

SHIP ARREST IN MALAYSIA

By Rahayu Abd Ghani, Principal Partner*
RAHAYU PARTNERSHIP – IN ASSOCIATION WITH JTJB
rahayu@jtjb.com
www.rahayupartnership.com
Suite A-17-17 Menara UOA Bangsar
5 Jalan Bangsar Utama 1, 59000 Kuala Lumpur
Tel: + 6(03)22872322
Fax: + 6(03)22877322



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

A ship may be arrested in Malaysia as long as the arresting party's claim falls under any of the provisions of Section 20(2) and Section 21 of the Supreme Court Act 1981 of England and Wales. A party who wants to arrest a ship in Malaysia must strictly comply with the Rules of Order 70 of the Rules of Court 2012 which govern admiralty proceedings in the Malaysian High Court. Malaysia now has a dedicated Admiralty Court situated in the High Court of Malaya at Kuala Lumpur to hear applications for arrest relating to Vessels calling the West Malaysian ports. For Vessels calling the East Malaysian ports, the application will have to be heard by any of the High Courts situated in the High Court of Sabah and Sarawak. According to Section 10 of Malaysian Arbitration (Amendment) Act 2011, a ship may be arrested as a security for arbitration proceedings or for the satisfaction of any arbitration award. This also applies in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

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

Malaysia is neither a party to the International Convention relating to the Arrest of Seagoing Ships of 1952 nor the International Convention on Arrest of Ships 1999.

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

No.

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

No.

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

- 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 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 or materials supplied to a ship for her operation or maintenance;
- m. any claim in respect of the construction, repair or equipment of a ship or dock 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 irrespective of her flag?

Yes.

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

No. We can only arrest a ship if the person who would be liable on the claim in an action *in personam* is, when the cause of action arose, the owner or demise/bareboat charterer of, or in possession or in control of the ship.

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

It is possible to arrest sister ships but not associated ships. Sister ships are ships that when the action is brought are owned by the same person who was the owner of the ship in connection with which the claim arises at the time when the cause of action arose.

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

It is possible to arrest Bareboat vessels but not Time-Chartered vessels.

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

No. However, a written undertaking by the arresting party to the Sheriff to pay the fees and expenses of the Sheriff while the arrested ship is under his custody and custody, must be furnished as a pre-condition to execution of the Warrant of Arrest. In addition, a Court deposit of RM15,000 must be made prior to issuance of the warrant of arrest.

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

Maritime claims are dependent upon the ownership of the ship. The ship can only be arrested provided that the party who was the owner at the time that the cause of action arose is still the owner at the time of arrest.

Maritime liens can be enforced irrespective of ownership and entitle the claimant to issue a claim and to arrest the ship despite a change of ownership. The procedure for arrest is the same however.

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

Yes. In the *Dong Nai* [1996] 4 MLJ 454, 463, the court cited a passage from Mallal's Supreme Court Practice which observes that, just like Singapore law, Malaysian law on the area of maritime liens is no different from English law. Under English law, and hence the laws of Malaysia, claims which are recognised to give rise to maritime liens consist claims for salvage, damage done by a ship, seaman's and master's wages, bottomry and master's disbursements.

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

Usually, a Warrant of Arrest can be obtained within a reasonably short period of time, so long as all the claim documents are in our possession, and the supporting affidavit leading to the arrest has been affirmed/ sworn.

Subject to the receipt of all documentation relevant to the claim, the application to the court can take place within a matter of hours. The actual arrest will be dependent on the availability of the bailiffs in the area that the ship is located but should be effected within 24 hours of the warrant being issued.

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

There is no requirement for a POA to be furnished. However, the claim documents must be furnished. Prior to the arrest, the arrestor should determine whether there is a caveat against arrest in force against the ship in question.

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

All court documents including the affidavit leading to the arrest can be filed electronically. All relevant documents must be filed with the court before the warrant of arrest can be issued. Certification or apostille by a Notary is not required although if supporting documents need translating then the translations should be certified by a Notary. The affidavit leading to the arrest, if filed a deponent residing outside Malaysia must be affirmed before a Notary Public (for Commonwealth countries) or a Consular Officer of the Malaysian Consulate Office situated in that country (for non-Commonwealth countries).

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

This will depend on the circumstances. If the claim arises out of a contract which contains an exclusive foreign jurisdiction clause it may be the case that the proceedings are stayed in favour of the relevant foreign court. However, for most other claims, the Court will usually accept jurisdiction.

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

File into Court the release papers i.e. Praeipie for Release and Release Order, and once issued, serve same on the Vessel, Marine Department and Immigration.

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

Bail Bond, Letter of Undertaking or Guarantee.

19. Does security need to cover interest and costs?

Yes.

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

Yes.

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

Within the day, depending on what time the Release Order is obtained.

22. Is there a procedure to contest the arrest?

Yes.

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

Upon arresting the ship and serving the Writ of Summons on the ship, time starts running under the time table/procedure set down by the Rules of Court 2012 and the claimants can follow the timelines set out in the Rules of Court 2012 to move the claim on its merits along the prescribed timelines.

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

Yes, but only where the arrest of ship is carried out in circumstances where there is *mala fides* or gross negligence (i.e. *crassa negligentia*) as to imply malice on the part of the arresting party which results in damage to the owner of the arrested property.

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

Yes. A corporate veil may be lifted if there are special circumstances which indicate the presence of a faced or sham set up with the object of perpetrating fraud or deception.

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

Yes, but only where there is a good reason for it. One important factor the court takes into account is whether, if the ship remains under arrest while the action is pending, the value of the security represented by the ship would be progressively reduced by the continuing costs of maintaining her under arrest. Other relevant factors include the market value of the arrested ship, the rate of depreciation in the value of the ship, any deterioration in the condition of the ship if she remains under arrest, the time lapse before the action comes on for trial and the quantum of the claims faced by the ship as compared with the value of the ship and the timing of the sale. The sale procedure will take several months considering the need to obtain the Judge's order, the service on the owner of the ship and the sale procedure that will follow thereafter.

**Rahayu Abd Ghani is the Principal Partner of Rahayu Partnership. The firm is part of the Joseph Tan Jude Benny (JTJB) GlobalNetwork. Rahayu graduated from the University of Newcastle-upon-Tyne with a Bachelor of Laws Honours Degree in 1996 and upon completing her Certificate in Legal Practice and being called to the Malaysian Bar in 1999, Rahayu started her practice in Messrs L.Y.Leong & Partners, Subang Jaya where she gained experience specializing in shipping, admiralty and insurance cases. She has been exposed to a full range of shipping, admiralty and insurance cases both contentious and non-contentious. She also handles civil, corporate and commercial cases. Her exposure includes: project financing; ship financing and registration; ship sale agreements and shipbuilding contracts; ship arrests for all types of claim; charter party and bill of lading disputes; marine insurance claims; arbitration; and shipping litigation.*