

SHIP ARREST IN CAMBODIA

By Dr. Darwin Hem*
BNG Legal
cambodia@bnglegal.com
www.bnglegal.com
No 65B, St 111, Sangkat
Boeung Prohit, Khan 7 Makara
Phnom Penh, Cambodia
Tel: +855 23 217 510
Fax: +855 23 212 840



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

Following Cambodia's adoption of the 1952 Brussels Convention, the Cambodian courts have occasionally dealt with ship arrests. Today, ship arrests in Cambodia are subject to either Book six on Compulsory Execution or Book seven on Preservative Disposition under the Code of Civil Procedure ("CCP"), promulgated on 6th July 2006, and effective from 6th July 2007. In addition to the seizure of the judgement debtor's ships for the enforcement of a final and binding Court Judgment or Arbitration Award¹ a claimant may apply to court for an order to provisionally attach or dispose of the defendant's ship.

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

Since 1957, Cambodia has been party to the International Convention relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952).

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

The provisions of CCP remain the major source of law for the arrest of ships. Like other executions, the execution against ships requires a title of execution. The requirement of a title of execution is satisfied if there is a final and binding judgment²; if the claimant is enforcing real security rights against the ship³; and if there is provisional attachment against the ship⁴.

- Final and binding Judgment: In principle, title of execution in the form of a final and binding judgment is necessary for the execution judge to issue an order for ship arrest. This means that if the judgment is not yet binding, it is not executable and thus the debtor's ship cannot be arrested in execution. However, a declaration of provisional execution may constitute title of execution for the purposes of arresting a ship, even if the judgment is not yet binding.⁵
- Enforcement of real security rights: Upon the creditor's request, the execution judge or bailiff may order for the ship to be arrested if there is a final and binding judgment or other documents having the same effect, including notarized documents certified by a notary proving the existence of real security rights.
- Provisional attachment: The execution of provisional attachment against a ship must be performed through the method of registration of provisional attachment and/or by ordering the bailiff to confiscate the Certificate of Registry of the concerned ship and submit this certificate to the Preservative Disposition Execution Court.

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

Pursuant to Article 568 of CCP, when the ship is not arrested in rem, the creditor may also demand for the execution of provisional attachment by means of ordering the confiscation of the Certificate of Registry of Vessels.

¹ Book six of CCP

² Article 454 to Article 486 of CCP

³ Article 521 to Article 523 of CCP

⁴ Article 568 of CCP

⁵ Article 350 and 455-3 of CCP

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

In order to answer this question, we must first ascertain that no matter the origin of the credit, any claim can lead to ship arrest, following court ruling.

- Under the Brussels Convention, ships may be arrested for any of the “maritime claims”⁶
- Under domestic law,⁷ any credit, whether ordinary or privileged, whether arising from a maritime claim or not, is a valid ground to apply to court for the arrest of the debtor’s ship.

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

Cambodian law does not, for the purposes of ship arrests, distinguish ships according to their flags. However, in practice, the nationality of a ship may be an obstacle in court proceedings in that the court needs to inform the ship’s embassy, in case, the ship is subject to provisional attachment by means of Code of Civil Procedure. Besides that, there are no privileges, except governmental ships, which immunity is protected by international law.

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

Once a maritime claim has arisen, ships can be arrested, even if the person liable for the maritime claim is not the ship-owner but is, for example, the bareboat charterer, voyage or time charterer or any other third party.⁸ The ship-owner shall, in order to have his ship released from the arrest, have to give security that guarantees the payment of the claim of the arresting party.⁹ In other words, the ship-owner will have to pay the security amount to release the ship, even if a third party is the debtor towards the claimant.

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

Under the Brussels Convention¹⁰, any ship belonging to the debtor may be arrested even where the claim is not directly related to the ship unless the claim pertains to the title or ownership of a particular ship or to disputes between co-owners or the mortgage or hypothecation of this ship.

A ship owned by an associated company of the debtor may be arrested only if the associated company is deemed to be jointly responsible for the claim as in the case of the responsibility of general partnership.¹¹

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

Under the Brussels Convention,¹² the creditor of a maritime claim against the bareboat or time charterer of a ship is entitled to arrest the ship in question or any other ship under the same ownership of the charterer.

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

Before the court issues the ruling to provisionally attach ships, the court may request the creditor to deposit money.¹³ The amount of deposit is the amount of damage that the court thinks the debtor may suffer after the court attaches the ship. Sometimes, the court may order the creditor to deposit an amount equivalent to the price of the ship. However, under Article 542 of CCP, it is the court’s discretion whether it orders to deposit or not. If the creditor demonstrates good evidence, the court may not need the creditor to deposit any money. This would be evidence that permits immediate examination¹⁴ such as a management agreement, a creditor’s report showing that the debtor has a lot of loans, etc.

⁶ Article 1 of the 1952 Brussels Convention

⁷ Provision of Prakas 2003 on resolution of ships registration, and provision relating to provisional attachment against ships (Article 568 of CCP), and compulsory execution against ships (Article 521 to Article 523 of CCP)

⁸ Article 4(1) of international convention relating to the arrest of sea-going ships (1952)

⁹ Article 5 of international convention relating to the arrest of sea-going ships (1952)

¹⁰ Article 3(1) of international convention relating to the arrest of sea-going ships (1952)

¹¹ Chapter 2 “General Partnership” of law on commercial enterprises, adopted 19 June 2005

¹² Article 3(4) of international convention relating to the arrest of sea-going ships (1952)

¹³ Article 542 of CCP

¹⁴ Article 131 of CCP

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

There is no difference in the arrest procedure in relation to maritime claims and maritime liens. However, while maritime claim may be extinguished due to a change in the ownership of the ship, maritime liens remain in full force and effect until the discharge executed by the debtors¹⁵.

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

Even though Cambodia has not acceded to any international conventions relating to maritime liens, Cambodia has adopted its own regulation relating to maritime lien since 2003.

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

We would need a couple of days after our law firm has obtained all the required documents of the claim and sufficient information (ship's movements, etc.). Once the complete application is handed to the competent court, an interim arrest decision will normally be obtained in a matter of days.

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

There is no need to provide a POA. Obviously, the claimant must provide the documents¹⁶ evidencing the existence and the cogency of the claim. These required documents are listed in CCP. In addition, when the claim is grounded on the Brussels Convention, the documents must also show the maritime nature of the claim.

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

Notarized documents of title of execution are required in the case of the execution of a final court judgment¹⁷ and the execution of security rights against ships.¹⁸

In practice, there have not been any documents filed electronically to court; all required documents¹⁹ must be handed directly to the competent court.

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

The Cambodian courts may accept jurisdiction over any substantive claims that fall within Articles 8 and 9 of CCP (general provision of competent court). In addition, the Cambodian courts may accept jurisdiction over the substantive claims listed in Article 7 of the Brussels Convention.

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

The procedure to release a ship can be divided into two cases:

First, a ship arrested to satisfy final and binding court judgment may be released under the following procedures:

- Money Guarantee for the ship's release: The debtor-in-execution shall provide money guarantee equivalent to the total amount of the claims of the creditor-in-execution, the claims of the creditors who have made demands for distribution, and the execution costs. The court shall, upon motion and prior to the making of any offer for purchase, cancel all of the compulsory execution proceedings except for the distribution proceedings.²⁰ This is to ensure that if the debtor fails to fulfill his duty, the creditors-in-execution can be paid with the money guarantee following the determination of the distribution proceedings.
- Permission to sail: The court may, upon a motion by the debtor-in-execution, grant permission for the ship to sail if the court finds that business necessity or other good grounds exist, and if the consent of each creditor and the highest bidder or the purchaser has been obtained.²¹

¹⁵ Article 52 of Prakas 2003

¹⁶ Article 541 of CCP

¹⁷ Article 350 of CCP

¹⁸ Article 521 of CCP

¹⁹ In case of execution of final judgment against ships

(Article 455 of CCP); execution of security rights against ships (Article 521 of CCP); and provisional attachment against ships (Article 568 of CCP)

²⁰ Article 461 of CCP

²¹ Article 462 of CCP

- Cancellation of compulsory sale proceedings: If the bailiff is unable to confiscate the Certificate of Registry of ships within 2 weeks of the issuance of the ruling for the commencement of compulsory sale, the execution court shall cancel the compulsory execution proceedings.²²

Lastly, in the case of provisional attachment against ships, the debtor may file a motion of objection to the provisional attachment. If it is established by a prima facie showing that clear circumstances constituting grounds for cancelling the ruling of preservative disposition exist and that there is a risk that execution of provisional attachment would cause irreparable damage, the court may order a stay or a cancellation of the provisional attachment with the requirement of security.²³

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

Under the CCP, security for the release does not need to be money. It can be any negotiable instruments, as deemed appropriate by the court.²⁴

19. Does security need to cover interest and costs?

In the case of a ship arrest to satisfy a final and binding court judgment, the security must be equal to total amount of claims of creditors and execution cost,²⁵ which might also include the interest and costs depending on the parties and/or judge. However, upon issuing a court ruling on provisional attachment against ships, the court must stipulate the monetary amount the debtor is required to place as a court deposit in order to have the execution of the provisional attachment rescinded.²⁶ Thus, it is the court's decision whether interest and costs are covered.

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

P&I LOUs are considered as negotiable instruments under CCP's provision. Therefore, depending on the value of LOUs and on the agreement between the parties, the court might accept this security. In addition, it might also depend on the agreement between parties. If claimant agrees to accept the LOUs, he/she has to forfeit the claim; as a result, the court ruling against the ships will be cancelled.²⁷

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

After depositing the security for the ship's release, it is only a matter of days before the court ruling cancelling the attachment against ships will be obtained. That court ruling only comes into effect when it becomes final and binding. However, the court may, if it finds it particularly necessary, declare the ruling to come into effect immediately.²⁸

22. Is there a procedure to contest the arrest?

It is possible to contest the arrest; the debtor can file a motion of objection before the court that issued the ruling of attachment against the ship.²⁹ In such a case, it is important that the debtor prepares all relevant documents supporting his reason for contest, such as the non-existence of the debtor's claim or others good grounds.

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

According to Article 557 of the CCP, in the case of provisional attachment against a ship, the claimant must take legal action on the merit within a period deemed reasonable by the Court³⁰ after the said ship has been arrested; otherwise the arrest will automatically be held to be cancelled.

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

Cambodian judges rarely accept a claim for compensatory damages for wrongful arrest, unless bad faith or malice on the part of the arresting party is clearly established.

²² Article 464 of CCP

²³ Article 551 of CCP

²⁴ Article 536 of CCP

²⁵ Article 461 of CCP

²⁶ Article 547(1) of CCP

²⁷ Article 461 of CCP

²⁸ Article 547(1) of CC

²⁹ Article 550 of CCP

³⁰ This period shall not be less than 2 weeks.

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

Piercing the corporate veil is not common. Therefore it is not normally possible to arrest the property of owners associated with the debtor. The exceptions are general partnerships, since the general partners are personally liable for the debts of the company. Where limited companies are concerned, Cambodian judges might reply on the theory of “fiction” instead of the theory of “appearance” to pierce the corporate veil. The company owning the ship must be proved to be fictitious. Considerations that the court may take into account include unity of management, absence of participation to the profits and/or debts, unequal distribution of the dividends, same beneficial or associated owner, etc.

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

Yes, if arrested property is subject to rapid deterioration or is expensive to retain in custody, the Bailiff is entitled to sell such property at the request of the claimant, even if the court has not yet given a judgment. In theory, Articles 565 and 568 of the CCP may apply also to ships under arrest. In practice, the lapse of time of the procedure of judicial sale depends on the complexity of the case.

**Dr. Darwin Hem is the Founder of the law firm BNG Legal, one of the leading Cambodia law firms.*

Education: Joint-Law Program of the University of San Francisco (USA) and Cambodia and a CAPA from the Bar Association of Cambodia, and a MBA in Finance from Charles Sturt University (Australia). He also studied economics in Australia and law in Lyon (France) under various scholarships, and has a Diploma in Economic Law from the Royal School of Administration and a Diploma in Finance from Development Alternatives, Inc. (USA).

Career: Attorney at law in Cambodia; an international associate member of the American Bar Association, a member of APAA (Asian Patent Attorneys Association), LAWASIA (The Law Association for Asia and the Pacific); a member of the Working Party on the Accession of Cambodia into the World Trade Organization; a Trademark Agent in Cambodia; an arbitrator at the Cambodian Arbitration Council. He specializes in real estate, commercial & corporate law, project finance, intellectual property and commercial litigation.