

SHIP ARREST IN AUSTRALIA

By Stephen Thompson, Partner*
COLIN BIGGERS & PAISLEY
Stephen.Thompson@cbp.com.au
www.cbp.com.au
Level 42, 2 Park Street
Sydney NSW 2000, Australia
Tel: +612 8281 4500
Fax: +612 8281 4567



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

Initial ship arrest in Australia is fast, simple and inexpensive. All that is required is a Writ, Application for Arrest Warrant, Arrest Warrant and a pro-forma affidavit. There is a filing fee and the court requires a deposit on account of its costs and expenses of the arrest (insurance, travel of court staff, vessel moves etc). Once the papers are filed a court officer or his/her delegate attends on the vessel to effect the arrest. Officers are available to travel to remote ports for that purpose.

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

None. Ship arrest is governed by the Admiralty Act 1988 (Cth) (the Act). However, there are many similarities between the Act and the 1952 Convention.

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

While freezing orders – which could extend to a ship – are available from Australian courts, they are considerably less attractive than ship arrest under the Admiralty Act. To obtain a freezing order it is generally necessary to demonstrate a strong prima facie case, establish a balance of convenience in favour of the injunction, and give an undertaking as to damages. None of those measures is required for ship arrest.

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

See above.

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

Arrest is available for maritime liens, proprietary maritime claims and general maritime claims.

Maritime liens

Arrest can be made in respect of a proceeding on a maritime lien, which includes liens for:

- (a) salvage;
- (b) damage done by a ship;
- (c) wages of the master or member of the crew; or
- (d) master's disbursements.

Overturning a first-instance decision to the contrary, the Full Court of the Federal Court of Australia has recently reaffirmed that Australia adopts the majority decision in the *Halcyon Isle*, namely that the *lex fori* is the proper law for the classification of a foreign maritime lien (*The Sam Hawke*). Accordingly, it seems unlikely that the classes of maritime lien historically recognized under Australia law will be significantly expanded in the foreseeable future.

Proprietary Maritime Claims

A proprietary maritime claim relates in broad terms to ownership of the vessel, and includes:

- (a) a claim relating to:
 - (i) possession of a ship;
 - (ii) title to, or ownership of, a ship or a share in a ship;

- (iii) a mortgage of a ship or of a share in a ship; or
- (iv) a mortgage of a ship's freight;
- (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;
- (c) a claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other property in a proceeding in rem in the nature of a proceeding in Admiralty; or
- (d) a claim for interest in respect of a claim referred to in paragraphs (a), (b) or (c).

General Maritime Claims

A ship may be arrested for a general maritime claim, when the "relevant person" (see Question 8 below):

- (a) was, when the cause of action arose, the owner or charterer of, or was in possession or control of the ship; and
- (b) is, when the proceeding is commenced, the owner of the ship

A general Maritime Claim is:

- (a) a claim for damage done by a ship (whether by collision or otherwise); or
- (b) a claim in respect of the liability of the owner of a ship arising under Part II or IV of the Protection of the Sea (Civil Liability) Act 1981 or under a law of a State or Territory that makes provision as mentioned in subsection 7(1) of that Act; or
- (c) a claim under:
 - (i) the applied provisions (within the meaning of the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008); or
 - (ii) a law of a State or Territory of a kind referred to in subsection 10(1) of that Act; or
- (d) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship; or
- (e) a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:
 - (i) the owner or charterer of a ship
 - (ii) a person in possession or control of a ship; or
 - (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable; being an act or omission in the navigation or management of the ship, including an act or omission in connection with:
 - (iv) the loading of goods on to, or the unloading of goods from, the ship;
 - (v) the embarkation of persons on to, or the disembarkation of persons from, the ship; and
 - (vi) the carriage of goods or persons on the ship; or
- (f) a claim for loss of, or damage to, goods carried by a ship; or
- (g) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise; or
- (h) a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land); or
- (i) a claim in respect of general average; or
- (j) a claim in respect of towage of a ship; or
- (k) a claim in respect of pilotage of a ship; or
- (l) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance; or
- (m) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched); or
- (n) a claim in respect of the alteration, repair or equipping of a ship; or
- (o) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship; or
- (p) a claim in respect of a levy in relation to a ship, including a shipping levy imposed by the Protection of the Sea (Shipping Levy) Act 1981, being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia; or

- (q) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship; or
- (r) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship; or
- (s) a claim by a master, or a member of the crew, of a ship for:
 - (i) wages; or
 - (ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including the operation of the law of a foreign country; or
- (t) a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the International Arbitration Act 1974) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs; or
- (u) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.

As can be seen, the categories of general maritime claims are very wide, and substantially reflect arrestable categories of claim in other major jurisdictions and under the Arrest Convention.

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

Yes.

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

Yes, although foreign states are immune from the jurisdiction of Australian courts, unless engaged in commercial transactions.

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

There is a right to proceed against a sister ship (surrogate ship). A proceeding on a general maritime claim concerning a ship (Ship #1) can be commenced as an action in rem against some other ship (Ship #2) if:

- (a) a “relevant person” in relation to the claim was, when the cause of action arose, the owner or charterer of, or was in possession or control of Ship #1; and
- (b) that person is, when the proceeding is commenced, the owner of Ship #2. A “relevant person”, in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action in personam.

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

A ship can be arrested for a general maritime claim, when the “relevant person”:

- (a) was, when the cause of action arose, the owner or charterer of, or was in possession or control of the ship; and
- (b) is, when the proceeding is commenced, the demise charterer of the ship. Arrest is not available of a ship under time charter in respect of a liability of the time charterer.

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

No.

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

No.

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

Yes, see Question 5 above. Australia is not a party to any convention on maritime liens, and the Act provides an inclusive definition.

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

Provided the required information is provided, the arrest papers can be prepared and filed on the same day. The arrest itself is then in the hands of the court, and the time may depend on the availability of court staff and possibly the location of the ship (e.g. if there is a need for the Marshal to travel to a remote port). However, arrests can usually be effected within 48 hours

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

No.

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

No original documents are required, and in the Federal Court, all documents are lodged electronically. Notarisation is not required.

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

Yes, although in some instances the court will recognise and enforce a valid forum clause if the dispute is contractually based.

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

There are two ways to release a ship from arrest. The first is by application to the Registrar which is the most frequent method of release. The second is by application to the Court. Upon application to the Registrar (in accordance with the relevant form), a ship may be released from arrest if the Registrar is satisfied that:

- a) an amount equal to the amount claimed or the value of the ship or property has been paid into court, whichever is less; or
- b) a bail bond for the same amount as set out in a) above has been filed in the proceeding; or
- c) the party who applied for the ship's arrest has made arrangements for and consented to the ship's release.

Alternatively, upon application to the Court (in accordance with the relevant form), the Court has the discretionary power to order the release of a ship from arrest on such terms that are just. If the Registrar or Court orders the release of the ship, a notice will be given to the Marshal who will then proceed to release the ship. The Marshal may refuse to release the ship if satisfactory arrangements have not been made for payment of the Marshal's costs and expenses in respect of the custody of the ship while it was under arrest, including the costs and expenses associated with its release.

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

In order for a ship to be released, the owner must provide the plaintiff with an alternative security for the claim. This can be in the form of a bank guarantee, a letter of undertaking from a P&I club or insurer, a bail bond pursuant to Part VII of the Admiralty Rules 1988 (Cth), or cash deposited with the Court.

19. Does security need to cover interest and costs?

A plaintiff is entitled to obtain security for its claim in an amount equal to:

- (a) its "reasonably arguable best case" including interest up to the likely date of judgment and its costs in the proceeding; or
- (b) the value of the ship arrested, whichever is the lesser.

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

Generally yes, especially in respect of International Group clubs. The court is entitled to be satisfied as to the adequacy and reliability of the security proposed.

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

An arrested vessel can usually be released within a day of security being provided and accepted, or of an order of the court being made.

22. Is there a procedure to contest the arrest?

If the plaintiff's claim does not fall within the requirements of the Admiralty Act 1988 (Cth) (being sections 15-19 of the Act), the claim can be challenged in Court for lack of jurisdiction. In addition, a claim can be made for damages for unjustified arrest by a person with an interest in the ship (or who has suffered loss or damage as a direct result), when:

- a) a party unreasonably and without good cause:
 - i. demands excessive security in relation to the proceeding; or
 - ii. obtains the arrest of a ship; or
- b) a party or other person unreasonably and without good cause fails to give a consent for the release of the ship.

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

Australian courts will apply any legislative and contractual limitation periods applicable to the claim in question.

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

Yes.

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

Rarely.

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

Yes. The time period depends on how long the claimant takes to make an application, whether the application is contested, and the availability of a reasonable market for the ship.

****Stephen** is a partner in Colin Biggers and Paisley's Transport & Logistics Group. Stephen's practice is primarily transactional and advisory, with a focus on the shipping, maritime, ports and supply chain industries. His clients number among the leaders in the transport and logistics field, and he has extensive experience advising Australian and overseas shipping lines, logistics companies, port operators and government organisations. He has also worked with shipping specialists in London.*

Stephen advises clients on business acquisitions and disposals, regulatory issues, negotiation and drafting of contracts, carriage of goods and passengers by sea, air and land, ship arrest and admiralty.

Stephen is a member and former Director of the Maritime Law Association of Australia and New Zealand, as well as a member of the Legal Committee of Shipping Australia Ltd. Stephen has also participated in several working groups, on the invitation of the Federal Court, addressing the potential for reform of the Admiralty Act.

Stephen is recognised in Chambers and Partners as one of Australia's leading shipping lawyers, and is listed in the 2014-2015, 2016 and 2017 editions of Best Lawyers in Australia for transport law. In 2016, Doyle's Guide listed him as a leading shipping and maritime lawyer.