

SHIP ARREST IN FIJI



By Nicholas Barnes & Ronal Singh*
MUNRO LEYS

mail@munroleyslaw.com.fj

www.munroleyslaw.com

Level 3, Pacific House, Butt Street

PO Box 149, Suva, Fiji

Tel: + 679 331 4188

Fax: + 679 330 2672



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

The High Court of Fiji has the Jurisdiction to grant a warrant to arrest Ships within Fiji waters. The arrest procedure primarily used to obtain security for a maritime claim or a lien. The Law relating to ship arrest is complex and a failure to observe the law and procedure can be critical to establish jurisdiction. The applicable law and the procedure have been primarily adopted from England. It is a very powerful tool and so not surprisingly it has some very stringent rules surrounding the process of obtaining a warrant for arrest.

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

Currently Fiji does not apply any international convention in respect of ship arrests. It simply relies on domestic laws and laws adopted from England (including Common Laws).

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

No. The procedure to arrest a ship is through a Court order. This is obtained by filing an ex-parte application. The rationale is not to risk alerting ships of her impending arrest.

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

Yes. The Fiji courts do have jurisdiction to grant freezing orders.

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

The Admiralty Jurisdiction of the High Court of Fiji is as follows:

- (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 done by a ship;
- (e) Any claim for damage received 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, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

- (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;
- (i) Any claim in the nature of towage in respect of a ship or an aircraft;
- (j) Any claim in the nature of pilotage in respect of a ship or an aircraft;
- (k) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (l) Any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
- (m) Any claim by a master or member of the crew of a ship for wages, and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Merchant Shipping Acts, 1894 to 1954, is recoverable as wages or in the court and in the manner in which wages may be recovered;
- (n) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (o) Any claim arising out of an act which is or is claimed to be a general average act;
- (p) Any claim arising out of bottomry;
- (q) 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.

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

The High Court of Fiji has jurisdiction within Fiji waters irrespective of the ships flag. This provides comfort to local businesses intending to do business with ship calling into a Fiji Port for repair or supply of goods and materials.

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

For a ship to be arrested the debtor must have some interest in the ship, that can include the owner, charterer or person in possession and may in certain circumstances include a beneficial owner. This is a requirement that is envisaged in the Administration of Justice Act 1956 and Supreme Court Act 1981. Both of these English Acts are applied and relied upon in Fiji.

The effect of an arrest was expressed in the case of *Hai Soon International Trading PTE Ltd v Owners of the Motor Vessel Yin Chen No. 1* [2010] FJHC 474 where Justice Wati referred to the case of the case of *The "Cella"* (1888) 13 P.D. 82 (C.A.) which discussed the effect of a ship arrest Lord Esher M.R said at page 87:

"the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant"; and Lord Justice Fry said at page 88: "The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment"; and Lord Justice Lopes said at page 88 as well: "From the moment of the arrest the ship is held by the court to abide the result in the action, and the rights of the parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently."

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

The case of *Hai Soon International Trading PTE Ltd v Owners of the Motor Vessel Yin Chen No. 1* referred to Section 1(1) of the Administration of Justice Act, 1956 which provides;

For the purposes of enforcing either a maritime claim or a maritime lien a sister ship can also be named as a party in rem. The case of *The Preverse* [1973] 1 Lloyd's Rep. 202 states that where proceedings are taken out against a sister ship, the rule is the same as that applying to the actual offending ship. However, the claim or lien can only be realised against one. If the ship that is directly subject to the cause of the action cannot be arrested, a sister ship may be arrested provided

- (a) it is named within the proceedings and
- (b) beneficially owned by the same debtor.

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

The Supreme Court Act 1981 does not limit the word charterer to demise charterers. It includes time charterers. This means that the same procedure is applied.

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

There is no requirement to offer any form of counter security in any form. However the court must be satisfied that a right to arrest exists either through a maritime claim or a maritime lien.

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

No. The process to arrest a ship is the same whether the ship is arrested pursuant to a lien or a claim.

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

A maritime lien is recognised by the Fiji Court through Common law. Justice Scott in *Jeyang International Company Limited v the Owners of the Motor Vessels Kao Ya No. 1 and Kao Ya No. 137* Admiralty Action No. 9 of 2001 accepted the priority classification by Lord Diplock in *The Halcyon Isle* (1980) 3 ALL ER 197. These cases establish 6 classes of maritime liens in an order of priority. These are as follows:

1. Salvage;
2. Collision damage;
3. Seamen's Wages;
4. Bottomry (now obsolete);
5. Master's wages;
6. Master's disbursements

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

An application to arrest ships can be completed within 24 hours - 48 hours depending upon complexity. The Application is then allocated by the registry to a judge for determination of the arrest.

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

All evidence is required to be provided to court (including documentary evidence) in print. These are always annexed to an affidavit. The registry will not accept the filing of documents electronically unless the Court directs.

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 Court is moved through a motion together with an accompanying Affidavit. This is accompanied by other documents. No documents are filed electronically unless ordered by the Court.

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

Yes it will unless the jurisdiction of the court is challenged.

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

The Limitation Act provides 3 years for actions in tort (personal injury) otherwise it is 6 years.

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

Yes they do. Damages usually follow.

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

Not to date but as a common law jurisdiction – incremental changes can occur.

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

If the ship's value deteriorates the court can direct the admiralty marshal to sell the ship *pendente lite* and pay the gross proceeds into court. There are no time frames for the court to order this. However if either of the party contests the application to sell it may take 2 – 3 months for the court to resolve.

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

A motion and affidavit is filed to either offer bail or challenge the jurisdiction of the Court.

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

A cash bond or an undertaking by the vessel owners to satisfy any judgment given against the vessel.

23. Does security need to cover interest and costs?

Yes

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

If it is accepted by the Plaintiff, the Court may accept it as well.

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

Usually parties negotiate before applying to Court for release. However if a motion is filed and contested, it can take between 7-21 days.

26. Is there a procedure to contest the arrest?

As arrest is usually done ex-parte, the ship owners are able to contest the orders at once

a. as soon as it is served upon the return date.

b. upon the return date given by the Court in the arresting order.

**Nick was admitted to the roll of Solicitors of England and Wales in 1991 and spent the first years of his career in private practice in the UK as a commercial litigation solicitor practising mainly in professional negligence and employment law.*

In 1997 Nick left the UK to work in the South Pacific island state of Tuvalu as the People's Lawyer, a government-funded public advocate position, with a wide range of civil and criminal law responsibilities. After 12 months in Tuvalu he joined the Attorney General's Office in Fiji as Principal Legal Officer for two years before returning to the United Kingdom, where he worked as an in house lawyer for Greenpeace UK, a prominent non-government organisation. In July 2002, he was appointed Solicitor-General of the Caribbean island state of Grenada, a position he held until returning to Fiji to join Munro Leys in 2004. He is also Managing Partner of Munro Leys. Nick's practice has a particular emphasis on commercial, administrative and environmental law. He is admitted to practise law in New Zealand, Tuvalu and Grenada as well as England and Wales and Fiji.

**Ronald gained his Bachelor of Laws degree from the University of the South Pacific in 2006. He completed his professional Diploma in Legal Practice in 2007 and was admitted to the Fiji Bar in the same year. Ronald spent several years working in private practice in Fiji before joining Munro Leys in May 2012.*

Ronald primarily practises in the firm's Litigation Group covering a wide range of commercial and private disputes.

Ronald is a mediator accredited by the Australian Centre for Dispute Assessment & Resolution.