

SHIP ARREST IN HONG KONG

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1. Please give an overview of ship arrest practice in your country.

Hong Kong is a Special Administration Region (SAR) of the People's Republic of China (PRC). As such it has a separate and distinct legal system from that of the PRC. Hong Kong has a common law system of justice which developed during the years when it was a British colony.

A ship - or one of its sister ships - may be arrested where:

- a claimant's cause of action carries with it a right of arrest;
- an in rem writ has been issued;
- the ship is available in Hong Kong; and
- no caveat against arrest has been entered.

2. Which International Convention applies to arrest of ships in your country?

The Brussels Convention 1952, as enacted in Hong Kong legislation.

3. Is there any other way to arrest a ship in your jurisdiction?

No.

4. Are there alternatives e.g. saisie conservatoire or freezing order?

It is possible to get an injunction. This is more difficult and expensive than arresting the ship. Civil Justice Reforms were implemented in April 2009. Innovations in the regime have put interim relief, similar to *saisie*, into effect. The reforms have opened up Hong Kong to claims where injunctions are available to provide support and security for foreign proceedings.

5. For which types of claims can you arrest a ship?

The High Court Ordinance lists the types of maritime claim for which a vessel may be arrested. They include claims for:

- possession or ownership of, or mortgage on, a ship;
- loss of life or personal injury because of a defect in a ship;
- damage done by or to a ship;
- loss or damage to goods carried by ship and other claims relating to carriage of goods by ship;
- use or hire of a ship;
- salvage, towage and pilotage;
- goods and materials supplied to a ship;
- construction or repair of a ship;
- wages owed to a ship's master or crew;
- acts of general average;
- bottomry; or
- collisions.

Arrest is impossible in some cases (e.g. in relation to claims for insurance premiums). The purpose of an arrest is to obtain security in respect of a court judgment in that action. The court should not allow the arrest of ships for other purposes. In the 2014 case the "KOMBOS" [2014] HKCU 1698, the court upheld the arrest of a vessel even though the Plaintiff had already obtained an arbitration award. The effect of this judgment is significant as it means that vessels can still be arrested under the in rem jurisdiction of the court so long as the judgment or arbitration award in personam remains outstanding. The court's jurisdiction can be invoked to secure claims in arbitration where the law of the place governing the arbitration permits this.

An arrest intended to force the party affected to agree to a foreign jurisdiction is outside the purpose of an action in rem. Where a plaintiff has already commenced an action in a foreign jurisdiction, a

duplicate action in rem commenced in Hong Kong will be considered vexatious and is liable to be set aside.

6. Can you arrest a ship irrespective of her flag?

Usually, vessels under any flag may be arrested. However, if the vessel belongs to a port of a state having a consulate in Hong Kong and the arrest is for possession of the ship or in respect of outstanding crew wages, a notice of action must be sent to the consul and a copy of the notice annexed to the affidavit to lead warrant.

Hong Kong is a Special Administrative Region of the PRC and this status has given rise to questions of whether legal claims can be brought in the Hong Kong courts against entities which form a part of the PRC Government and whether foreign states are entitled to claim immunity from legal claims brought in Hong Kong courts.

In *Intraline Resources Snd Bhd v The Owners of the Ship or Vessel "Hua Tian Long"*, it was held that the Guangdong Salvage Bureau (GSB), which is an entity of the PRC, could rely on "Crown immunity" after their derrick barge, "Hua Tian Long", was arrested for an alleged failure to perform a charterparty. The doctrine of Crown Immunity developed whilst Hong Kong was a British colony and meant that the Crown was immune from the processes of its courts. In 1997, the PRC became the sovereign such that the organs of the PRC can now claim immunity in response to claims against them in Hong Kong.

In *FG Hemisphere v Democratic Republic of Congo* two arbitral awards were obtained against the Democratic Republic of Congo ("the DRC") because it defaulted on its obligations in relation to a contract to build a hydroelectric facility. The DRC claimed state immunity and the Hong Kong Court of Final Appeal sought a ruling by the National People's Congress (NPC) of the PRC under provisions of the Basic Law. The NPC Standing Committee unanimously confirmed that the doctrine of absolute state immunity applies in Hong Kong, as it does in Mainland China. The principle of restrictive immunity no longer applies.

7. Can you arrest a ship irrespective of the debtor?

Yes, subject to Sovereign and Crown immunity.

8. What is the position as regards sister ships and ships in associated ownership?

A plaintiff may proceed in rem against any ships under the same beneficial ownership. The writ should be issued against all of the ships. It must subsequently be amended by striking out all names except that of the ship on which the writ has been served or against which a warrant of arrest has been issued.

9. What is the position as regards Bareboat and Time-Chartered vessels?

Bareboat-chartered vessels can be arrested, but not time-chartered vessels.

10. Do your Courts require counter-security in order to arrest a ship?

No. In limited circumstances including where the plaintiff is foreign, the defendant can apply to the court for an order to compel the plaintiff to give security for the defendant's litigation costs, subject to the court's discretion.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

Maritime claims depend on the ownership of the ship. A ship can only be arrested if the owner at the time of the cause of action is still the owner at the time of arrest. Maritime liens can be enforced regardless of ownership. An identical arrest procedure applies in both cases.

12. Does the Hong Kong SAR recognise maritime liens? Under which International Convention, if any?

Hong Kong recognizes maritime liens arising in connection with a number of specified claims such as claims for:

- damage done by a ship;
- salvage rendered to a ship;
- wages owed to a master or seaman;
- masters' disbursements; and
- bottomry.

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

Arrest documents can be issued within 48 hours of receiving the file. Although there are certain difficulties, documents can be issued and executed on emergency application to a duty judge out of normal office hours. This can be achieved by solicitors undertaking to issue a writ and swear an affidavit in support of the warrant at the first available opportunity when the court re-opens.

14. Do you need to provide a Power of Attorney, or any other documents in respect of the claim to the Court?

No but solicitors' firms in Hong Kong require a formal written retainer before advising or acting on instructions on behalf of a client.

Apart from the documents to be exhibited in the affidavit to establish a prima facie right to arrest, no other documents are required.

According to Order 75/5/14 of the Rules of the High Court, there is no prescribed or practice form for the affidavit. Instead, an outline of the form is provided. The affidavit must state certain specified details, such as the nature of the claim, the parties' details and the name of the ship.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

The claimant's solicitor will apply to issue a warrant of arrest, supported by an affidavit. The caveat book must be searched for caveats against arrest. A written application must be made to the registrar for leave to search; this can be done by letter. The warrant, once issued, is filed with the bailiff, together with a request to execute the warrant and an undertaking to pay the costs of arrest. The affidavit consists of a written statement of facts and belief, with the sources and grounds thereof, and is made under oath. It constitutes the only evidential requirement for arrest. An undertaking to pay the Bailiff's expenses must also be submitted.

Documents cannot be filed electronically. Notarisation and/or apostille certification is not required but if any documents need to be translated then these must be certified by a notary.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

The court will usually accept jurisdiction. However, if grounds exist for a forum non conveniens application, or if the claim arises out of a contract containing an exclusive foreign jurisdiction clause, the proceedings may be stayed in favour of the relevant foreign jurisdiction.

The court will not insist on hearing an entire action commenced by the issuance of a writ followed by an arrest. The parties can agree an alternative jurisdiction. For example, this frequently happens in cases involving collisions in international waters.

17. What is the procedure to release a ship from arrest?

This is done by filing a Praecipe demanding the court to issue a Warrant of Release. An undertaking issued by a solicitors' firm to pay all charges and expenses incurred by the Chief Bailiff is required to be filed at the same time. The agreement of the arresting party and all caveators must be obtained. This is normally done by the parties signing their names on the Warrant of Release expressing their consent to release the ship from arrest.

18. What type of security needs to be placed for the release?

The party seeking release of the ship should obtain the consent of the arresting party (and the caveators, if any) to the issue of a release by giving bail to his/their satisfaction. The arresting party may agree to accept a P&I Club Letter of Undertaking or a guarantee issued by a bank or insurance company on wording acceptable to him. The court does not have power to intervene in negotiations over private security arrangements but it is always open to the party seeking release of the ship to provide bail or make payment into court to secure the release of the ship under arrest.

19. Does security need to cover interest and costs?

The arresting party is entitled to sufficient security to cover the amount of his claim with interest and costs.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

No, not without the consent of the arresting party.

21. How long does it take to release the ship?

Within a few hours.

22. Is there a procedure to contest the arrest?

The party seeking release of the vessel may make an application to court on the basis that the court does not have jurisdiction to issue the Warrant of Arrest. Such application is usually made on grounds that the party seeking arrest had acted in bad faith or in a grossly negligent manner or that he had failed to disclose material facts known to him at the time the affidavit leading to the issue of a warrant of arrest was sworn.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

Although a writ may be issued earlier than an application for a warrant of arrest, service of the writ can only take place when the vessel is in Hong Kong jurisdiction. The vessel is then arrested. The defendant has 14 days to acknowledge service and another 14 days to file a defence.

24. Do the Courts of your country acknowledge wrongful arrest?

Whether or not a caveat has been entered, the court's test for ordering an inquiry into damages for wrongful arrest is whether the action was so unwarrantedly brought as to imply malice or gross negligence on the part of the plaintiff. The defendant must establish malice or gross negligence before the plaintiff can be held liable for damages. Damages can also be recovered where an arrest has been unduly continued.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

The principle of separate corporate personality is a cornerstone of Hong Kong company law. However, the court will lift the corporate veil where the protection given by incorporation under the law is being abused. The grounds for lifting the corporate veil are where the separate corporate personality is used to evade an existing legal obligation, or practise fraud or deception.

26. Is it possible to have a ship sold *pendente lite*; if so how long does it take?

The court will not order the appraisal and sale of a ship while the litigation is pending except for good reason, regardless of whether the action is defended. Where the action is defended and the defendants oppose the making of such an order, the court examines more critically the question of whether there is good reason to make the order.

The question of whether an order for the appraisal and sale of a ship under arrest in an action in rem should be made while litigation is pending normally arises only where there is a default of acknowledgment of service or defence, in which case such an order is commonly made on the plaintiff's application on the grounds that the security for the plaintiff's claim would otherwise be diminished by the continuing costs of maintaining the arrest, to the disadvantage of all interested parties (including the defendant, if it has a residual interest).

Where the defendant to an action in rem against a ship appears with the intention of defending the action, it almost invariably obtains the ship's release by providing bail or other security for the claim that is satisfactory to the plaintiffs.

The Hong Kong Court will more readily order sales of vessels *pendente lite*, especially in Crew and/or Mortgagee actions for which Hong Kong is a recognized centre in Asia.

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His practice focuses on Aviation; Shipping; Transport; Insurance; Claims and Recoveries; Carriage of Passengers and Goods; Casualty Investigation; Personal Injury; Pleasure Craft; Risk Management; Litigation; Dispute Resolution. Chris has been devising strategies to resolve complex, often high profile cases on behalf of clients and has special interests in hands-on involvement in case handling and practice management. He has published numerous works and articles.