

Practicalities of ship arrest in Hong Kong and Mainland China

Until recently, ship arrest had been supplemented or, in some cases, replaced by the use of Rule B attachments of electronic funds transfers passing through New York. In 2002, it was held in the case of *Winter Storm Shipping v TPI* that an electronic fund transfer in the hands of a third-party intermediary bank was attachable property belonging to a Rule B defendant. However, on 16 October 2009, this decision was overruled by the US Appeal Court in *The Shipping Corporation of India Ltd v Jaldhi Overseas Pte Ltd*, thereby re-establishing ship arrest as the primary method of obtaining pre-judgment security for maritime claims.

Understanding the differences in the law governing arrest, as well as the procedures for arrest in the various jurisdictions will be important in ascertaining the most appropriate forum for an arrest and sale. With China being one of the mainstays of global trade, now is an appropriate time to review the procedures for arrest of vessels calling there. The table below illustrates some important features of ship arrest practice in the Hong Kong Special Administrative Region and Mainland China.

In summary, ship arrest in Hong Kong is predominantly based on principles of English law. It is both quick and cheap to arrange and does not require the provision of counter-security. In contrast, the procedure for arrest in Mainland China is somewhat less convenient and more expensive, requiring a set of power of attorney documentation to be provided, as well as counter-security. Nevertheless, the procedure can be completed relatively expeditiously when necessary.

Issues to consider	Hong Kong	Mainland China
1. Is it a signatory to any of the International Conventions on ship arrest? If so, which one?	Yes, the 1952 Brussels Arrest Convention.	No, but the law relating to ship arrest is generally in line with the provisions of the 1999 Arrest Convention.
2. For what types of claims can you arrest a ship?	<ul style="list-style-type: none"> • Possession or ownership of, or mortgage on, a ship; • loss of life or personal injury because of a defect in a ship; • damage done by or to a ship; • loss or damage to goods carried by ship and other claims relating to the carriage of goods by ship; • use or hire of a ship; • salvage, towage and pilotage; • goods and materials supplied to a ship; • construction or repair of a ship; • wages owed to a ship's master or crew; • acts of general average; • bottomry; • collisions, etc. 	<ul style="list-style-type: none"> • Possession or ownership of, or mortgage on, a ship; • loss of life or personal injury in connection with ship operation; • loss of or damage to property caused by ship operation; • agreements in respect of the employment or chartering of a ship; • salvage, towage and pilotage; • provision of supplies or rendering of services in respect of ship operation, management, maintenance or repair; • construction or repair of a ship; • crew's wages; • acts of general average; • disputes arising out of a ship sale contract; • insurance premiums for a ship (including P&I Club calls), etc.

<p>3. What is the procedure for an arrest?</p>	<ul style="list-style-type: none"> • Claimant's solicitor applies to issue a warrant of arrest, supported by an affidavit; • a written application is made to the registrar for leave to search the <i>caveat</i> book for <i>caveats</i> against arrest; • the warrant is issued and filed with the bailiff, together with a request to execute the warrant and an undertaking to pay the costs of arrest; and • the bailiff effects service of the warrant and writ. 	<ul style="list-style-type: none"> • Claimant's lawyer files a written application with the relevant maritime court, accompanied by supporting documentation; <p>[NB: Original copies of the supporting documents are not usually required, but the claimant is normally required to submit an original arrest application, which must be properly executed by an authorised director of the claimant. When a lawyer is involved in the arrest, a set of power of attorney documentation (a power of attorney, a certificate of the identity of the legal representative and a certificate of the claimant company's incorporation) should also be submitted. These, if issued by a foreign company, should be notarised and legalised at the place of the claimant company's incorporation and/or where its authorised director resides. Normally, due to the usually urgent nature of arrest applications, the court will accept faxed/scanned versions of the power of attorney documentation, but will set a time limit within which the original copies of the notarised and legalised documents should be submitted to the court.] It should however be noted that the Chinese courts have wide discretion as to the formality requirements and it will be necessary to confirm with the particular court as to whether they are strict on the formality requirements (even if in a urgent situation) or are prepared to be more flexible.</p> <ul style="list-style-type: none"> • the arresting party usually has to provide counter-security (see the answer to question 12, below); • the court issues an arrest order; and • the judges will serve the arrest order.
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4. How quickly can an arrest be effected?	Arrest documents can normally be issued within hours of our firm receiving the file.	It normally takes less than a day to complete the documentation. An arrest order will be granted (or denied) by the court within 48 hours of receipt of the arrest application but counter-security for the arrest will usually need to have been provided before the application will be granted.
5. What expenses are incurred?	Court fees: typically no more than USD 297 (HKD 2,300) Solicitors' fees: variable Bailiff's expenses: variable but usually about USD 451 (HKD 3,500) per day	Court fees: variable but the maximum being USD 732 (RMB 5000) Lawyers' fees: variable All other expenses/disbursements incurred by the court during the course of the ship arrest may need to be paid by the arresting party, but are generally recoverable in the substantive proceedings if the arresting party succeeds.
6. How do you obtain a ship's release?	<ul style="list-style-type: none"> • The relevant party files for release with <i>praecipe</i> (i.e. the writ demanding an order for release); • solicitors give an undertaking to pay the bailiff's costs; • the agreement of the claimant and all <i>caveators</i> are obtained; and • the bailiff releases the vessel. <p>A release can usually be obtained promptly provided the requirements for release are satisfied, particularly the provision of adequate security.</p>	<ul style="list-style-type: none"> • Appropriate security is provided by the respondent; • the relevant party files an application for release; • all expenses incurred during the course of the arrest are paid; • the agreement of the claimant is obtained; and • the bailiff releases the vessel.
7. Can you arrest a ship to obtain security for both court judgments and arbitral awards?	For court judgments, yes; for arbitral awards, yes where the law of the place governing the arbitration permits this.	Yes.
8. Can bareboat-chartered ships be arrested?	Whether a bareboat-chartered ship can be arrested depends upon the type of claim being brought.	Yes, but only if the bareboat charterer of the ship is liable for the maritime claim and is the bareboat charterer at the time of the arrest and it is limited to arrest of the vessel involved in the dispute.
9. Can time-chartered ships be arrested?	Whether a time-chartered ship can be arrested also depends upon the type of claim being brought.	No.
10. Can legal sister ships be arrested?	Yes. Merely associated ships cannot be arrested.	Yes, except for claims relating to the ownership or possession of a ship. Merely associated ships cannot be arrested.

11. Is counter-security required? If so, in what form and how much?	No.	The courts almost invariably request that counter-security be provided. Acceptable forms of counter-security include cash deposits, guarantees issued by first-class local banks and letters of undertaking issued by first-class local insurance companies. Letters of undertaking issued by P&I Clubs (other than China P&I Club) are not normally accepted. The amount of the counter-security is at the court's discretion but is usually in line with the losses the shipowner may suffer as a result of the arrest. In practice, the amount payable is likely to be 30% of the amount of the claim or 30 days' hire of the ship to be arrested plus reasonable maintenance costs but different local maritime courts may have different practice and the level of counter security required can vary significantly from region to region.
12. What maritime liens are recognised?	<ul style="list-style-type: none"> • Salvage; • collision damage; • seaman's wages; and • Master's wages and "disbursements on account of a ship". 	<ul style="list-style-type: none"> • Wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew and others; • loss of life or personal injury suffered during the ship's operation; • vessel's tonnage dues, pilotage dues, harbour dues and other port charges; • salvage; and • loss or damage to property resulting from tortious acts committed during the ship's operation.
13. How soon after the arrest is effected will the claimant have to take action on the merits?	The writ is issued at the same time as the arrest warrant, so there is no delay between the arrest and the action on the merits.	If a ship is arrested before legal action on the substantive claim has been commenced, the claimant must commence proceedings (including arbitration proceedings where applicable) within 30 days of the arrest, otherwise the court will release the ship or return the security provided by the respondent.
14. Will the courts that ordered the arrest accept jurisdiction over the substantive claim?	In general, yes, unless there is a valid jurisdiction or arbitration agreement between the parties to the contrary.	In general, yes, unless there is a valid jurisdiction or arbitration agreement between the parties to the contrary.

15. Do the courts acknowledge wrongful arrest? If so, what is the test?	Yes. The defendant must prove that the action was so unwarrantedly brought as to imply malice or gross negligence on the part of the plaintiff.	Yes, but the test for wrongful arrest has not been clearly laid down in the law or judicial practice.
16. Do the courts acknowledge the piercing and lifting of the corporate veil?	Yes, but the courts will only lift the corporate veil in limited circumstances e.g. where the corporate structure is used to evade an existing legal obligation or to defraud.	Yes, but the courts rarely lift the corporate veil, as the burden of proof is hard to discharge, e.g. one of the main factors to consider is whether the relevant parties have commingled assets, and this is difficult to prove.
17. Is it possible to have a ship sold prior to obtaining a judgment? If so, how long does such a sale take?	Yes, but the court will only make an order for sale if there is a good reason e.g. where the costs of maintaining the arrest may exceed the value of the claim, thereby diminishing the value of the claimant's security. Such a sale would normally take approximately three months to complete.	Yes, where a ship has been kept under arrest for over 30 days and it would not be appropriate to allow the arrest to continue, the court may, at the request of the parties concerned, order that the ship be sold by auction. Such a sale would normally take several months to complete.



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