

SHIP ARREST IN NEW ZEALAND



By Kerryn Webster & Felicity Monteiro*

WILSON HARLE

firm@wilsonharle.com

www.wilsonharle.com

64 Fort Street, 1010 Auckland, New Zealand

Tel: 00649 915 5700

Fax: 00649 915 5701



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

Initial ship arrest in New Zealand can be fast and relatively inexpensive. It requires a notice and application to be filed and does not require a hearing. An undertaking to meet the costs of the Registrar is also required. The time and cost involved in continuing a claim against the ship, and possibly obtaining judicial sale, will depend upon a range of factors.

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

New Zealand is not a signatory to any International Conventions dealing specifically with arrests. Ship arrests in New Zealand are governed by the Admiralty Act 1973 and the High Court Rules.

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

No (although note the comments on freezing orders in response to question four, below). Arrests in New Zealand are obtained by filing in the High Court, a Notice of Proceeding relating to an *in rem* claim against the vessel and an application for arrest, supported by an affidavit. The proceeding must relate to a claim falling within the heads of jurisdiction set out in the Admiralty Act 1973.

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

The New Zealand High Court also has jurisdiction to grant freezing orders over any type of asset and, while such orders could extend to ships, the powers do not relate specifically to vessels. It is harder to obtain a freezing order than it is to arrest a vessel: an application is usually made without notice but a hearing is usually required and the applicant must demonstrate a good arguable case, show that there is a risk of dissipation of the relevant asset and give an undertaking as to compensate the respondent for any damages caused by the order, before a freezing order is made. In contrast, for an arrest, the applicant will need to file an *in rem* notice of proceeding, with a concise statement of the nature of the claim and of the relief or remedy sought, an application for a warrant of arrest and an affidavit in support setting out the details of the parties, the ship and the claim. No real interrogation of the matters set out in the notice and affidavit is carried out and the warrant for arrest is issued without a hearing. The applicant is required to provide an indemnity to the Registrar but this is limited to the costs of arrest and does not cover any damages suffered as a result of the arrest.

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

Arrest is available for claims coming under s 4(1) of the Admiralty Act 1973, which lists:

(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 salvage:
- (j) any claim in the nature of towage in respect of a ship or an aircraft:
- (k) any claim in the nature of pilotage in respect of a ship or an aircraft:
- (l) any claim in respect of goods, materials, or services (including stevedoring and lighterage services) supplied or to be supplied to a ship in its operation or maintenance:
- (m) any claim in respect of the construction, repair, or equipment of a ship or for dock or port or harbour charges or dues:
- (n) any claim by a master or member of the crew of a ship for wages:
- (o) any claim by a master, shipper, charterer, or agent in respect of disbursements made on account of a ship:
- (p) any claim arising out of an act which is or is claimed to be a general average act:
- (q) any claim arising out of bottomry:
- (r) 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 irrespectively of her flag?

Yes.

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

For some claims, yes, except for foreign state immunity. For certain claims, however, the debtor against whom the *in personam* claim arises must also be the owner or charterer of the vessel at the time that the action is brought.

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

For some claims a sister ship may be proceeded against. Claims which cannot be transferred to a sister ship are claims for:

- (a) possession or ownership;
- (b) claims between co-owners;
- (c) claims in respect of a mortgage; and
- (d) claims for forfeiture, restoration or droits of admiralty.

For other claims falling within s 4(1) of the Admiralty Act, a sister ship may be proceeded against if the person liable on the claim was owner or charterer of the ship when the cause of action arose and was the beneficial owner or demise charter of the other ship when the action was brought.

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

A ship can be arrested if the relevant person was the owner or charterer, or in possession or control of the ship, when the cause of action arose and, when the action was brought, was beneficial owner or demise charterer of the ship. Arrest of a ship that is under time charter is not available in relation to claims against the time charterer.

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

No. However, a party seeking the arrest of a ship is required to provide an indemnity to the Registrar for the costs likely to be incurred by the vessel to be arrested, such as harbour dues and crew expenses. The Registrar requires some payment upfront to cover initial arrest costs and then to be kept in funds in anticipation of subsequent costs.

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

Yes. A maritime lien entitles the claimant to arrest the relevant vessel regardless of beneficial ownership. For other claims, the person against whom the claim arises must also be owner or demise charter at the time the action is brought.

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

Yes, for certain types of claims, but they are defined and recognised under the Admiralty Act, not an international convention.

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

Provided that all of the necessary information (including translations if required) is available, the proceeding can be prepared and the application for arrest made on the same day. It is then in the hands of the Court to arrest the vessel, although this is usually done within a few days.

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

No. See 15 below.

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

In order to obtain the arrest of a vessel, a notice of proceeding, application for arrest, supported by affidavit, and filing fee must be filed in the High Court Registry. The required documents are standard form documents and, while originals of these documents need to be filed, they can be prepared by the New Zealand law firm instructed. Usually, the documents would need to be physically filed with the Court but in cases where there is extreme time pressure, the documents may be accepted electronically in the first instance. No other original documents are required nor do any documents need to be notarised. A statement of claim which sets out the nature of the claim must also be filed, but this can be done after the vessel has been arrested.

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

Yes. There may, however, be issues of jurisdiction if the claim is contract based or if a cross-border insolvency is involved.

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

A party interested in a vessel under arrest can request the release of the vessel by filing in the court a standard form setting out the grounds on which the release is sought. The registrar must ascertain whether there is a caveat against release in force before releasing the vessel and, if there is, the party seeking release must give notice to the caveator requiring that the caveat be withdrawn. The vessel will not be released until the caveat has been removed. The registrar may issue a release either upon an order of the court or with the consent of all the other parties to the action. The registrar must issue a release if the party who sought the arrest files a notice withdrawing the warrant of arrest before an appearance is entered in the action concerned. Before the vessel is released, the party who sought the arrest must either pay the costs due in connection with the custody of the vessel while under arrest or undertake to pay those costs.

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

A vessel may be released from arrest if the amount claimed in the relevant notice of proceeding together with costs of issue and execution of the warrant of arrest is paid into court or if security for those amounts is given to the satisfaction of the registrar. On the application of any party, the court can determine the amount and form of the security required.

19. Does security need to cover interest and costs?

A plaintiff is normally entitled to security on the basis of its reasonably best arguable case, together with interest and costs.

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

International Group P & I Club letters of undertaking have been established as an acceptable form of security in New Zealand. Other forms of security may also be accepted on proof of sufficient means.

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

Once the request for release has been filed and security to the satisfaction of the registrar, or as determined by the court, has been paid, the vessel will normally be released immediately. If the parties are unable to agree on the amount of security, there may be some delay for an application to determine the amount and form of security to be heard.

22. Is there a procedure to contest the release?

There is no specific procedure set out in the Admiralty Act or the High Court Rules to contest a release. Any party may make an application to the court to determine the amount and form of security if they are not satisfied with the amount agreed or set by the registrar but the application will need to be made before the registrar has issued the release. Accordingly, a party that is interested in a vessel under arrest is likely to want to file a caveat against release, intervene in the proceeding and file their own *in rem* claim against the vessel to ensure that notice is given when a request for release is made and that they are able to seek to be heard in relation to that request.

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

If the defendant enters an appearance following the arrest, then a claim must be filed with 10 working days. The Courts will apply relevant limitation provisions to any claims.

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

Yes, where the party arresting has acted in bad faith or with gross negligence. It is not enough that the claim is made on a mistaken basis.

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

Only in special circumstances where a failure to do so would cause substantial injustice.

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

Yes. The time will depend on the urgency of the claimant's application, whether the application is opposed, whether there is a ready market for the vessel and whether the ongoing costs of arrest are likely to exhaust the security in the ship.

**Kerryn Webster is a Senior Associate at Wilson Harle. Kerryn is an experienced civil and commercial litigator with considerable trial experience. She has broad experience acting in range of civil, commercial, and corporate criminal matters. She has particular expertise in maritime, breach of contract, international trade and public law disputes. She is currently Chair of the New Zealand branch of the Maritime Law Association of Australia and New Zealand and is listed as an "Associate to watch" in Chambers and Partners 2014 and 2015 Asia Pacific Rankings for Shipping.*

**Felicity Monteiro is a Senior Associate at Wilson Harle. Felicity is an experienced civil and commercial litigator and has assisted clients with a broad range of civil and commercial issues. She has developed expertise in telecommunications, regulatory and competition law as well as shipping and admiralty law. She is also listed as an "Associate to watch" in Chambers and Partners 2013, 2014 and 2015 Asia Pacific Rankings for Shipping. Felicity has completed an LL.M at the University of Auckland and was instrumental in establishing the New Zealand branch of the Women's International Shipping & Trading Association (WISTA) in 2014.*