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United Kingdom: Maritime Arrest Under English Law

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Maritime arrest is a legal action to seize a vessel, cargo, container or other maritime property as security for a claim or to enforce a maritime lien. The claim may be brought "in rem", namely against the arrested property itself and not necessarily against the property's owner (which may be unknown). Arrest differs from "attachment" in that the property itself is not the named party in the action and the defendant must own the property for it to be subject to attachment. "Arrest" is literally just that – the vessel will be prevented from moving or trading pending resolution of the outstanding claim.

Arrest can be effected under English law, the Arrest Convention 1952, or the Arrest Convention 1969. For the purposes of this note, I will deal with the position under English law, governed by the Admiralty Court in London, although the regime is similar in many jurisdictions under these Conventions.

Arrest is available in a wide variety of situations, including any claim to ownership or possession of a vessel or share in it, any claim for damage done by or suffered to a vessel, to claims for goods or materials supplied to a vessel for its operation or maintenance, or a general average act, to name but a few.

There are of course criteria that must be met in order for the Court to entertain an application for arrest. The underlying dispute must be a "maritime claim" as defined by s20 of the Supreme Court Act 1981, meaning that the claim must have some connection with shipping, or aviation. The claimant must also prove that the vessel in respect of which arrest is sought is connected with the claim.

If the claim is a maritime lien, this may operate to allow the arrest of a vessel even if it has changed ownership – the doctrine being that the lien attaches to the property at the time the cause of action arises and remains so attached until satisfied or time barred. Maritime liens take priority over registered mortgages, yet need not be registered themselves. What constitutes a maritime lien varies in different jurisdictions, although the various International Lien conventions may be applicable. Under English law, a claim is deemed to be a maritime lien according to the law of the place of arrest. Essentially, maritime liens under English law arise in respect of claims for damage done by the vessel to property or persons, salvage, crew wages, and wages and disbursements of the Master. Statutory liens include mortgages and claims in respect of goods and services supplied to a vessel. They are not, strictly speaking, maritime liens, but still engender the right to arrest under the Supreme Court Act.

Should a ship connected to the claim have changed ownership, and the claim is against the Owner but does not constitute a maritime lien, arrest of a sister ship is possible, provided that the sister ship was owned by the same entity which owned the ship connected to the claim at the time the cause of action arose. That entity must also be the beneficial owner of all the shares in the sister ship.

The grant of an arrest warrant is not conditional on the claimant making disclosure of all material facts at the time of application, for example that proceedings have been commenced in another jurisdiction. Arrest is often utilised to satisfy a Court judgment, but an application for an arrest can be made at any time once proceedings have commenced, there being no requirement for judgment to have been entered. Nor will a vessel owner's subsequent insolvency override the security obtained by arrest, since an arrested vessel will stay under the control of the Admiralty Court. This provides tangible security for any damages awarded, since the Court can order the arrested property to be sold in order to realise those damages. The possibility of arrest alone will often prompt an Owner to provide security through its bank or its insurers in the form of a letter of undertaking, although provision of such a letter once arrest has been effected will operate to ensure prompt release.

Procedurally, a warrant of arrest is available once an in rem Claim Form, known as ADM1, is issued. This standard form requires "brief details" of the nature of the claim or counterclaim. Full Particulars of Claim will have to follow within fourteen days of service. One must also state that the claim has not been satisfied, the name of the ship and its port of registry, and the amount of the security sought, if any. The maximum security available is the value of the arrested property. In rem applications must also include

- the name of the person who would be liable on the claim were it not commenced in rem, and that this person was, when the right to bring the claim arose, either the owner or charterer of, or was in possession or in control of, the ship in connection with which the claim arose, and
- that at the time the Claim Form was issued, was either the beneficial owner of all the shares in the ship in respect of which the warrant is required, or the charterer of the vessel under a charter by demise.

Should the ship be owned by a State where by any convention or treaty, the United Kingdom has undertaken to minimise the possibility of arrest of ships of that State, notice (Form ADM6) must be served on a consular officer at the consular office of that State in London, or the port at which it is intended to arrest the ship, and evidenced to the Court.

No security is required in effecting arrest, apart from an undertaking in Form ADM4 to pay all costs of the Admiralty Marshal in securing arrest, keeping the vessel under his custody and procuring any subsequent release. The same form requests that a search is made in the Admiralty Registry to ensure that no caution against arrest is in place. Form ADM5 is a Declaration in Support of the Application for Arrest, ending with a Statement of Truth signed either by the claimant or its solicitor. There is also a Statement of Truth in Form ADM1. It is important that the arrest regime is not invoked in bad faith or without due consideration, as doing so may provoke an action for wrongful arrest.

Special conditions apply if the vessel to be arrested is involved in oil spillage, about which evidence will need to be adduced to the Court.

The costs of arrest depend on the value and complexity of the claim. Court fees for issuing a Claim Form in a claim between GBP 50,000 and 100,000 will be £630, increasing on a sliding scale up to £300,000 where they are capped at £1,530. The actual arrest fee is set at £200. The Admiralty Marshal's expenses can increase dramatically if the vessel remains under arrest for some time – since the vessel is under the control of the Admiralty Court, the Marshal is responsible in the first instance for berthing costs and the sustenance of crew. Naturally these costs are passed on to the party making the arrest and are ultimately recoverable, but in practical terms they need to be below the value of the ship.

Further disbursements may include a valuation of the vessel, or a search for its next port of call. The preparation entailed in completing the standard Court forms will depend on the nature of the case, but will clearly increase if the arrest is contested.

Once obtained, the Warrant of Arrest is valid for twelve months. It is physically served on the subject vessel by an officer from HM Customs acting on instructions from the Admiralty Marshal. The entire process can, in some cases, be completed within hours.

Apart from the obvious uses of arrest, namely to satisfy judgments or enforcing security, arrest can be invoked in order to secure jurisdiction in a dispute. If proceedings are started abroad, in breach of an English jurisdiction or arbitration clause, the Courts will act in order to restrain that breach. In the course of obtaining the injunction to prevent the foreign proceedings from continuing, having a vessel effectively immobilized will concentrate the mind of the party in breach. Equally, as a condition of granting a stay of proceedings, the Courts may order the provision of security, which can be obtained via arrest, although in practice alternative security will generally be posted in order that the vessel can sail.

Once a ship has been arrested, release will be ordered by the Court when security for "the reasonably best argued case" has been given. [The Moscanthy, 1971]. A plaintiff demanding excessive security may later be

penalised in costs. Provision of security is normally by payment of funds into Court, a Letter of Undertaking from the vessel's P&I Club, an undertaking to the Court with surety (bail bond) or, most commonly, bank guarantee from a bank acceptable to the Court. Procedurally, an application of release must be filed, Form ADM12, together with the consent of the plaintiff. Re-arrest is possible should the security prove insufficient, but this further security must not exceed the value of the ship at the time the first arrest was effected. In practice, re-arrest is not often practicable as most guarantees will exclude re-arrest for the same claim.

A third party claiming a right in rem against arrested property may file a caution against release, which prevents any dealings with the arrested property as well as its release for a maximum period of one year, although further cautions can be entered. The cautioner must have good grounds for its application, since the Court may order the cautioner to pay damages for any delays or loss incurred if those grounds prove baseless. Unless the cautioner's claim is a maritime lien, it must still issue a Claim Form to safeguard against the sale of the vessel whilst under arrest, of which more later. The Court will not enter a caution against release if the level of security is the only reason for doing so.

If security is not forthcoming, an order for sale of the ship can be obtained. The value will be determined by a Court-appointed valuer, the sale advertised and sold via sealed bids. If none of the bids meet the value determined, the Admiralty Marshal will accept the highest bid, if the arresting party and the holders of any cautions consent. In the event of a dispute, the Marshal will obtain directions from the Court.

The buyer in such a sale takes title free of all claims and encumbrances, once outstanding liabilities have been settled. This is why a cautioner must still issue a Claim Form, in order to secure its claim on any sale. The Admiralty Marshal and the Court take priority, then the costs of the party making the arrest. Maritime liens, claims of mortgagees and other secured creditors rank next, followed by other claims in rem and then other claims. If the party making the arrest has no registered charge, it recovers in proportion to any other unsecured creditors. It should be remembered that arrest in itself does not confer priority to the arresting party's claims.

Nonetheless, arrest of a vessel or the threat of it remains a potent resource which, if utilised, is likely to cause severe disruption to a vessel's owners. But the criteria for arrest, which will vary between jurisdictions, must be satisfied or an action for wrongful arrest and damages may ensue. However if arrest is employed appropriately, it will provide the reassurance of physical security for a claim which may otherwise be difficult to set in motion, let alone enforce.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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MV Saldanha (B J Macfarlane & Co)

This case raised the question of whether the detention by pirates of the MV SALDAHNA (the 'Vessel'), or the effects of piracy entitled charterers to argue that the vessel was off-hire in accordance with cl.15 of the NYPE form of Charterparty agreed by the parties in the

[Charterparty dated 25th June 2008.](#)

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In our bulletin on 30 July 2009 we reported on the decision of Justice Moore in the Federal Court of Australia in *Leonie's Travel Pty Ltd v International Air Transport Association, Qantas Airways Limited & Ors*. Qantas was found not liable to pay travel agent commissions and to have not breached its Contract with the travel agents. That decision has now been overturned on appeal to the Full Court of the Federal Court of Australia in *Leonie's Travel Pty Ltd v Qantas Airways Limited* [2010] FCAFC 3

[Survey of Shipping Primary Equity Offerings in the 2009 U.S. Public Market \(Holland & Knight\)](#)

2009 was a challenging year for many shipping companies throughout the world. Despite a difficult environment, 14 companies completed 21 primary equity offerings in the U.S. public market.

[EPA Reviewing PCB Rules and MARAD Foreign Transfer Approvals \(Blank Rome LLP\)](#)

On April 7, 2010, the Environmental Protection Agency (EPA) published an Advance Notice of Proposed Rulemaking (ANPRM), 75 Fed. Reg. 17,645, announcing its intent to reassess its regulations governing the existing use of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act (TSCA).

[Commencement of laytime: common pitfalls and errors \(Clyde & Co\)](#)

Determining when laytime commences is essential for both owners and charterers.

[DOT Issues NPRM Relating to DBE Requirements \(Foley & Lardner\)](#)

On May 10, 2010, the United States Department of Transportation (DOT) issued a Notice of Proposed Rulemaking (NPRM) regarding additional proposed changes to the Disadvantaged Business Enterprise (DBE) regulations at 49 CFR Part 26 (Part 26), applicable to all recipients of federal grants through an agency within DOT, including the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA).

[Container Detention Charges Decision Sparks Debate \(DLA Phillips Fox\)](#)

The New South Wales Consumer, Trader & Tenancy Tribunal's recent decision in *D V Kelly Pty Ltd v China Shipping (Australia) Agency Co Pty Ltd* [2010] NSWCTTT 136 has caused considerable debate and cast doubt over the enforceability of container detention charges. The case concerned the distinction between liquidated damages and penalty clauses in contracts, and has already caused ripples throughout the entire Australian shipping industry.

[Decarbonising The Shipping Sector - Extension Of The EU Emissions Trading Scheme \(Freshfields Bruckhaus Deringer\)](#)

It is estimated that approximately 75 per cent of the world's trade is carried by ships and with increased globalisation this figure is set to increase.

[New Proposed FAA Re-Registration Requirement \(Foley & Lardner\)](#)

All owners, lessors, and lessees of U.S.-registered aircraft and holders of security interests and aircraft mortgages in such aircraft, should be aware of a new proposed rule that is about to be adopted by the Federal Aviation Administration (FAA).