

HONG KONG: BRIEFING

SHIP ARREST IN
HONG KONG
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AN OVERVIEW OF SHIP ARREST IN
HONG KONG:

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- WHAT CAN A SHIP BE ARRESTED FOR?
- WHICH SHIP CAN BE ARRESTED?
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Hong Kong has long been a thriving port and active maritime jurisdiction. Formerly part of the British Commonwealth, Hong Kong inherited the English judicial system familiar to participants in the maritime sector.

This briefing provides an overview of ship arrest in Hong Kong.

Conventions and legislation

On 29 March 1963, Hong Kong acceded to the 1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (Brussels).

The High Court's jurisdiction to determine admiralty claims stems from the High Court Ordinance (Cap.4), s.12A-E. That jurisdiction is regulated by the Rules of Court, Order 75.

What can a ship be arrested for?

Admiralty claims

Ship arrest is available to civil claimants in Hong Kong primarily for¹:



- a. Possession or ownership / disputes between co-owners in respect of the ship
- b. Mortgages
- c. Damage done or received by a ship
- d. Damage to life or goods
- e. Agreements related to carriage of goods in a ship or the use or hire of a ship
- f. Salvage
- g. Towage / pilotage
- h. Goods or materials supplied to ship for operation or maintenance (i.e. necessaries)
- i. Construction, repair, dock charges and dues
- j. Crew wages, Master's wages and disbursements
- k. General average

This includes the maritime liens available under Hong Kong law, e.g. damage done by ship, salvage, wages and master's disbursements.

Arrest for claims that should be brought in arbitration

If vessel has been arrested in Hong Kong, the arrest / security provided can be maintained if the claim is stayed for arbitration, as security for the claim in arbitration². This is identical to the position in Singapore.

Which ship can be arrested?

Ships beneficially owned by, or demise chartered by, the person who would be liable on the admiralty claim in an action *in personam*³.

Evidence of registered ownership suffices in almost all cases⁴ (e.g. SeaWeb, Lloyds Intelligence, ship registry certificate).

Sister ship arrests (that is, of ships owned by the same person as the ship involved in the claim) are generally available in Hong Kong⁵, but not for 'proprietary' claims, e.g. mortgages, claims for possession of a ship⁶.

The "same person" referred to above is strictly interpreted so that vessels owned by associated companies in the same corporate group are generally not subject to arrest. The exception is where there is sufficient evidence to "lift the corporate veil" and to show that the corporate structure is a mere facade, sham, or fraud – this is not easily proven.

“SISTER SHIP ARRESTS (THAT IS, OF SHIPS OWNED BY THE SAME PERSON AS THE SHIP INVOLVED IN THE CLAIM) ARE GENERALLY AVAILABLE IN HONG KONG...”

¹ High Court Ordinance (Cap.4), s.12A(2).

² Arbitration Ordinance (Cap.609), s.20(6).

³ High Court Ordinance (Cap.4), s.12(b)(4)(i).

⁴ *The Almojil 61*, [2014] HKCFI 1152.

⁵ High Court Ordinance (Cap.4), s.12(b)(4)(ii).

⁶ And perhaps strangely, also not for "damage received by ship". However it is difficult to envisage a situation where "damage received by ship" arises and gives rise to a claim against the ship receiving damage, without "damage done by ship" or some other admiralty claim arising as well.

Procedure and costs

Court documents

The applicant would need to file (i) an admiralty writ *in rem*, (ii) an application for an arrest warrant, and (iii) a supporting affidavit. Before applying for the arrest warrant, the arresting party should (iv) search the caveat book for caveats against arrest.

When obtained, the warrant of arrest is served on the ship by the Bailiff, who must also be provided with (v) a request to execute the warrant, and (vi) an undertaking to pay the Bailiff's costs of the arrest. The warrant is valid for 12 months from issue.

Counter-security is not required.

Contents of the supporting affidavit

The affidavit must establish a right to arrest, including the existence of an admiralty claim, and ownership of the ship to be arrested by the person who would be liable on an action *in personam*.

As a warrant of arrest is normally sought *ex parte*, the applicant bears a duty of full and frank disclosure (and we understand similar applies in Singapore):

- a. The duty is a continuing duty – hence if the Plaintiff later becomes aware of facts showing that, for example, there is actually no admiralty claim, it should inform the Court.
- b. The duty includes disclosing matters which are negative for the Plaintiff's case.
- c. It is not sufficient to merely exhibit voluminous documents to the supporting affidavit – the documents should be explained in the text of the affidavit itself.
- d. If the claims include both admiralty and non-admiralty claims, both should be clearly distinguished in the supporting affidavit.

If there is non-disclosure of material facts the warrant of arrest may be set aside on that basis alone. The Court however has discretion to nonetheless retain or grant a fresh warrant of arrest⁷. Damages for wrongful arrest may be ordered if the non-disclosure amounts to proceeding in a "cavalier fashion" or "malicious negligence"⁸.

Costs in practice

Filing fees to obtain a warrant of arrest are about US\$300.

The Bailiff will generally ask the arresting party to provide a deposit for the Bailiff's costs if the ship remains under arrest for 1-2 weeks. The sum requested is not less than about US\$6,500 – a request for US\$13,000 is common. The Bailiff's costs per day (e.g. guard fees) depend on the size and type of vessel, but usually amount to about US\$450-725 per day.

Solicitors' fees vary depending on the complexity of the matter.

These costs are recoverable from the proceeds of sale of the ship, with priority.

“THE AFFIDAVIT MUST ESTABLISH A RIGHT TO ARREST, INCLUDING THE EXISTENCE OF AN ADMIRALTY CLAIM, AND OWNERSHIP OF THE SHIP TO BE ARRESTED BY THE PERSON WHO WOULD BE LIABLE ON AN ACTION IN PERSONAM.”

“IF THERE IS NON-DISCLOSURE OF MATERIAL FACTS THE WARRANT OF ARREST MAY BE SET ASIDE ON THAT BASIS ALONE.”

⁷ *The Oriental Dragon*, [2013] HKCFI 2078.

⁸ *The Hong Ming*, [2011] HKCFI 577.

“THE PROCEEDS OF SALE ARE PAID INTO COURT AND STAND IN PLACE OF THE SHIP. THIS AVOIDS ASSET VALUE WASTING AWAY UNDER ARREST WHILE THE FACTS OF THE CASE ARE ARGUED IN FULL.”



Security

Any form of security acceptable to the Plaintiff will do. A Plaintiff cannot unreasonably refuse to accept security – so for example a Plaintiff would probably not be entitled to reject a Letter of Undertaking from an International Group P&I Club and insist on a bank guarantee.

Sale and Priorities

As with other English law based jurisdictions the High Court has jurisdiction to order the sale of a ship lying under arrest *pendente lite*, that is, while the action remains pending. Such a judicial sale vests the purchaser with the ship free from all encumbrances. The proceeds of sale are paid into Court and stand in place of the ship⁹. This avoids asset value wasting away under arrest while the facts of the case are argued in full.

Absent “powerful special features”, judicial sale may only be performed via public auction or tender. The High Court has refused permission for a privately arranged sale even where the Plaintiff adduced three valuations showing that the proposed private sale price was higher than the ship’s value¹⁰. We understand this to be similar to the current position in Singapore where the courts now tend to refuse to endorse privately arranged sales.

Approximately 1% commission is payable on judicial sale – HK\$150 for every HK\$15,000.

The order of priorities to the proceeds of sale lying in Court is, generally:

- a. Bailiff’s costs, including commission
- b. Cost of producing the fund, i.e., Plaintiff’s arrest and sale costs
- c. Possessory liens pre-dating the maritime liens, if existing
- d. Maritime liens – special rules apply for priorities between maritime lien claimants
- e. Possessory liens, if existing
- f. Mortgages
- g. Statutory liens (i.e. the other admiralty claims) – statutory lien claimants rank *pari passu* with each other
- h. Shipowner’s unsecured creditors

⁹ *The Convenience Container*, [2006] HKCFI 556; [2007] HKCA 305.

¹⁰ *The Margo L*, [1997] HKCFI 776.

CONTACTS

Should you like to discuss any of the matters raised in this Briefing, please speak with the authors, Richard Wilmot, Justin Gan and Mark Tan, a member of our maritime team below or your regular contact at Watson Farley & Williams.

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