

SHIP ARREST IN KENYA

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

- (i) The Admiralty High Court of Kenya derives its admiralty jurisdiction from the Judicature Act (Cap. 8) Laws of Kenya whereby it is obliged to exercise the same procedure and law as the High Court in England. English Law and procedure in respect of ship arrests has been strictly followed and continue to be so applied to day without replacing and enacting domestic legislation since independence.
- (ii) The High Court in Mombasa in the Republic of Kenya therefore has vested Admiralty jurisdiction which can only be exercised in the same manner and to the same extent and in accordance with the same procedure as in the High Court in England as provided for in The Judicature Act, Laws of Kenya.
- (iii) Therefore the provisions of Section 20 of the Senior Courts Act, 1981 of England (formerly the Supreme Court Act, 1981) must be strictly applied by a party seeking to arrest any vessel within the territorial waters of Kenya under Part 61 of the English Civil Procedure Rules (White Book) which govern the procedure in respect of Admiralty Claims.

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

The International Convention for the Unification of certain Rules Relating to the Arrest of Sea-going ships made at Brussels on May 10, 1952 has been ratified by Kenya. The Brussels Convention on Jurisdiction and the enforcement of judgments In Civil and Commercial Matters 1968 and the International Convention on Arrest of Ships, 1999 are relevant.

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

An *in Rem* arrest of a ship can only be effected through *in rem* proceedings governed by the Senior Courts Act, 1981, in respect of maritime claims in an admiralty action. There is therefore no other way to arrest a ship nor are other alternatives available such as Saisie Conservatoire or freezing orders.

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

See answer to question above.

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

Only claims which are within the Admiralty Jurisdiction of the High Court as defined by S. 20 of the Senior Courts Act, 1981 (Act) may be commenced following the issuance of an *in rem* claim against the ship in arrest proceedings.

These claims are restricted under Sections 20(1) and (2) of the Act: -

Section 20 (1)

(1) The Admiralty Jurisdiction of the High Court shall be as follows, that is to say –

- (a) Jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);
- (b) Jurisdiction in relation to any of the proceedings mentioned in subsection (3);
- (c) Any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

- (d) Any jurisdiction connected with ship or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.
- (2) The questions and claims referred to in Subsection 1(a) are -
- (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 received by a ship;
 - (e) Any claim for damage done 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 in consequence of the wrongful act, neglect or default of -
 - (i) The owners, charterers or persons in possession or control of a ship; or
 - (ii) The master or crew of a ship, or 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.
 - (j) Any claim -
 - (i) under the Salvage Convention 1989;
 - (ii) under any contract for or in relation to salvage services; or
 - (iii) in the nature of salvage not falling within (i) or (ii) above;
 or any corresponding claim in connection with an aircraft.
 - (k) Any claim in the nature of towage in respect of a ship or aircraft.
 - (l) Any claim in the nature of pilotage in respect of a ship or an aircraft.
 - (m) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.
 - (n) Any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues.
 - (o) Any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages).
 - (p) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.
 - (q) Any claim arising out of an act which is or is claimed to be a general average act.
 - (r) Any claim arising out of bottomry.
 - (s) Any claim for the forfeiture or condemnation of 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.

Section 20(3)

- (b) Any action to enforce a claim for damage, loss of life or personal injury arising out of
 - (i) a collision between ships; or
 - (ii) the carrying or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
 - (iii) non-compliance on the part of one or more of two ships, with the collision regulations.

Section 21(3) – In respect of maritime claims giving rise to maritime liens

The following claims may be brought in rem irrespective of ownership of the ship and therefore allow arrest proceedings to be commenced notwithstanding who actually owns the vessel at the time the action is commenced.

- (i) Any claim for possession or ownership of a ship or to the ownership of any share therein.

- (ii) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship.
- (iii) Any claim in respect of a mortgage or a charge on a ship or any share therein.
- (iv) 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.
- (v) Any claim which gives rise to a **maritime lien**. The following claims fall into this category:
 - claims for damage done by a ship.
 - claims for salvage.
 - claims for master's wages and disbursements and seamen's wages.
 - claims for bottomry and respondentia.
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All other claims (being maritime claims without a maritime lien) are limited by consideration of ownership and can only be brought in rem and thus against a particular ship if the following conditions are satisfied:

Section 21(4)

- (i) the claim arises in connection with a ship; and
- (ii) the person who would be liable on the claim if sued personally was the owner or the charterer or in possession or control of the ship when the cause of action arose; and
- (iii) at the time when the action is brought i.e. when the claim is issued, the person who would be liable on the claim if sued personally was the beneficial owner of all the shares in the ship or was the demise charterer of it.

A claim form can only be issued and a ship arrested in these circumstances if between the date of the cause of action i.e. the matter or breach of contract complained of, and the date the claim form is issued:

1. the ownership remains unchanged; or
2. the demise charterer is unchanged.

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

Yes.

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

No, a debtor may only arrest a ship as set out under Sections 20(2) and 21(4) above.

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

A sister ship can be arrested provided:

- (i) the claim arises in connection with a ship; and
- (ii) the person who would be liable on the claim if sued personally was the owner or the (demise) charterer or in possession of the ship at the time the cause of action arose; and
- (iii) at the time when the claim form is issued the person who would be liable on the claim if sued personally, is the beneficial owner of all the shares in the sister ship to be arrested.

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

In general a bareboat charter entitles the charterer to take over full control of the vessel by engaging its own master and crew and by fitting a vessel with all necessary equipment to make it seaworthy. Such a charter is otherwise referred to as a charter by demise. A claim form therefore can only be issued and the ship arrested if the ownership remains unchanged and the demise charterer is unchanged between the date of the cause of action and the date the claim form is issued (unless the claim gives rise to a maritime lien).

However if the ship is on time charter then in these circumstances a ship can only be arrested in respect of a claim which gives rise to a **maritime lien** as set out under Section 21(3) as above. In other words, a maritime

claim without a maritime lien cannot be claimed by arresting the ship if the claim is against the time charterer only and not against the owner of the ship irrespective of whether or not the ship has changed ownership from the date the cause of action arose at the time of her arrest.

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

No security is required to arrest a ship, apart from the undertaking given by the advocate to pay the Admiralty Marshal's fees and any expenses incurred by him in respect of the arrest of the ship, the care and custody of it while under arrest and the release or endeavors to release it. The Admiralty Marshal is the Court Officer who deals with the administrative functions of arrest, sale and appraisalment of property in Admiralty proceedings.

The undertaking covers all the expenses the Admiralty Marshal incurs such as hiring a launch or instructing agents to serve the arrest papers on the ship. It can also include port charges and the cost of local agents to victual and bunker the vessel during the arrest. These are usually around £ 200 but can run to thousands of pounds. If berth charges, victualing and tug charges are incurred over a prolonged period of arrest. The Admiralty Marshall can ask for his costs to be reimbursed monthly. These costs are recovered by the arresting party on appraisalment and sale of the ship, but only if the sale value of the ship is more than the Admiralty Marshal's costs. Practically however, the arresting party pays all costs and expenses of the Admiralty Marshal directly for the duration the ship is under arrest.

The undertaking is given by the advocates acting for the arresting party. This obviously imposes a risk on the advocates for the Admiralty Marshal's fees. Therefore before signing the undertaking advocates may require their clients to provide them with an undertaking to indemnify them against any costs incurred as a result of their undertaking to pay the Admiralty Marshal's fees.

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

See answer to question 5.

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

Yes, see question number 5.

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

The procedure for applying for a warrant of arrest is in most cases, straight forward. In general, a minimum of 8 hours' notice is preferable for drafting and filing of the arrest papers and carrying out the necessary searches.

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

A POA is not required, see answer below to question number 15.

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

Declaration in Support of Application for Warrant of Arrest ("Declaration")

This must contain certain specified details such as the nature of the claim or counterclaim and that it has not been satisfied and if it arises in connection with a ship, the name of that ship and her port of registry, the amount of the security sought, if any, details of the parties and ownership of the ship in accordance with Section 21(4) of the Act. This Declaration must be verified by a Statement of Truth signed by the advocate representing the arresting party or by the arresting party. After *in rem* proceedings have been commenced, the arresting party may make an application for arrest by filing at the Court;

- (i) the warrant of arrest.
- (ii) the application and undertaking to the Admiralty Marshal; and
- (iii) the Declaration.

A power of attorney is not required to be provided when instructions are given to arrest a ship.

Before the ship is arrested a search must be made from the caveat book at the Admiralty and Commercial Registry in Mombasa to ensure no caution (caveat) against arrest has been lodged. A caution against arrest is an official notice, filed with the Court, undertaking to provide security for any claim against the ship in return for the ship not be arrested. If a caution has been lodged, the person who lodged it (the caveator) must, within 3 days of notice being given that the action has begun, provide security in the amount stated in the caution. If a caution against arrest has been filed, a party arresting that ship can still do so but must have a but good reason, failing which the Court has discretion to order the vessel to be released and can order the arresting party to pay compensation.

The following information and documents are required to prepare the arrest papers: -

1. Details and proof of ownership.
2. Details of the ship's proposed port of call.
3. Documents supporting the arresting party's in rem claim.

In addition some firms require an undertaking to indemnify them for the advocates undertaking to the Admiralty Marshal for their fees and an advance payment of £ 1,000 for Court fees and disbursements.

The said documents may be filed electronically supported by the Declaration and may be filed as exhibits in support of the claim and annexed to the Declaration. Otherwise they do not require notarisation nor apostille.

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

Yes, in practical terms this is only possible when a vessel is within the limits of a port, either at anchor or alongside.

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

Once reasonable security has been provided the ship will be released on the filing of an application for release together with the consent of the arresting party for its release. The party at whose instance the release is issued pays any costs incurred in releasing the ship as well as the Admiralty Marshal's expenses, if any, for its release in terms of the undertaking given by the arresting party. The Court will grant a release Order immediately the arresting party gives its consent.

Where another person claims to have a right in rem against a ship which has already been arrested, they may file a caution (caveat) against the release of the ship at the Admiralty Registry, which prevents the ship being released without their consent. This prevents the need for another party to arrest a ship already under arrest. Once security has been provided for the original arrest the person who has filed a caution against release can take over the arrest.

Once the ship has been released there remains a right to re-arrest her if the security is insufficient. However, the amount of security provided cannot exceed the value of the ship at the time she was initially arrested.

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

Once the ship has been arrested it will be released when the arresting party consents, or the Court orders release, following reasonable security having been given. Reasonable security is calculated on the basis of an amount sufficient to cover the arresting party's reasonable best case, together with interest and costs. The amount of security cannot, however, exceed the value of the ship arrested.

Security is normally provided by way of a bank guarantee issued by a 1st class bank in Kenya, P&I Club letter of undertaking, a payment into Court (a payment of a sum of money into the Court's account) or a bail bond (an undertaking to the Court backed by sureties).

19. Does security need to cover interest and costs?

The party at whose instance the release is issued pays any costs incurred in releasing the ship as well as the Admiralty Marshal's expenses, if any, for its release in terms of the undertaking given by the arresting party.

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

Yes.

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

The Court will grant a release Order immediately the arresting party gives its consent.

22. Is there a procedure to contest the arrest?

Part II of the Civil Procedure provides for the procedure for disputing the Court's jurisdiction to try the claim or argue that the Court should not exercise its jurisdiction.

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

In most cases a ship is arrested for the purpose of obtaining security in an arbitration between the parties, however, if the claim proceeds to full trial, then usually it will take approximately 2 to 3 years for a hearing after all the preliminary pre-trial steps have been carried out including full discovery and case management.

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

Yes, damages for wrongful arrest will only be awarded where it is proved by the owners of the arrested ship that the action was brought either with malice or gross negligence.

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

In the event the ownership is disputed to what extent will the Courts permit the arresting party to look beyond the registered owner of a ship in order to find the beneficial owner?

In certain circumstances the Courts have allowed investigations to look behind the registered ownership to determine the true beneficial owner.

However, some shipping companies own a fleet of ships which are financed, managed or operated by a common source and which are registered in the names of separate companies whose only asset is the particular ship registered in its name. Often such companies are registered in a country where the identification of shareholders in companies is not a matter of public record. This arrangement is referred to as a "one-ship company" but the Courts have recognised this as a legitimate business arrangement and in the absence of evidence of fraud it is not permissible to lift the corporate veil in order to look behind the one-ship company structure for the purpose of identifying the beneficial owner of that company in order to establish that the beneficial owner of the company is the beneficial owner of the ship.

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

In the event a ship which is under arrest is not released for lack of security and there is a risk that its condition and value will continue to deteriorate over time, the Court is likely to allow it to be sold pending the Court proceedings. In that event, the Court will order the appraisal and sale of the ship. Such a sale will be conducted after being advertised and sealed bids received through the Court on the usual terms and conditions, to the highest bidder, if the sale amount is above the appraised value. The proceeds of sale

shall be retained in escrow in the bank account opened in the name of the Admiralty Marshall until the case is finally heard and determined and the proceeds are then paid out on order of priorities.

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Ushwin obtained his LL.B from the University of Nairobi and a postgraduate diploma from the Kenya School of Law. He is a member of the Law Society of Kenya. Ushwin is also a Certified Professional Mediator (PM) having completed a course with Mediation Training Institute (MTI).