South African court orders return of Club LOU

A recent decision in South Africa has positive practical consequences for shipowners providing security to release vessels from arrest. The court ordered that the security be released even though the order lifting the arrest was under appeal.

Published 02 September 2024

In a recent Gard case the Cape Town High Court clarified the effect of an application for leave to appeal an order setting aside a vessel arrest. This is an encouraging step for shipowners - the court held that despite the pending appeal, the security for the claim should be released. This resulted in the return of the Club letter of undertaking (LOU) to Gard before hearing the appeal relating to the arrest.

Background

Arrest

In March 2015 the MV ASTURCON was arrested without notice, by Afriline Denizcilik Veg Emi Kiralama Ltd (Afriline), for a claim of approximately USD 252,000 against another vessel, claimed to be its sister ship. Gard put up a letter of undertaking (LOU) within a matter of days to secure the release of the vessel and the vessel owners applied for an order:

- for security for costs
- to set aside the arrest and
- to return the Club LOU.

Security for owners' costs

In May, Afriline were ordered to provide for security for costs in the form of a bank guarantee.

Application to set aside the arrest and return the LOU

By the time of the hearing on 3 June, Afriline had still not provided the bank guarantee as security for costs. The court ordered that if Afriline failed to put up the bank guarantee by noon on 9 June, the arrest of the ASTURCON would be set aside and owners would be entitled to have the LOU returned within 24 hours (the June Order). Afriline did not comply and the court refused its application (made after the deadline) for an extension of time.

Application by Afriline for leave to appeal

Afriline asked for leave to appeal the June Order - which the High Court refused but the Supreme Court granted.

Application by owners for return of the LOU

Afriline did not return the LOU, so on 1 July the owners applied to the High Court for return of the LOU.

The decision

The issue before the High Court was whether the LOU should be returned to Gard pending the appeal. The owners argued that Afriline was in contempt of the June Order and the security constituted by the LOU cost them in the region of USD 2,000 per month to maintain. Afriline opposed the application on the basis that the appeal should be determined first. It argued:

i. That by *jumping the queue* and having its application heard urgently and before the appeal was determined, the owners would have an unfair and highly prejudicial procedural advantage.

The judge's view was that a vessel arrest without notice is an invasive process, so an affected party is permitted to approach a court on an urgent basis to apply for the setting aside of an arrest. Logic requires the effect of a pending appeal on a LOU provided in an arrest situation should also be determined as a matter of urgency. Furthermore, the maintenance costs of the

LOU in this case were substantial, so fairness dictated that the effect of the June Order, pending the appeal, be determined promptly.

ii. That the granting of leave to appeal effectively suspended the June Order.

The judge considered a number of similar cases as well as the views of leading shipping law specialists. The court's starting point was section 18 (1) of the Superior Courts Act 2013 and Uniform Rule 49 (11). These provide that *the operation and execution of a decision,* which is the subject of an appeal, is suspended pending the decision of the appeal. The point being that for suspension to come into effect there must be a decision capable of *execution*. The judge found that the June Order was similar to the arrest *having been unsuccessfully sought*. For the purposes of Section 18 (1), this was a *negative order,* which could not *be carried into execution*, i.e. there was nothing to be suspended pending the appeal.

iii. That the wording of the LOU secured Afriline's claim against the vessel and costs, *including* the costs of the pending appeal. Therefore, return of the LOU could not be ordered as it represented continued security for the appeal proceedings.

The judge concluded that the LOU should be considered in the context in which it was given, namely to secure the release of the vessel and create a *deemed arrest* of the vessel. It therefore followed that if the arrest was set aside by the June Order, the *deemed arrest* was terminated and the rationale for the LOU fell away. The LOU could not be interpreted as an undertaking to secure the costs of the pending appeal.

In September, the judge ordered Afriline to return the LOU to Gard within 24 hours, which it did.

Comment

South Africa has always been considered a haven for vessel arrest and has invariably been the jurisdiction of choice for claimants seeking to arrest. The decision in the ASTURCON is important because it clarifies the situation when an arrest order is successfully challenged by the vessel owners but the claimant appeals. Despite the pending appeal, the owners nevertheless are entitled to the return/release of any security provided (or the vessel should be allowed to sail from the jurisdiction). Furthermore, the court recognised that providing security to avoid delay to a vessel comes at a high financial cost to owners.

Shipowners are well aware that the financial impact of a detained vessel or the withholding of security can be considerable. When a vessel is arrested, owners' primary objective is to have the vessel released and the parties can lose sight of the continuing costs associated with providing security. Security is usually provided by a bank guarantee, by placing of funds in an escrow account or by a Club LOU. Provision of a Club LOU is a discretionary service which is decided on a case by case basis. It does not always involve costs for owners, however, every now and then a Club is requested to provide security for a claim not covered under the Club Rules - which was the case here. Whereas a Club would normally provide security for covered liabilities, it would only provide security for liabilities falling outside a Member's cover on a discretionary basis and then upon receipt of adequate counter-security in the form of a cash deposit into escrow or a first class bank guarantee. That was the situation in this matter, therefore the owners incurred security-related costs.

Particular points of interest arising from this case:

- Failing to meet the court's deadline may well have been Afriline's downfall - had it met the deadline for providing the bank guarantee or applied for an extension of time before the deadline expired, the end result may have been different

- Once a vessel is under arrest, the overriding factor should be its release through providing security in a form acceptable to the court/claimant - the rights and wrongs of the arrest should wait until a later date

- We can assist in ensuring the security and counter security wordings are back to back.

Questions or comments concerning this Gard Insight article can be e-mailed to the Gard Editorial Team.