

SHIP ARREST IN KOREA



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

There are two principal methods of arresting a ship under a Korean law—an arrest can either be made (1) on the basis of a maritime lien against the ship that is recognized by the law of the ship's flag or (2) as a preliminary attachment if a creditor can show the existence of a claim against the registered shipowner.

Chapter 5 of the Korean Commercial Code sets forth the rules for arrest of ships by way of a maritime lien, which arise out of the use and operation of a particular vessel. For foreign-flagged ships, however, the courts in Korea will ascertain the law of the flag state's jurisdiction to determine whether a particular claim gives rise to a maritime lien, but will apply Korean law (including time bar) to the arrest proceeding. Arresting a ship by way of a maritime lien automatically commences auction sale proceedings.

In contrast, the Civil Execution Act sets forth the rules for arrest of ships by way of a preliminary attachment or preliminary disposition proceeding. An arrest by way of preliminary attachment is available whenever a creditor can show that it has a claim against the registered owner of a ship, irrespective of whether it is a "maritime claim" or whether the claim arose with respect to the concerned ship. It is also possible to attach other assets under the same law. The right to arrest a ship by way of a preliminary attachment is based on the principle that a creditor should take interim measures to preserve its rights against the debtor. The procedure is ancillary to a proceeding on the merits and does not give the Korean court jurisdiction over the merits of the underlying claim. Furthermore, while arresting a ship by way of a preliminary attachment does detain the vessel (except in the case of vessels flagged in Korea), it is not possible for the creditor to commence auction sale proceedings unless and until a final judgment or award is obtained from a court or arbitral tribunal having jurisdiction over the merits.

A ship may only be arrested by way of a preliminary attachment if arrest by way of a maritime lien is not available.

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

Korea is not a party to any of the international conventions relating to the arrest of ships. In particular, for an arrest by way of preliminary attachment, there is no requirement of a "maritime claim" or requirement that the claim arose with respect to a particular ship. It is only necessary to show that the debtor on the underlying claim and the registered owner of the ship are the same person.

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

In addition to the two methods for arrest of ships detailed herein, it is also possible for a creditor to arrest a ship in reliance on a mortgage or a possessory lien.

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

An arrest by way of preliminary attachment, which is detailed herein, is effectually a *saisie conservatoire*.

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

As stated above, whether a particular claim gives rise to a maritime lien in Korea depends on whether a maritime lien is recognized under the law of the ship's flag. For ships that are flagged in Korea, Article 777 of the Commercial Code sets forth the following claims that give rise to a maritime lien:

(1) Claims for the cost of litigation for common interests of the creditors, public taxes imposed on the vessel concerning a voyage, piloting fees, towing fees, maintenance and inspection charges on the ship and her equipment after her last entry into port;

(2) Claims under employment contracts with crew and other persons hired onboard;

(3) Claims for salvage remuneration and contributions in general average; and

(4) Claims for loss or damage arising due to a collision or other navigation accident, loss or damage to navigation facilities, port facilities and waterways, personal injury and loss of life of crew and passengers.

In addition, any type of claim may be used to arrest a ship by way of preliminary attachment, provided that the debtor is the registered owner of the ship.

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

A ship may be arrested by way of a preliminary attachment irrespective of her flag. However, the availability of a maritime lien is determined by reference to the laws applicable in the jurisdiction of the ship's flag.

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

A claim against a ship that gives rise to a maritime lien may be used to arrest the ship irrespective of the debtor. For arrest of a ship by way of preliminary attachment, the debtor must be the registered owner of the vessel.

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

It is not possible to arrest a sister ship or associated ship in Korea on the basis of a maritime lien. The arrest of a sister ship is possible in a preliminary attachment proceeding, so long as the registered owner of both ships is the same. The arrest of a ship under associated ownership is theoretically possible where the circumstances warrant piercing the corporate veil; however, as courts in Korea generally do not permit piercing the corporate veil, this is very difficult in practice.

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

Arrest of a ship under Chapter 5 of the Commercial Code requires the existence of a claim against the ship, as opposed to a bareboat or time charterer.

In contrast, to arrest a ship in a preliminary attachment proceeding, the arresting party must have a claim against the registered owner of the ship. A claim against a mere charterer, even a bareboat charter, will not give rise to a right to arrest a ship by way of preliminary attachment.

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

Counter-security is required to arrest a ship on the basis of a preliminary attachment. The amount of counter-security which to be provided by the arresting party in each case is up to the discretion of the individual judge overseeing the matter. In Busan, where many applications for arrest are filed, judges typically require 20 percent of the claim amount as counter-security, although this can vary depending on the particular case and judge. The type of counter-security may also vary. While judges will typically accept a surety bond, they have discretion to require some or all of the counter-security in cash.

No counter-security needs to be posted for arresting a ship by way of a maritime lien; however, the payment of maintenance charges and the costs necessary for auction sales proceedings is required.

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

Korean law does not recognize the concept of a "maritime claim" as such, but where a claim that is maritime in nature gives rise to a maritime lien under the law of the ship's flag jurisdiction, then the lien holder may arrest the ship. Alternatively, the party seeking to arrest a ship for a maritime claim or any other type of claim may do so by way of a preliminary attachment provided that it has a claim against the ship's registered owner.

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

Yes, but Korea is not a party to any of the international conventions dealing with maritime liens and mortgages.

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

Upon receiving all of the documents necessary to file an application for arrest or preliminary attachment of a ship, a minimum of 72 hours is generally required, although it may be possible to arrest a ship within 48 hours in extreme situations. In Korea, it is not possible for a judge to consider the application during a weekend or holiday or outside normal business hours.

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

Yes. An original notarized POA is required to file any application for arrest and, if the POA is notarized outside of Korea, it needs legalization or an apostille. In addition, the party applying for arrest should provide documents evidencing its claim against the debtor. In the case of arrest by way of preliminary attachment, the party applying for arrest should, technically, also show that the arrest is necessary to protect its interest in enforcing a subsequent judgment or arbitration award, but in practice this is not a burdensome evidentiary requirement.

For arrest by way of a maritime lien, the applicant does not need to show that the arrest is necessary to protect its interest in enforcing a subsequent judgment since the application for arrest itself is the first step toward commencing auction sale proceedings in Korea. Nevertheless, it is necessary for the party applying for arrest to produce evidence showing that it has a maritime lien under the law of the vessel's flag jurisdiction.

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

In principle, original documents are required to evidence the claim against the debtor and show the existence of a maritime lien. The latter is usually shown by provision of a legal opinion, together with copies of relevant rules, in the ship's flag jurisdiction. All documents originating outside of Korea require notarization and legalization or apostille, as appropriate, and are needed at the time the arrest application is filed.

For arrest by way of preliminary attachment, the evidentiary burden on the party applying for arrest is substantially less than in the case of an arrest by way of a maritime lien, even more so where counter-security is being provided by the arresting party. A statement by the arresting party, or the arresting party's lawyer, together with copies of the basic documents showing the existence of a claim against the debtor will typically suffice.

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

No. Korean law makes no provision for in rem or quasi in rem jurisdiction.

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

Release of the vessel is also dependent on whether the vessel was arrested by way of pre-judgment attachment or under a maritime lien.

Pre-Judgment Attachment

To release a vessel arrested by way of pre-judgment attachment, the vessel owner must deposit cash security equal to the full claim amount, without exception. A Letter of Undertaking may be deposited in lieu of cash security only if the arresting party consents, otherwise only cash is acceptable. After the security is deposited to the Court, the arrest is automatically cancelled. The cash deposit or LOU serves as a substitute for the vessel. Unless settlement is reached soon, litigation on the merits would soon follow.

The above is simplest way to release a vessel arrested by way of pre-judgment attachment. On the other hand, the owner or third party owner of the vessel can file objection to the arrest with the Court, which is similar to main litigation on the merit. Thus, the latter remedy takes much more time, which is recommendable only where the owner is not capable of providing cash deposit.

Maritime Lien

Once his vessel has been arrested under a maritime lien, the vessel owner may take one of two steps to release his vessel. Firstly, the vessel owner may file an objection to the commencement of auction sale proceedings and apply for an Order to suspend the auction sale. This is an expedient remedy. The Court will review the objection without delay and, assuming the Court accepts the objection, will order the auction sale to be suspended with deposit or without deposit in the Court's discretion. Once the vessel owner has obtained the Suspension Order, he must submit the Order along with a cash deposit to the Court, which will then cancel the auction sale

proceedings. The cash deposit is equal to the aggregate amount of all claims against the vessel, plus the estimated costs of conducting the auction sale. After the auction sale is cancelled, the vessel is released and the cash deposit stands as a substitute. The cash deposit will be distributed to the vessel's creditors only after judgment on the merits.

A second option open to the owner of a vessel arrested under a maritime lien is to seek a declaratory order from the Court that the obligation right claimed by the arrest applicant does not exist, or that the obligation right does not give rise to a maritime lien. If the Court accepts the vessel owner's arguments, the Court will issue a Suspension Order. As described before, the vessel owner would then submit both the Suspension Order and a cash deposit to the Court, and the Court would then cancel the auction sale proceedings.

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

Regardless of whether the vessel was arrested by way of pre-judgment attachment or under a maritime lien, it is cash.

19. Does security need to cover interest and costs?

In case of arrest based on pre-judgment attachment, security does not need cover interest or costs. In contrast, in case of arrest based on a maritime lien, the security need to cover the costs, but not interest.

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

It is not accepted.

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

In case of arrest based on pre-judgment attachment, if cash deposit is posted for cancellation of arrest, the arrest will be cancelled automatically. Thus, we may say that it takes 1 day or at most 2 days.

In contrast, in case of arrest based on a maritime lien, several procedural steps should be taken. The time necessary depends on several factors including the Court's then work load situation and the availability of judge. We can say that it takes 3 days to 1 week.

22. Is there a procedure to contest the arrest?

The owner of the vessel can file lodge objection with the court, and then the court will review the merit.

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

As arresting a ship on the basis of a maritime lien automatically commences auction sale proceedings, the claimants are not required to take legal actions on the merits within any specific period of time. In practice, however, the shipowners will usually challenge the existence of the obligation giving rise to the maritime lien, the claimant's right to exercise the maritime lien, or both, and apply for the suspension of the execution of auction sale proceedings while the challenges are considered by the court. In order to suspend the execution of auction sale proceedings, the shipowners are required to deposit a cash sum equivalent to the aggregate amount of all claims against the ship plus estimated auction sale costs or, alternatively, to reach an agreement with the arresting party about the type and amount of security to be provided. If suitable security is provided, the ship will be allowed to sail while the court considers the merits of the shipowners' arguments.

For arresting a ship on the basis of a preliminary attachment, there is no stipulated period for brining a claim on the merits. Rather, the shipowners must apply to the court for an order directing the arresting party to proceed on the merits of its claim. The court will then consider the circumstances of the case and stipulate a time period of more than two weeks, generally closer to one month.

Meanwhile, the ship will be detained (if it is not registered in Korea) unless and until the shipowners have provided suitable security to the arresting party, typically a cash amount equal to the amount claimed against the debtor.

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

Yes. A wrongful arrest claim in Korea will be assessed using ordinary tort principles. If the arresting party does not succeed on the merits of the underlying claim, the court will presume that

the arrest was effected negligently. The arrest may also be wrongful, even if the arresting party eventually succeeds in recovering some amount, if the amount recovered is significantly less than the amount initially claimed when arrest the ship.

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

Korean law permits piercing the corporate veil. However, in practice, the courts have permitted piercing the corporate veil only in rare circumstances.

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

For arrest on the basis of a maritime lien, a ship can be sold pendente lite and, in fact, will usually be sold pendente lite unless cash security is provided by the shipowners.

In the case of arrest by way of preliminary attachment, it is not possible for the ship to be sold pendente lite as this is only a provisional remedy to secure a claim pending final resolution of the merits of the dispute by a court or arbitral tribunal properly seized of jurisdiction.

**Dong-Hee Suh is the managing partner of the law firm Suh & Co. and has over twenty years of expertise in international commercial litigation and arbitration in maritime shipping matters, international trade, marine insurance, aviation accidents, ship finance and ship building.*

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Mr. Suh's prior honors include the 2012 Hong Kong MLA luncheon meeting where he addressed "Cross-Border Insolvency Law and Practice in Korea" and the 2012 Comité Maritime International Conference in Beijing where he was the South Korean delegate to the section on the Judicial Sale of Ships.

Mr. Suh received his LL.B. from Seoul National University Law College in 1984. He received an LL.M. from Tulane University in 1996 and was admitted to the New York bar in 1997. He has previous experience working at the law firm Kim & Chang (1992-2000) before founding Suh & Co in 2000.