

SHIP - ARREST IN MALAYSIA

A Guide for P&I Clubs, Foreign Solicitors and In-house Counsel.

The Introduction

1. Q : Can ships be arrested in Malaysia?

A : Yes, they can, both in West (Peninsular) and East Malaysia (the states of Sabah and Sarawak).

Ships are usually arrested as pre-judgment (or pre-arbitration award) security for a claim to be litigated in court or heard in arbitration.

The litigation may be before a Malaysian court or foreign ones. The arbitration may be seated in Malaysia or overseas.

2. Q : How do you go about arresting ships in Malaysia?

A : There are seven tasks to be performed from the time I receive ship-arrest instructions to when the ship is released from arrest.

The tasks are:

- (a) Ensuring that the subject-matter of the claim falls within the court's admiralty jurisdiction;
- (b) Where necessary, ensuring that the ownership requirements of the ship are met;
- (c) Ensuring that the ship is in Malaysian waters;
- (d) Preparing the arrest paperwork;
- (e) Conducting the arrest hearing;
- (f) Serving the writ and warrant on the ship and giving notice of the arrest to the relevant authorities; and,
- (g) Preparing the release papers.

I will explain each task in turn. But I've also linked each task to the portion of this note that explains it, if you rather jump ahead.

At the end, I explain how I quote [fees](#) for ship-arrest work.

3. Q : How do you prioritise the tasks?

A : Given the tight timeline in most ship arrest proceedings, some tasks must in fact be done simultaneously whilst others can be done once things are firmed up.

This [diagram](#) explains how I prioritise them.

The First Task: The Subject-Matter

4. Q : Why do you have to ensure that the subject-matter of the claims falls within the court's admiralty jurisdiction?

A : A ship can be arrested only for any one of the 18 [statutory liens](#) or the five [maritime liens](#).

If the claim, for whatever reason, does not fall within one of these headings, the ship cannot be arrested.

The Second Task: The Ownership Requirement

5. Q : What are ownership requirements? To what claims do they apply?

A : Ownership requirements (generally) apply only to [statutory](#) lien claims, numbers 5 to 13.

They apply in two aspects: (i) when a suit is brought against the ship involved in the claim; and, (ii) when a suit is brought against a sister-ship.

6. Q : What are the ownership requirements when a suit is brought against the ship involved in the claim?

A : In order to arrest the ship involved, there must be evidence that :

(a) When the right to claim arose, the defendant was either (i) the owner; (ii) the charterer of; or (iii) in possession or in control of, the ship; and,

(b) When the writ was filed, that defendant was either the (i) beneficial owner of the ship; or, (ii) her demise charterer.

7. Q : What are the ownership requirements when a suit is brought against a sister-ship?

A : In order to arrest a sister-ship, there must be evidence that :

(a) When the right to claim arose, the defendant was either (i) the owner; (ii) the charterer of; or (iii) in possession or in control of, the ship; and,

(b) When the writ was filed, that defendant was the beneficial owner of the sister-ship.

8. Q : What type of evidence do you need to prove the ownership requirements?

A : I usually rely on the latest version of either the [Lloyd's List Report](#), [Seaweb Report](#), [Equasis Report](#) or the vessel's [ship registry certificates](#).

The Lloyd's List, Equasis and Seaweb Reports will explain who the ship's registered owners are and when she changed hands. Therefore, they are ideal for proving the Ownership Requirement. The Lloyd's List Report might even say who her beneficial owners are.

If I am relying on ship registry certificates, I will need a copy of the certificates proving ownership (i) when the right to claim arose; and (ii) the latest version just prior to filing the writ.

I exhibit these reports (and certificates) in the arrest affidavit and explain the Ownership Requirement in the [affidavit](#) when explaining the grounds of arrest.

If the ship is Malaysian-flagged, I will also:

- (a) Firstly, check which Malaysian port that the ship is registered at using the Malaysian Marine Department's online [system](#); and,
- (b) Secondly, write to that port [registry](#) for a copy of the ship's transcript. The transcript can usually be obtained in 24 hours.

I try to obtain a copy of the transcript of Malaysian-flagged ships because the transcript will say whether mortgages have been taken out over the ship.

If mortgages have in fact been taken out, the client may not want to proceed with the arrest.

9. Q : What law applies in determining the beneficial ownership of a ship?

A : Malaysian law applies in determining the beneficial ownership of a ship.

The starting point in determining beneficial ownership is to assume that the beneficial owners are in fact the registered owners. I will then consider any other evidence that might displace that assumption.

The point, however, is that at the arrest stage, there is generally no need to adduce evidence of foreign law to determine the beneficial ownership of the ship.

The Third Task: Is the Ship in Malaysian waters?

10. Q : Why is it important to determine whether the ship is in Malaysian waters?

A : It is important to determine this because ships can be arrested only if they are in Malaysian waters.

This gives claimants in Malaysia a wider geographical jurisdiction to bring claims compared to (say) Singapore where ships can be arrested only if they are within port limits.

It is also important to determine if the ship is in Malaysian waters because an arrest outside the waters may result in the defendant shipowners being awarded damages for wrongful arrest.

11. Q : What are the limits of Malaysian waters?

A : The breadth of Malaysian waters is 12 nautical miles from the baseline.

12. Q : How do you know if the ship is in Malaysian waters?

A : Usually the client tracks the ship's location, by subscribing to ship-tracking services like [MarineTraffic](#) or [ShipFinder](#), or by using their contacts in the industry.

But I try to cross-check this information by getting in touch with the [Marine Department](#), the Port Authorities (if the ship is scheduled to call at port) or with the Maritime [Search](#) and Rescue Operation (if the ship is involved in an accident or collision at sea).

A useful list of contacts to cross-check the position of the ship is at page 66 onwards of the Admiralty Court User [Guide](#).

Determining when (and for how long) a ship will be in Malaysian waters, will give the claimant a timeframe within which the writ and arrest warrant must be served.

However, the Marine Department or Port Authorities will – understandably – be in no position to confirm the ship's whereabouts or her schedule. And it is common for shipowners to redirect the ship if they get wind of legal proceedings.

Therefore, it would be prudent to prepare and execute the arrest as soon as possible.

If I am unsure if the ship has anchored in Malaysian waters, the Malaysian [Mapping](#) and Survey Department may be able to confirm this (if the ship's coordinates are available).

The Fourth Task: Preparing the Paperwork

13. Q : What paperwork must be prepared to arrest a ship?

A : There are a [host](#) of papers that must be prepared before the writ and arrest warrant can be served, all of which will be prepared by the solicitors.

The client need only be concerned with three items:

- (a) The [affidavit](#) setting out the grounds of arrest;
- (b) The [undertaking](#) given to the Admiralty Sheriff; and,
- (c) The [MYR15,000](#) (about USD3,300) deposit to the Sheriff, for arrest expenses.

14. Q : What goes into the arrest affidavit?

A : The affidavit stating the grounds of arrest lies at the heart of the arrest papers.

The affidavit should say:

- (a) Whether the claim falls within the subject-matter of the court's admiralty jurisdiction (the first task), exhibiting documents proving this;
- (b) Whether the claim meets the ownership requirement (the second task), exhibiting documents proving this;
- (c) The nature of the claim (or counterclaim), whether seeking outstanding sums or damages or a declaration or indemnification or costs;
- (d) That the claim is unsatisfied. This is a one-liner to say that the claimant is still suffering from the losses;
- (e) The name of the ship to be arrested and the port to which she belongs;
- (f) The amount of security sought (which usually includes (i) the principal sum claimed; (ii) interest as per contract or the Malaysian Court's rate of 5% per annum over (say) three years; and (iii) costs). I should say that the amount of security sought cannot exceed the value of the ship;
- (g) Whether a search for caveats against arrest using the Court's online system has been carried out.

The affidavit should go on to say (or exhibit):

- (a) The notice of filing of the writ sent to the consulate in Malaysia of the State to which a foreign ship belongs, for claims for possession or for wages. This is provided that the State has a consulate in Malaysia;
- (b) The bottomry bond, where the claim arises out of bottomry;
- (h) The necessary facts showing that the Court is entitled to entertain a suit arising from either oil pollution (under the Civil Liability Convention 1992) or bunker oil pollution (under the Bunker Pollution Convention 2001), in claims involving the Conventions.

I try to have the client's representative affirm the affidavit, if time permits. This is because the client is in the best position to explain the claim.

15. Q : What happens if there is indeed a caveat against arrest?

A : If there is a caveat lodged, I will check if the sum mentioned in the caveat is sufficient to provide security for the claim.

If it is, there may be no point going through with the arrest.

If it is not, it may be worthwhile contacting the caveator to ask if sufficient security can be provided. Caveats are valid for six months.

16. Q : What is the undertaking about?

A : This is an undertaking given by the claimant using the Malaysian solicitor as his agent.

The undertaking says that the claimant promises to pay on demand all expenses incurred by the Sheriff: (i) in serving the arrest warrant; and (ii) whilst the ship is under arrest.

Prior to giving this undertaking, the solicitors will usually seek either (i) a back-to-back undertaking from the client; or (ii) more commonly, a deposit of money from the client to meet the expenses.

I say that a deposit is the more common route because solicitors will be keen to ensure that there is no time-lag between the Sheriff's calling on the undertaking (or the need for payment arising) and payment being made.

This is because if payment is not prompt, the Malaysian solicitors may be held in contempt of court and the ship may be released at the Sheriff's behest.

The amount of money sought as a deposit depends on the expenses that may be incurred.

17. Q : How often is the undertaking called upon?

A : In the vast majority of cases, ships are released promptly (within a few hours or a couple of days) upon the provision of alternative security (usually in the form of a P&I Club Letter of Undertaking).

In these “*catch-and-release*” cases, the undertaking is not called upon as the expenses incurred (if at all) is negligible.

In the rare situation where no alternative security is provided, a ship may incur considerable expenses whilst under arrest, depending on her size, the number of crew on-board and how well-provisioned (food, bunkers, engine supplies, etc.) the ship may be. It is in these situations that a deposit of money will be needed.

One way to manage expenses if no alternative security is provided, is for the claimant to promptly seek a court order that the ship be sold (and her crew repatriated). Once the vessel is sold (or a skeletal crew is appointed), relatively lesser expenses will be incurred.

18. Q : So the Sheriff will first incur the expenses and then seek reimbursements from the claimant by calling on the undertaking?

A : No.

The Sheriff expects the *claimant* to meet the expenses incurred directly and to then recoup the expenses when the ship is sold.

This is despite (i) the undertaking; (ii) the fact that the arrested ship is under the Sheriff's (and not the claimant's) custody and care; and (iii) the MYR15,000 deposit paid by the claimant for Sheriff's expenses.

What this means in practice is that a representative of the claimant's solicitors will accompany the Sheriff to serve the arrest warrant and meet the expenses incurred.

Also the claimant liaises directly with the shipowners or their solicitors to supply the necessary provisions to maintain the arrested ship, with the liaising done under the Sheriff's supervision. These expenses are then recouped by the claimant once the ship is sold via the judicial process (if it comes to that).

The reason the Sheriff requires the claimant to directly meet the expenses is (I suppose) to relieve the Sheriff of the burden of arranging and paying for provisions for every ship in his care, bearing in mind that ships can be arrested anywhere in Malaysian waters 24/7. It saves the Sheriff from incurring a whole lot of hassle.

Put another way, the Sheriff operates a light-touch supervisory role, stepping in only if there is a disagreement between the parties.

To pre-empt any disagreement down the line, it would be best to obtain the Sheriff's approval prior to supplying provisions, etc., to the ship. And (if the shipowner's are represented), to copy the email seeking the Sheriff's approval to the solicitors so that (i) the shipowners are aware of the type, quantum and price of the provisions (ii) can prior to the supply of provisions, provide their input on the supplies..

19. Q : Is the MYR15,000 deposit in addition to the undertaking?

A : Yes, the MYR15,000 deposit is in addition to the undertaking provided. The deposit is meant to meet the initial costs (if any) of serving the warrant and of maintaining the ship whilst under arrest.

Usually, the deposit is refunded once the ship is released or sold. This is because, as explained above, it is the Sheriff's policy for the claimant to meet all arrest expenses despite the deposit.

Therefore, the deposit is paid is (I suppose) to meet expenses in cases where the claimant does not pay the sums demanded despite the undertaking provided. I imagine that in those instances, once the Sheriff reimburses the shipowners for the provisions needed, the Sheriff will order the release of the ship.

Strictly speaking, the deposit should be paid to the Court prior to the service of the warrant. But in practice, the Sheriff allows parties to make the deposit up to three days *after* the service of the warrant. But because of this tight timeline, solicitors usually require clients to make payment of the deposit to the firm prior to the arrest hearing.

The deposit is required only for warrants issued by West Malaysian courts and can be paid either through the Court's e-filing system or by bank draft.

20. Q : How long does it take to prepare the arrest papers?

A : That depends on whether the information and documents needed are readily available.

Generally, the papers can be prepared in about two days with the affidavit taking the bulk of the time to prepare.

The Fifth Task: The Arrest Hearing

21. Q : How is the arrest hearing conducted?

A : The hearing is before the Admiralty Registrar and is usually held online, via Zoom or by email exchange.

I usually call up the Admiralty Clerk once arrest instructions are firmed up to say when the papers will be filed. The Clerk then schedules a tentative slot for the hearing.

The hearing is '*without notice*' to the defendant, given the urgency of most ship-arrest applications. This means that the defendant is unrepresented at the hearing and the Registrar therefore will be doubly keen to ensure that the arrest requirements are met.

At the hearing I explain how the claim meets the requirements, with cross-references to paragraphs in the affidavit.

The Sixth Task: Serving the Writ and Warrant

22. Q : How long does it take to serve the writ and warrant?

A : That depends on where the ship is located and how accessible she is.

It may take a day (or two) for the Sheriff to arrive at the nearest port or harbour where the ship is to be arrested.

From the port, the Sheriff (and the claimant's representative) will charter a launch boat (weather-permitting) to the ship to be arrested.

At times, there may be some trouble locating the physical ship at sea (if she is not at berth). But much depends on how accurate the available coordinates are.

23. Q : How do you serve the writ and warrant on the ship?

A : The writ and warrant is served by the Sheriff sticking the writ and warrant on the ship.

When the Sheriff (and the claimant's representative) board the ship, they will usually first speak to the Master to explain what they intend to do, the nature of the claim and the effect of the arrest.

At this stage, the Master will usually seek a few moments to speak to the shipowners (or ship managers) to notify them of the proceedings and to determine how he should deal with the situation.

If the Master is comfortable, the Sheriff will then serve the papers by sticking a copy of the writ and warrant on the bridge, a sheltered portion on the outside of the ship and on the mast of the ship.

When on board I usually:

(a) Take pictures of the writs and warrants that have been stuck; and,

(b) Make a note of the ship's coordinates.

I then exhibit the photographs and mention the coordinates in an affidavit to explain that the papers were served in keeping with the rules and within Malaysian waters. The affidavit will be sworn by the Sheriff.

Once the Sheriff has served the papers on the ship, the solicitors will arrange for service of the papers on the Marine Department, Port Authorities, Customs Department and the Immigration Department.

24. Q : What happens if the Master refuses to let the Sheriff on board or is being difficult?

A : If the Master refuses to let the Sheriff on board, the Sheriff may stick the writ and warrant on the ship's hull. That counts as good service.

The claimant's solicitors should then email a copy of the writ and warrant to the shipowners or the ship's managers or the ship's agent, giving them notice of the arrest. A copy of the writ and warrant should then also be emailed to the Marine Department.

If the Master is hostile, Malaysian law allow the claimant to also seek assistance from the Marine [Police](#) or Harbour Master.

25. Q : Is there any way to find out if a ship has been arrested?

A : There is no formal method in the Malaysian court system to find out if a ship has been arrested.

Therefore, the usual method is to make informal enquiries by speaking to clerks at the court registries. In this approach, much will depend on the recollections of the clerks involved.

The Seventh Task: Preparing the Release Papers

26. Q : When do you prepare the release papers?

A : I usually prepare the release papers immediately after the writ and warrant are served.

This is because alternative security is usually agreed immediately in the 'catch-and-release' cases. And at times, negotiations on that security is conducted between the insurers, bypassing solicitors altogether.

However once alternative security is agreed (usually by way of a LOU), all parties involved expect the ship to be immediately released from arrest and a delay in doing so might result in damages being awarded for the wrongful continuation of arrest.

The amount of security sought in the LOU is usually the sum mentioned in the arrest [affidavit](#). But I also tell clients that the Malaysian Court has the power to reduce the amount sought as security if the Court finds it excessive.

The jurisdiction and choice-of-law clauses in the LOU (in case there is a dispute on the terms of the LOU) usually mirror the jurisdiction and choice-of-law clauses in the substantive dispute (if it is a contractual dispute), so that the rights and responsibilities of all parties are in sync.

27. Q : What constitutes the release papers?

A : The release [papers](#) consists of a number of documents.

But perhaps the most important – for the client’s purposes – is (again) the undertaking to meet all expenses incurred whilst the ship was under arrest.

This undertaking will overlap with the one provided by the claimant when arresting the ship, if the claimant is the same party as the party seeking the release.

If the party seeking the release is not the arresting party, this undertaking gives the Sheriff the right to look to the party seeking the release to meet the expenses incurred during the arrest.

28. Q : Must the [Instrument](#) of Release also be served on the ship – just like the writ and warrant of arrest?

A : Strictly speaking, the sealed Instrument of Release should be served on the ship.

But in practice, as both parties are keen to have the ship released immediately, the defendant’s solicitors are usually content with the sealed Instrument being emailed to them. This saves the time that might be spent in serving the Instrument on the ship.

The claimant’s solicitors will go on to serve the Instrument on the Marine Department, Port Authorities, Customs Department and the Immigration Department.

The sealed Instrument of Release is usually issued within the day.

The rules require an affidavit proving service of the Instrument of Release. But in practice, this is rarely done as the defendant’s solicitors will usually agree to accept service of the papers.

Fee Quote for Ship-Arrest Work

29. Q : How do you quote fees for ship-arrest work?

A : When providing a quote, I divide the work into three segments:

(a) The advice on whether the arrest requirements are met.

Here, I have a look at the merits and quantum of the claim at the outset so that the client does not throw good money after bad.

In doing this I may ask for further clarification (or documents) and will set out the legal and commercial considerations to bear in mind prior to starting arrest proceedings.

A key consideration is whether there might be other creditors on the scene and where they might rank in the order of priorities. I say that this is a key consideration because if there is (say) an unpaid mortgagee, it is likely that that claim will out-rank most other claims.

This may mean that (if no alternative security is provided) and the ship is sold by the Court, the client may walk away empty-handed or with only meagre compensation. This is because once the mortgagee is compensated, there may be little left over for the other creditors.

I usually quote one set of fees for the advice (as distinct from quoting on a time-cost basis) because the scope of work here is fairly clear.

(b) The preparation of the arrest papers.

There will be some overlap in the work done here and with the earlier advice on whether the arrest requirements are met. This is because the contents of the advice will form the basis of the affidavit (if the requirements are indeed met).

But I also include under this heading the work done in preparing the ancillary arrest papers, cross-checking the ship's whereabouts, preparing for and attending the arrest hearing, service of the writ and warrant on the ship (and the various authorities), and the preparation of the Sheriff's affidavit explaining the service of the writ and warrant.

Here too, I usually quote one set of fees because the scope of work is fairly clear.

(c) Advising on alternative security and preparing the release papers.

The work here is usually not substantive as most ships are released upon the provision of P&I Club LOUs, which often have a template wording.

THE PAPERWORK FOR AN ARREST

1. The Admiralty Writ in Rem.
2. The Warrant of Arrest.
3. The Notice of Application (seeking an arrest hearing).
4. The Affidavit in Support of the Arrest Application.
5. The Praecipe for Warrant of Arrest.
6. The Praecipe for Service of the Writ.
7. The Particulars of Property and the Undertaking to Meet the Arrest Expenses.
8. A Certificate of Urgency (to request an urgent hearing of the arrest application).
9. Payment of MYR15,000 to the Sheriff, as deposit for the Sheriff's expenses.
10. Letters serving the Writ and Warrant on the:
 - Marine Department;
 - Port Authorities (if the vessel is in port limits);
 - Customs Department;
 - Immigration Department (so that the Department can deal with the crew); and,
 - Licensed terminal operator.

The Writ and Warrant is served on the Marine Department, Port Authorities and Customs Department to give them notice (i) that the ship has been arrested; and (ii) that port clearance should not be issued until the ship is released from arrest.
11. Notice of filing of the writ given to the consulate in Malaysia of the port of a State to which a foreign ship belongs, in a claim for possession or for wages.
12. The bottomry bond, where the claim arises out of bottomry.

STATUTORY LIENS

1. Claims for possession or ownership of a ship.
2. Claims between co-owners regarding the possession, employment or earnings of a ship.
3. Claims in respect of a mortgage, usually by a bank mortgagee.
4. Claims for damage received by a ship.
5. Claims for damage done by a ship, usually due to a collision at sea or allision with port infrastructure.
6. Claims for loss of life or personal injury.
7. Claims for loss of or damage to goods carried in a ship.

Commonly, these claims arise from a breach of the bill of lading or charterparty contracts.

8. Claims relating to the use or hire of a ship.

Claims for freight and demurrage might fall under this category.
9. Claims for salvage, towage, pilotage and those arising from a general average act.
10. Claims for goods or materials supplied to a ship.

Bunker suppliers bring claims for unpaid bunkers under this heading.
11. Claims in respect of the construction or repair of a ship or for dock charges or dues.

The port authorities' right to arrest for unpaid dues under the Court's admiralty jurisdiction is in addition to the powers conferred by port legislation, enabling authorities to distrain and sell ships for unpaid dues.
12. Claims by crew wages or for disbursements.
13. Claims arising from bottomry.
14. Claims arising from forfeiture or condemnation of a ship or goods.

MARITIME LIENS

1. A salvage lien, a right conferred upon salvors successful in salving a ship.
2. A damage lien. It is not necessary for the damage to be caused to a ship.
3. A lien for wages by seafarers.
4. A lien for the Master's disbursements.
5. A lien arising out of bottomry claims.

PRIORITISING TASKS

The First Stage (All three are to be done simultaneously)

First Task

Meeting the subject-matter requirements.

Second Task

Meeting the Ownership Requirements.

Third Task

Checking if the ship is in Malaysian waters.

The Second Stage

Fourth Task

Preparing the Arrest Paperwork.

The Third Stage

Fifth Task

The Arrest Hearing.

The Fourth Stage

Sixth Task

Serving the Writ and Arrest Warrant.

The Fifth Stage

Seventh Task

Preparing the Release Papers.

THE RELEASE PAPERS

1. The Instrument of Release.
2. The Praecipe for the Instrument of Release.
3. The Particulars of Property and Undertaking to Meet Expenses Incurred Under Arrest.
4. A Certificate of Urgency (to request that the Instrument of Release be sealed urgently).
5. Preparing the Affidavit of Service of the Release Papers.