A quick overview of ship arrest in some popular jurisdictions
This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members.

A significant proportion of the expertise in the Managers’ offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director, Chao Wu.

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A quick overview of ship arrest in some popular jurisdictions

The uncertain shipping market makes the issue of arrest a topical one. The key questions being; where are the most advantageous arrest jurisdictions? And what makes them so favourable? This article seeks to give a brief overview of some popular arrest jurisdictions, and sets out why they are potentially advantageous.

South Africa

Arguably one of the most well-known arrest jurisdictions is South Africa; it has numerous procedures which make it favourable for arrest.

South Africa has not acceded to any arrest convention and ship arrest is dealt with under the Admiralty Jurisdiction and Regulation Act 105 of 1983. There are effectively three ways to arrest or attach a ship in South Africa; i) an arrest in rem, ii) an arrest in personam, and iii) a security arrest.

An interesting feature of this jurisdiction is that of associated ship arrests. This allows for the arresting party to take a step further than under the traditional sister or surrogate ship arrest procedure.

To understand associated ship arrests it is important to distinguish this from that of sister ship arrests. A sister ship arrest is where two or more ships are, or are deemed to be, commonly owned. To execute a successful sister ship arrest the ships have to have the same registered ownership. With the introduction of separate special purpose vehicle ownership, where each ship is seen as a distinct company the usefulness of arrest by sister ship procedure has been somewhat thwarted.

South Africa’s associated ship arrest provisions by comparison allow an arresting party to effectively pierce the corporate veil. A vessel can be arrested on an associated basis, where, for example, the registered owner of the vessel in respect of which the claim arose was at the time the claim arose controlled, directly or indirectly, by the same over fifty percent shareholding that controls the target vessel at the time of the arrest. It is then possible to bring an action in rem, or a security arrest by arresting the associated ship instead of the ship in respect of which the maritime claim arose. The test for determining whether the ships are associated has been established through South African case law and in effect looks at who the controlling shareholder is. One is also able to use the associated ship provisions to arrest a vessel associated with a charterer against whom a claim lies.

Aside from this associated ship procedure, there are various other favourable attributes to arresting in this jurisdiction, not least that arrest in this jurisdiction is proportionately cost effective.

A further procedure that is popular is that of the security arrest. An arresting party can arrest property in South Africa as security for a claim to proceed.
in a different jurisdiction, thus the arresting party does not need to submit to South African jurisdiction for the merits of the claim in which the security was sought. Importantly with respect to security arrests, the arresting party will need to show evidence that there is a genuine and reasonable need for security, which may be proved, for example, by reports into the solvency of the party they are seeking to arrest.

Additionally, this jurisdiction recognises the provision of a P&I Club letter as sufficient security to release a vessel.

**Australia**

The OW Bunker crisis recently cast Australia into the limelight as an arrest jurisdiction with the Western Australian Court decision on the **SAM HAWK** [2015] FCA 1005. Australia is not a signatory to any arrest convention. Ship arrest is governed by the Admiralty Act 1988. To arrest in Australia your claim would need to be a maritime lien, a proprietary maritime claim or a general maritime claim.

The maritime liens recognised by the act are claims in respect of salvage, damage done by a ship, wages of the master and crew and masters’ disbursements. In Australia, it has been unclear before this decision whether a foreign maritime lien is enforceable through a ship arrest, when the underlying claim would not give rise to a maritime lien under Australian law. The Western Australia Federal Court made a groundbreaking decision in the **SAM HAWK** [2015] FCA 1005 allowing the vessel to be arrested for a claim for unpaid bunkers, i.e. a foreign maritime lien.

Proprietary maritime claims are claims relating to the possession, title, ownership or mortgage of a ship and also encompass claims between co-owners of a ship relating to the possession, ownership, operation or earnings of a ship.

General maritime claims are listed at section 4(3) of the Admiralty Act and include for example, damage done by a ship (whether by collision or otherwise), loss of life or for personal injury, etc.

To arrest for a general maritime claim the arresting party must establish that a relevant person was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property, and is, when the proceeding is commenced, the owner of the ship or property.

There is also the option for sister ship arrest if the ownership (or bareboat charterer) link can be established between the relevant person, the subject vessel and the vessel to be arrested. The concept of associated ship arrest is not one recognised in Australia.

**Arrest in Australia is relatively straightforward and there is the added advantage of a dedicated Maritime court.**

**USA**

The US is not a signatory to any arrest convention. Under US law the two primary tools for arresting/attaching a vessel are to be found under Rule C and Rule B of the Federal Rules of Civil Procedure’s Supplemental Rules for Certain Admiralty and Maritime Claims.

Under Rule C, a Plaintiff can bring an in rem action against the vessel/property if a maritime lien exists or if the Plaintiff has certain statutory rights against the vessel regardless of whether the defendant can be found in the district.

Under Rule B, a plaintiff has a prima facie in personam maritime claim and may attach the defendant’s vessel or property as security for his claim, giving the plaintiff a quasi in rem jurisdiction over the defendant, provided that the defendant has property in the arrest jurisdiction, he is not “found” in that jurisdiction and there is no statutory or other maritime law bar to the attachment. Unlike an arrest under Rule C, an attachment under Rule B does not require there to be a maritime lien on the vessel.

Procedurally, the two arrest procedures are similar in that the plaintiff will be required to file a Verified Complaint setting out an admiralty/maritime claim, as well as an agreement of Indemnity releasing the U.S. Marshal from any liabilities resulting from the arrest. The plaintiff will also need to pay a deposit in respect of the maintenance costs for the vessel when under arrest.

The main procedural difference between a Rule C arrest and a Rule B attachment is that a Rule B attachment must be accompanied by an affidavit from the plaintiff’s attorneys setting out that the defendant cannot be “found” within the District in which the attachment is sought, whereas with a Rule C arrest, the plaintiff will need to approach the court to obtain a Warrant for Arrest and this needs to be accompanied by an affidavit setting out the grounds upon which the arrest is based.

Unlike South Africa, the courts in the USA will always have jurisdiction over the substantive claim unless a forum selection clause requires that the claim be bought in a different jurisdiction.

There is no associated or sister ship arrest available.

**Hong Kong**

Hong Kong is signatory to the 1952 Brussels Arrest Convention and ship arrest in Hong Kong is based on the principles of English law.

Ship arrest is available to claimants predominantly for possession or ownership disputes, mortgages, damage to the ship, salvage etc. and also for maritime liens available under Hong Kong law including damage done by ship, salvage, wages and masters’ disbursements.
A ship or a sister ship may be arrested where; the arresting party’s cause of action allows for arrest in this jurisdiction, a writ has been issued, the ship is within Hong Kong’s jurisdiction and, very importantly, where no caveat against the arrest has been entered.

Interestingly, if a vessel is arrested in this jurisdiction and security provided, this security will remain in place – even if the claim is stayed for arbitration – and it then becomes security for the claim in the arbitration. The arrest of a ship to provide security for a claim is a useful tool in jurisdictions where this is allowed.

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

Sister ship arrests are generally available in Hong Kong, but not for ‘proprietary’ claims, e.g., mortgages and claims for possession of a ship.

Conclusion

Whilst the jurisdictions set out above are by no means a closed list as to potential arrest jurisdictions, they do provide some illuminating examples of the manner in which the remedy of arrest is available to parties. In the current fluctuating shipping markets it is important to keep such jurisdictions in mind. Whilst this article seeks to highlight a few examples of what makes these jurisdictions unique it is always recommended to obtain an opinion from a lawyer in the jurisdiction before proceeding.

For more information or further advice on this topic, please contact Lisa Clarke (lisa.clarke@thomasmiller.com or +44 20 7204 2607)

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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.

Clubs letters will not be accepted as security unless agreed between the parties.