

SHIP ARREST IN SCOTLAND



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

A party seeking to arrest a ship in Scotland can do so by application to either the Court of Session, which has jurisdiction over the whole of Scotland, or to the regional Sheriff Courts. The rules of each of the courts make specific provision for Ship Arrest under the chapters governing Admiralty matters. It is worthy of note that since 1 August 2012, the rules governing the Sheriff (local) Courts were extended to include specific Admiralty Actions (Chapter 49 of the Ordinary Cause Rules 1993), with particular reference to Arrestment of Ships, mirroring Chapter 46 of the Rules of the Court of Session 1994.

The power to arrest in Scotland, while originally based in the common law, now derives from the Administration of Justice Act 1956, Part V ('the 1956 Act'). In order to proceed with an arrestment the vessel must either be the ship with which the action is concerned or all the shares in the ship must be owned by the alleged defaulting party. Taking these restrictions into account, ships can typically be arrested in three main situations:

Firstly, a ship can be arrested to found jurisdiction, ie the presence of the ship in Scotland is sufficient to give the Scottish courts jurisdiction to hear a case against an identified "Defender". The Defender may seek to challenge this position with reference either to an express contractual jurisdiction clause or, in the case of the EU/EEA, to the Brussels and Lugano Conventions. Importantly this type of arrestment does not give a right of security or detention over the vessel.

Secondly, under Scots Law, a creditor who has raised court action, the "Pursuer", has the right to seek to arrest property of the alleged debtor as security against a debt claimed as part of a court action. This is arrestment on "the dependence" of an action. If certain criteria (discussed below) are met, a ship can be detained by an arrestment on this basis. Actions brought by a creditor who arrests the vessel as security against a debt are known as in personam.

Thirdly, in certain restricted circumstances (again discussed below) an action can be brought against the vessel itself in rem, regardless of ownership. If the circumstances fit, it is also sometimes competent to raise action both in rem and in personam.

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

Scotland, as part of the UK, is a party to the International Convention Relating to the Arrest of Sea Going Ships 1952 (The 'Convention'). The Convention is applied by the 1956 Act. The question of jurisdiction is governed by the Brussels Convention 1968 and the Lugano Convention 1988, as applied in Scotland by the Civil Jurisdiction and Judgements Act 1982 (as amended).

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

An application can be made to the Court of Session to arrest on the dependence of a foreign action, relying upon s27 of the Civil Jurisdiction and Judgements Act 1982. Such an arrestment would need to meet the criteria applied to any other Scottish ship arrest. Separately, a Scottish port can also detain a vessel for non-payment of dues, under s44 of the Harbours, Docks and Piers Clauses Act 1847.

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

Apart from the exceptions identified in answer 3 above, ie a s27 application or detention by a port, an order granted in accordance with the 1956 Act is the only option available. Claims subject to ship arrest

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

s47(2) of the 1956 Act sets out the types of claim upon which an arrestment can be sought. These are contained within 19 subsections of s47(2), (a) to (s) and include, amongst others, claims arising from “damage done or received by any ship”, “loss of life or personal injury”, “agreement relating to the use or hire of any ship” and “supply of goods or materials to a ship for her operation or maintenance”. It is important for a potential arresting party to consider carefully whether its claim falls within the listed types, to mitigate the risk of a claim for wrongful arrest.

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

Yes. However UK ships belonging to the Crown cannot be arrested, neither can warships nor vessels owned by foreign states, except where such vessels are engaged for commercial purposes.

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

Certain types of action can be raised against the vessel itself, giving rise to a real right (see answers 11 and 12 below). Such actions do not require the debtor to be the owner of the vessel.

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

Sister ships can, technically, be arrested in Scotland, subject to the condition that the defender must own all of the shares in the sister ship. As the modern practice is typically to have a separate legal entity in existence for each merchant vessel, in most instances it will therefore not be practically possible to arrest a sister ship.

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

Since 1 July 2010, Bareboat (Demise) Chartered vessels can be arrested in Scotland where the alleged debtor is the bareboat charterer. Time-Chartered vessels can only be arrested if the type of claim is one which gives rise to an action in rem, ie a maritime lien (see answers 11 and 12 below).

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

No.

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

Yes. In Scotland a maritime lien is directed against the ship itself and survives a change of ownership. It gives rise to a real rather than a personal right such as would arise from the successful pursuit of a more general ‘maritime claim’.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes. Scots Law recognises maritime liens in respect of collisions, salvage, seamen’s wages and master’s disbursements. Historically, a lien could also be claimed for bottomry and respondentia. Scotland, as part of the UK, is a signatory to the International Convention on Maritime Liens and Mortgages 1993, which came into force on 5 September 2004.

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

Proceeding on the assumption that the documents relevant to the claim are provided with the file, a court action including “warrant to arrest” can typically be prepared and put before the court within the same working day. The Scottish Courts require a judge to authorise the arrestment, as an action preliminary to the commencement of the actual case, so a written case must be submitted, with a short ex parte hearing in front of the judge. The ship must be in port or at anchor in a recognised anchorage at the time of service. Service of the arrestment must be formally effected by Messengers at Arms (process servers) upon the vessel. The whole process can be done expeditiously, within around 8-10 hours, but this will vary according to individual circumstances.

14. Do you need to provide a POA, or any other documents of the claim to the Court?

No POA is required. Typically, the Court would expect to see proof of the debt due and certified copy registry documentation.

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

Original documents are not typically required, provided true copies of the originals can be produced. The Scottish Courts do not presently accept electronic filing of documents.

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

As set out in answer 1 above, a vessel can be arrested to found jurisdiction in Scotland. However, if a particular contract or charter party relevant to the matters in dispute contains an exclusive jurisdiction or arbitration clause, the Scottish courts will typically give effect to that. In relation to a vessel with owners outside of the EU/EEA, the court will typically be able to deal with the substantive dispute, subject to the possible challenge of an argument of forum non conveniens. For EU/EEA members, the position is less clear. Depending upon one's reading of EC Regulation 44/2001 and its relationship with Scottish legislation arguments for the Scottish courts to either accept or cede jurisdiction can be made. The writer would recommend that potential arresting parties in this situation seek particular legal advice on the merits of their particular case.

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

After a Scottish Summons has been approved for Service by the Court, it must be served within a year and a day of that approval. However an arrestment on the dependence granted as a preliminary matter will fall after 20 days unless the arresting party expressly seeks an extension. If the service of court papers requires to be carried out abroad, this will almost certainly be necessary. Once the action is served, the Defender then has 21 days (or 42 days where served outwith the EEA) before the papers can be presented by the Pursuer to the Court again.

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

Yes. Such a finding can result in a significant award against the arresting party. As a matter of practice it is therefore necessary to consider carefully whether the arrestment sought falls within the specific categories set out in s47(2) of the 1956 Act.

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

Yes, but only in very limited circumstances, typically where a fraud can be proven to have been perpetuated.

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

No, this is not possible in Scotland. Sale of the vessel can take place but only following resolution of the principal claim.



** Neil Smith is a partner in Mackinnons, a Scottish law firm. He is qualified to practice in Scotland and in England and Wales. Neil's practice is principally in relation to contentious matters involving the sea, extending from merchant vessel work to the offshore oil and gas industry and the fishing industry. He is experienced in conducting high value commercial litigation and arbitration and also has first-hand experience of serious casualty incidents and collisions. He and his partners act for many P&I clubs and Hull insurers as well as taking direct instructions from offshore supply vessel companies, international drilling contractors and Scottish port authorities. Neil's recent experience in ship arrest work relates to both actions raised principally in Scotland and to protective arrestments sought on the dependence of foreign proceedings.*