

SHIP ARREST IN SCOTLAND (QUESTIONS 1 to 9)

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

The right to arrest a ship in Scotland derives from Part V of the Administration of Justice Act 1956. This part is headed "Admiralty Jurisdiction and Arrestment of Ships in Scotland". This has been amended over the years, most recently by the Bankruptcy and Diligence etc. (Scotland) Act 2007 which is an Act of the Scottish Parliament.

For the ship to be capable of being arrested in Scotland in security of a claim it must be the very ship with which the dispute is concerned and the defender must either own at least one share in the ship or be the bareboat charterer. Alternatively, a ship can be arrested where the defender owns all the shares even if it is not the ship with which the dispute is concerned. If the Scottish courts would not otherwise have jurisdiction, the ship can be arrested in a Scottish Port "to found jurisdiction". Arresting in this way however merely gives the court jurisdiction, but does not create any security over the ship itself.

A Claimant (Pursuer/Plaintiff) can often obtain a significant advantage by being able to arrest a ship at the outset of a court action for payment. This is one of the few instances in Scots Law where it is feasible for a Claimant to obtain security pre judgement. It is necessary to go to the court (either the Court of Session in Edinburgh or the local Sheriff Court) to seek the permission of the Judge to arrest the ship if the case can be brought within one of the many categories listed in the 1956 Act. If the Judge grants the permission then the ship can be arrested by Court Officers even without the alleged debtor (or anyone else associated with the ship) necessarily being aware up to that point that an arrest is being contemplated, far less that it is imminent. The court papers then require to be served on the Defender (Defendant) albeit that the papers can be served on the ship itself if what is raised is an action in rem in respect of a maritime lien such collision, salvage or for crew wages. The Defender then has an opportunity to challenge the arrest with the Pursuer being liable in damages if it is found to be an unlawful arrest.

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

The United Kingdom (of which Scotland forms part) is a signatory to the International Convention Relating to the Arrest of Seagoing Ships 1952. This was brought into UK domestic law by the 1956 Act. Jurisdiction is governed by the Brussels Convention 1968 and the Lugano Convention 1988. These were introduced into UK Law by the Civil Jurisdiction and Judgements Act 1982 as amended.

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

Port Authorities in Scotland have the right to detain a ship for non-payment of harbour dues in terms of the Harbours, Docks and Piers Clauses Act 1847. Detention under the 1847 Act is the equivalent of arrestment. It is also possible to arrest a ship in a Scottish port in implementation of an order of a foreign court. Such an arrestment must comply with the Civil Jurisdiction and Judgements Act 1982. In certain circumstances, arbitration judgements can also result in ship arrest in Scotland.

4. Are there alternatives, for example saisie conservatoire or freezing orders?

Scots Law does not provide any alternatives beyond arrestment under the 1956 Act, detention by a Port Authority and in respect of a foreign action, all as referred to above.

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

A ship can be arrested in a Scottish port in implementation of a Court or Arbitration Judgement. More common, however, is an attempt to arrest on the dependence of an on-going court action. Where the entrance requirements set out at number 1 above apply, 47 (2) of the 1956 Act lists various circumstances in which arrestment on the dependence is permissible. These categories include damage done or received by any ship, loss of life or personal injury relating to the ship, salvage, any agreement relating to the use or hire of any ship, loss of or damage to goods carried in any ship, towage, pilotage, liability for dock charges or dues and Master's disbursements.

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

The question of flag is irrelevant to arrest in Scotland except that UK ships owned by the Crown and ships which themselves are owned by foreign states cannot be arrested unless they have been contracted for commercial purposes.

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

Scots Law recognises the exercise of a right in rem in certain specific circumstances, for example in relation to collision damage and salvage. Where there is a right in rem a court action can be raised directly against the ship with the court papers served on the ship itself. This can create a significant advantage for a Claimant since it obviates the need which would otherwise exist to serve the court papers on the owner which of course might be abroad in a remote jurisdiction.

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

As set out above, it is possible to arrest sister ships and ships in associated ownership so long as all the shares in the ship being arrested are owned by the Defender in the court action. Common ownership is however now relatively unusual.

9. What is the position as regards bareboat and time-chartered ships?

Bareboat chartered ships can be arrested in Scotland where the alleged debtor is the bareboat charterer. Ships under time charter can however only be arrested in respect of an action in rem.

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SHIP ARREST IN SCOTLAND (QUESTIONS 10 to 26)

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

No, counter-security is not required

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

A ship may be arrested to satisfy a maritime lien or it may be arrested to secure a debt pending the outcome of a court action. A maritime lien gives rise to a real right: a right which is good against the world and not just an individual. Where the pursuer has a real right by virtue of a maritime lien, an action is brought to arrest the vessel in rem. This means the action is brought against the ship itself i.e. the ship is named as defender in the action. Therefore an action to enforce a maritime lien can be brought against the relevant ship, regardless of any change of ownership that has taken place.

By contrast, where an action is raised against the owner of a ship, and the vessel arrested as security against the debt litigated upon, this is an arrestment in personam. The right to arrest a ship in a maritime claim based on a personal right will not survive a change of ownership. An action can be raised both in rem and in personam where the pursuer has rights against the owner and the vessel.

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

Yes, Scotland recognises maritime liens. Liens can arise from things such as collisions, where a lien is created over the vessel at fault, from the contractual claims of seamen for their wages, or from salvage where a maritime lien is created in favour of the salvor.

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

The time required will depend on the complexity of the facts. If the papers are available and in order, it might be possible to obtain a warrant from the court and have the arrestment formally executed in a matter of hours.

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

No. Power of Attorney is not required, however the Court would expect to see evidence of ownership of the vessel to be arrested and proof of the debt alleged to be owed.

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 documents required will depend on the facts of the case. Generally, copy (not original) documents are lodged with the court. Documents cannot currently be filed electronically.

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

The general answer to this is yes, however there are numerous complexities and advice would need to be taken with regard to the specific circumstances of each case. Scotland is subject to Council Regulation (EC) 44/2001 as well as the 1968 Brussels and the Lugano Conventions. These instruments would be applied by the court in deciding whether to accept jurisdiction over the underlying dispute. The existence of any exclusive jurisdiction clause or arbitration clause in an agreement between the parties would also be a relevant factor.

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

The procedure for release of a ship from arrest in Scotland is by way of motion to the Court in which the warrant for arrest was granted for recall of arrestment either on the basis that the arrestment is

incompetent or otherwise not lawful or is not a reasonable use of diligence having regard to all the circumstances (including the strength of the arrestor's prima facie case and the debtor's financial standing) or else on the basis of sufficient alternative security being provided.

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

The normal form of alternative security for release of a ship from arrest is a letter of undertaking from owners' P&I Club or other reputable insurer to settle any award or agreed settlement sum in respect of the arrestor's claim in full. However, cash consigned in Court or a bank guarantee or bond from a reputable insurer are also potentially acceptable forms of security.

19. Does security need to cover interest and costs?

Security requires to cover interest and costs. Judicial rate interest in Scotland is 8% (although in some situations this may be subject to challenge as out of line with commercial interest rates) and expenses are recoverable on a scale which tends to allow for recovery of roughly 60% of actual costs incurred. The figure for security in respect of interest and costs will be an estimated figure.

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

P&I Club Letters of undertaking are usually accepted as sufficient security for release of an arrestment provided it is a reputable Club and the terms of the letter are adequate.

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

Release of the arrestment can be immediate. A hearing can be fixed at short notice outside normal Court hours if necessary and if the arrestment is deemed to be invalid or if suitable alternative security is provided the Court will grant recall and on provision of the Court's order or agreement from the arrestor to release to the Harbour Master the arrestment will be released with immediate effect.

22. Is there a procedure to contest the arrest?

When the arrestment order is granted a hearing will be fixed shortly afterwards at which the ship owner is entitled to attend and contest the arrestment. If there is urgency, it is possible for the ship owner to apply for recall immediately at any point from the time of arrestment and such an application can be heard within hours.

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

The action is deemed to have commenced at the point at which the summons or writ is served on the defender, after having been approved by the court. Defenders within the EEA are given 21 days' notice and defenders domiciled outwith the EEA are given 42 days' notice before the case then calls in court.

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

Yes, wrongful arrest is a delict (tort). Care should be taken in deciding whether to arrest a ship as wrongful arrest can result in significant damages being awarded against the arresting party.

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

Yes, however piercing of the corporate veil will only occur in exceptional circumstances, generally where it can be shown that the corporate structure has been used to defraud or evade liabilities.

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

This is not possible in Scotland.

*Tim Edward is shipping litigation partner with Maclay Murray & Spens. He has been with the firm since 1990 and a partner in the Dispute Resolution Department since 1996. He has dealt with a wide variety of shipping disputes over that period, including arrestment of vessels in Scottish waters, personal injury claims arising from accidents at sea, pollution and salvage claims and claims arising from collisions and cargo loss and damage. He has acted for owners, cargo interests and Clubs and notable clients have been North of England P&I, Steamship Mutual P&I, Transocean, Schlumberger and most of the major London shipping law firms.