far more extreme than even *The Andria* suggests.

35. This position is now crystallized in Malaysia, as seen in the decisions of Abdul Malik Ishak J in *The Norma Splendour*,[5] and of Clement Skinner J in *The Swallow*[6].

H. The Difficulties

36. The difficulties surrounding this issue are many fold.

37. As our laws on arrest currently are premised on the principle that an arrest cannot be effected as security for arbitration proceedings, it is necessary to maintain that the Court action *in rem* against the ship in Malaysia, wherein the arrest is initiated, is distinct from the arbitration which is an *in personam* proceedings, and that the Malaysian action is intended to be pursued to finality on the basis that the award handed down in the arbitration is likely to remain unsatisfied. Hence, the Malaysian Writ in Rem would have to plead the original cause of action, state that arbitration is pending and that the award therein is unlikely to be satisfied, and seek

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[5] [1999] 6 MLJ 652

[6] [2003] MLJU LEXIS 237. (See also the decision in *The Dong Moon* [1979] 1 MLJ 152, although the application of the requirement for a mandatory stay may be questioned, since Section 6 of *The Convention for the Recognition and Enforcement of Foreign Arbitral Awards Act* 1985 was not then in force, and the prevailing provision of *The Arbitration Act* 1952, Section 6, *pari material* to Section 4(1) of the English *Arbitration Act* 1950, retained in Court the discretion to refuse a stay, save upon the provision of security, as discussed by Brandon J in *The Rena K* [1979] 1 All ER 397 at page 410.)

damages on the original cause of action and the sale of the vessel. There must therefore, be evidence placed before the Court at the time of arrest, of the shipowner's financial instability to sustain the arrest. This type of evidence is not readily obtained, especially at early stages of a dispute.

38. Should the Defendants apply for a stay of the Malaysian proceedings, *The Rena K* principle would be invoked to submit that the arrest or security be retained despite the stay of proceedings, since the stay will not be final by reason of the doubts cast on the finances of the Defendants; giving rise to anticipation of the Malaysian action proceeding to completion against the ship. The arbitration award would be relied upon as creating an issue estopple when entering Judgment in the *in rem* proceedings. The arrest would stand as security for the anticipated judgment in the Malaysian action.

39. In reality though, the Defendant shipowner may not apply for a stay of the *in rem* proceedings. Hence, the application of *The Rena K* principle may not be given an opportunity to engage in support of the arrest. The Defendant shipowner may apply instead, to strike out the claim, or to set aside the Writ in Rem, for being vexatious and an abuse of process by reason of multiplicity of proceedings.

40. The Malaysian Courts may, in that event, be reluctant to apply *The Rena K* principle, as seen in *The Swallow*[7].

> *"…This leads me to the plaintiff's second submission i.e. that it had instituted these proceedings to seek security on the principle in The Rena K.* ***In my judgment the principle in The Rena K has no application to the facts of the present case****. In my view that principle envisages a situation where after a ship or cargo is arrested in an action in rem, the owner applies for a stay the court can order that security be provided, upon being satisfied that if for any reason the order of stay is subsequently lifted, any judgment the plaintiff may obtain in the in rem action will remain unsatisfied.*
>
> ***On the facts before me, there is no application for a stay by either the defendant or the interveners.*** *It is quite obvious to me why the defendant has not done so – the matters in dispute between the parties are already before arbitrators in London. The plaintiff themselves have not indicated that they wish to apply for a stay of these proceedings either.* ***Since there is no application for stay, the question of whether security should be ordered in case 'the stay of the action' should subsequently be lifted does not arise at all****. …"*
>
> (emphasis mine)

[7] [2003] MLJU LEXIS 237, but observe the English approach taken in *The Jalamatsya* [1987] 2 Lloyd's Rep 164, *albeit* with the benefit of Section 26 of *The Civil Jurisdiction and Judgment Act* 1982

41. If no stay of proceedings is applied by the Defendants, the Plaintiff may have to either move for a stay of proceedings pending the outcome of the arbitration, to avoid multiplicity in findings; or be prepared to elect to proceed with the trial in Malaysia.

42. These are all terribly uncomfortable positions to be in, when the reality is that security is wanted in aid of arbitration. Arrest was never intended to be dependent on the financial instability of the Defendant, but rather to guarantee recovery for the Plaintiff. It was not meant to complicate enforcement, but to ease recovery.

43. Malaysian law on arrest for arbitration is thus, in a wholly unsatisfactory state. I pause for a moment, to trace our admiralty jurisdiction.

44. Pursuant to *The Courts Ordinance* 1948, Section 47 thereof and the 2nd Schedule thereto, it was stipulated that the original civil jurisdiction of the High Court in respect of the whole of the Federation was the *"Jurisdiction and authority of a like nature and extent as exercised by the Chancery and King's Bench Divisions of the High Court of Justice in England"*. The admiralty jurisdiction was then, identical in all aspects with England.

45. This provision was repealed by *The Courts of Judicature Act* 1964 which provided by Section 24(b) that the civil jurisdiction of every High Court shall include the *"same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Administration of Justice Act 1956"*. *The Administration of Justice Act* 1956 was the admiralty provision preceding *The Supreme Court Act* 1981. The limitation of our admiralty jurisdiction to that of *The Administration of Justice Act* 1956 alone, assumed the entire admiralty jurisdiction of England to be codified or encompassed within *The Administration of Justice Act* 1956.

46. In 1984, *The Court of Judicature (Amendment) Act* amended Section 24(b) of *The Courts of Judicature Act* 1963 to state that the admiralty jurisdiction to be *"the same jurisdiction and authority in relation to matters of admiralty as is for the time being exercisable by the High Court of Justice in England"*. This amendment allowed for the general body of admiralty laws of England to be applied in Malaysia, not limited to that under *The Administration of Justice Act* 1956 (or *The Supreme Court Act* 1981 which had by then come into force in England). Had this position remained, *The Civil Jurisdiction and Judgment Act* 1982 of England and Section 26 thereof, would almost certainly have been accepted in Malaysia, permitting arrests for arbitration. The decision in *The Vinta* would have been quite different.

47. However, Parliament chose to revert to the earlier style of limited adoption by the provision introduced through of *The Court of Judicature (Amendment) Act* 1986, which is the current form of prescription of jurisdiction *i.e. "the same jurisdiction and authority in relation to matters of admiralty as is had in the High Court of Justice in England under the United Kingdom Supreme Court Act 1981"*, thereby seemingly ousting the application in Malaysia of the ancillary laws that supplement the admiralty jurisdiction of England.

48. The end result is this; Malaysia is shackled. Those who choose to arbitrate maritime claims lose the right of arrest, save in a very narrow instance, and that too with the risk of having to pay damages, if the Courts ultimately find the arrest unjustified on the *The Rena K* principle.

I. Why Reform?

49. Unless we change this position soon, Malaysia has much to lose. Most, if not all, maritime standard forms and many industry contracts, expressly provide for arbitration as the chosen forum of dispute resolution. This trend is here to stay. It is part of the globalization process. Arbitration is perceived as a more expeditious method of dispute resolution. A party exerting a choice of forum should not be deprived of the internationally recognized fundamental right of arrest for security in relation to maritime claims. The freedom to contract must be upheld, without penalty of the loss of right of arrest. Its effects are otherwise far reaching – not only on a point of principle and ideology which is out of alignment with international convention, but in terms of the practical impact on Malaysian maritime litigants and foreign users of Malaysian waters, ports and systems.

50. At present to arrest whilst arbitration is afoot could amount to an abuse of process, and the claimant liable in damages for wrongful arrest, which damages could run into a few million Ringgit depending on the length of time the ship is under arrest. Legal advisors are duty bound to warn of the possible challenge, and consequential award of damages in the event *The Rena K* principle is found inapplicable. This obviously deters an arrest within Malaysian waters. Potential litigants wait for the ship to call in another jurisdiction that allows for arrest as security for arbitration, and effect the arrest in courts of the favourable forum. There is loss of revenue to Malaysia, in terms of legal services, tax on such services, income generated by ancillary services rendered whilst a ship is under arrest, and commission payable to Treasury from the proceeds upon the judicial sale of the arrested ship. Loss of such revenue should be of significant concern to Malaysia. England, Hong Kong and Singapore for instance, go to great lengths to brand their legal system as efficient and effective, to retain it as a source of substantial income.

51. Ultimately, the inability to arrest for arbitration impacts on Malaysia's status and image as a progressive maritime nation. If Malaysia cannot respond to the basic and fundamental right of the industry to arrest as security for the chosen forum of dispute resolution, she would be failing as a maritime nation.

52. There clearly is an urgent need for change.

53. Singapore, like Malaysia, was once unable to arrest for arbitration; but Singapore responded to the industry's need. It legislated an amendment 3 years ago. Maritime users of the Singapore systems are assured of speed and efficiency in changes to the laws to meet the dynamics of the industry. Malaysia has to offer the same if she is to be taken seriously.

54. Laws to permit an arrest for arbitration can easily be formulated. The laws can be modeled on the English Section 26 of *The Civil Jurisdiction and Judgment Act* 1982, effected through an amendment to *The Courts of Judicature Act* 1964, or by a provision similar to the Singapore Section 7 of *The International Arbitration Act* (Chapter 143A) and Section 7 of the Singapore *Arbitration Act* (Chapter 10), by amendments to the Malaysia *Arbitration Act* 1952 and *The Convention for the Enforcement and Recognition of Foreign Arbitral Awards Act* 1985. In fact, our provision may be made superior, benefiting from the English experience on Section 26 of *The Civil Jurisdiction and Judgment Act* 1982, which identify some lacuna in the expression of their provision.

55. The real question is: How soon can we effect the change? The demand is for change now, not in 5, 10 or 15 years.

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