

Questionnaire

Study Relating To Liability For Wrongful Arrest

I. INTERNATIONAL CONVENTIONS

(a) Please advise which, if any, of the following Conventions your jurisdiction is a party to and has given effect to in its legislation:

(i) Arrest Convention 1952

Hong Kong is, strictly speaking, not a party to the Arrest Convention 1952. However, the United Kingdom was a party to it and the applicability of the Arrest Convention 1952 was extended to Hong Kong in 1963.¹ According to Article 153 of the Basic Law, international agreements which are implemented in Hong Kong will continue to be implemented notwithstanding the fact that China is not a party. Therefore, the Arrest Convention 1952 continues to apply in Hong Kong.

Sections 12A and 12B of the High Court Ordinance (Cap 4) ('HCO') give effect to the Arrest Convention 1952 although not in identical wording.

(ii) Arrest Convention 1999

Hong Kong is not a party to the Arrest Convention 1999.

(iii) Maritime Liens and Mortgages Convention 1926

Hong Kong is not a party to the Maritime and Mortgages Convention 1926

(iv) Maritime Liens and Mortgages Convention 1993

Hong Kong is not a party to the Maritime Liens and Mortgages Convention 1993.

(b) If none of the above is made part of your national law, or in any event, what are the grounds on which a vessel can be arrested in your country?

A vessel will only be arrested if the court has *in rem* jurisdiction. There are three statutory provisions governing the scope of the *in rem* jurisdiction.

¹ https://www.law.hku.hk/ccpl/database/Multi-treaties-rcrd_1Page512.html

First, s.12B(2) of the HCO provides that “In the case of any such claim is mentioned in section 12A(2)(a), (c) or (r) or any such question as is mentioned in section 12A(2)(b), an action in rem may be brought ... against the ship ... in connection with which the claim or question arises”. Sections 12A(2)(a), (b), (c) and (r) refer to:

- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage of or charge on a ship or any share therein;
- (r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

Second, s.12B(3) provides that “[i]n any case in which there is maritime lien or other charge on any ship ... for the amount claimed, an action in rem may be brought in the Court of First Instance against that ship”.

Section 12B(4) is the third provision and has the widest scope. It states:

In the case of any such claim as is mentioned in section 12A(2)(e) to (q), where-

- (a) the claim arises in connection with a ship; and
- (b) the person who would be liable on the claim in action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the Court of First Instance against-

- (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the

shares in it or the charterer of it under a charter by demise; or

- (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Sections 12A(2)(e) to (q) refer to:

- (e) any claim for damage done by a ship;
- (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of-
 - (i) the owners, charterers or persons in possession or control of a ship; or
 - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- (g) any claim for loss of or damage to goods carried in a ship;
- (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- (i) any claim-
 - (i) under the Salvage Convention 1989;
 - (ii) under any contract for or in relation to salvage services; or
 - (iii) in the nature of salvage not falling within subparagraph (i) or (ii); or any corresponding claim in connection with an aircraft;
- (j) any claim in the nature of towage in respect of a ship or an aircraft;
- (k) any claim in the nature of pilotage in respect of a ship or an aircraft;
- (l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (m) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (n) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- (o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

- (p) any claim arising out of an act which is or is claimed to be a general average act;
- (q) any claim arising out of bottomry.

Hence, s.12B(4) effectively imposes a two-stage test. The first stage concerns three elements. First, the claim must fall within ss 12A(2)(e) to (q). Second, the claim must be connected to a ship. Third, this ship must be owned, chartered, possessed or under the control of “the relevant person” (defined as the one who would be liable had an action *in personam* been brought). The first-stage test is assessed at the time when the cause of action arises.

The second stage concerns the time when the action is brought before the CFI. Once the first stage is satisfied, the CFI will turn to identify the ships against which the Admiralty jurisdiction may be exercised.

The ship identified in the first stage may or may not already have been sold when the action is brought.

The plaintiff can bring an action against that ship if it remains owned or is demise chartered by “the relevant person” at the time the action is commenced.

The plaintiff can alternatively bring an action against another ship if “the relevant person” beneficially owns all the shares in that ship at the time when the action commences. The plaintiff is thus offered the flexibility to bring an action against a sister ship (whether or not it may also bring an action against the ship identified at the first stage).

II. QUESTIONS RELATING TO WRONGFUL ARREST

1. To what extent is a claimant required under your national law to provide security in order to obtain an order for arrest or, subsequently, to maintain an arrest?

“Counter security” in favour of the shipowner in respect of potential claims for wrongful arrest is not required under ss 12A and 12B.

However, security for the Court’s own costs of effecting and supervising the arrest is required.

The legal requirement for an order to arrest is set out in the answer to Question I(b).

2. Under your national law, if the claim for which a vessel has been arrested has subsequently been rejected by the court hearing the case on its merits, would the arrestor be liable in damages by reason of:

- (a) The mere rejection of the claim?

No.

(b) Or Would proof be required about the arrestor's:

- (i) Awareness/knowledge that his claim had no foundation, or
- (ii) Negligence in bringing such a claim, or
- (iii) Bad faith or gross negligence or, otherwise, malicious bringing of such a claim?

Bad faith, gross negligence or malicious intent is required: *The Maule* [1995] 2 HKC 769 (CA). If an arrestor knows that he cannot legitimately arrest a ship, such knowledge can be used to imply bad faith: *The Maule*, 773F (Bokhary JA as he then was). If an arrestor wrongfully arrests a ship without applying his mind to whether that was a legitimate course then such conduct may be described as malicious negligence: *The Maule*, 773G (Bokhary JA). Therefore, the High Court recently made the remark that Hong Kong adopts the same test as many common law jurisdictions where "the legal threshold for a shipowner to obtain damages for wrongful arrest is notoriously high": *The Fearless I*, HCAJ 197 and 198/2012 [2013] 5 HKLRD 48 (CFI) [44] (Ng J).

3. Under your national law, if a vessel is arrested pursuant to a decision by a court of first instance, but the arrest is subsequently repealed by an appeal court (without deciding on the merits of the claim):

- (a) Would the arrestor be liable in damages for the consequences of the arrest, and, if yes, in what circumstances?

The arrestor would only be liable if either bad faith, gross negligence or malicious intent is proved. Please refer to the answer to Question 2(b).

- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

Yes. Please refer to the answer to Question 2(b).

4. If the arrest claim was not against the owner of the ship and could not be enforced against that ship under the law of the state where the vessel was arrested:

- (a) Would, under your national law, the arrestor be liable in damages?

The jurisdiction to award damages for wrongful arrest in Hong Kong does not distinguish between types of wrongful arrest, eg wrong owner, wrong ship, poor merits. The arrestor would only be liable if either bad faith, gross negligence or malicious intent is proved. Please refer to the answer to Question 2(b).

- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

Yes. Please refer to the answer to Question 2(b).

5. If the amount of the arrest claim was grossly exaggerated:

- (a) Would, under your national law, the arrestor be liable in damages to the owner of the ship for any of the following losses caused by reason of the grossly exaggerated claim:

- (i) For the extra cost of the security required,
- (ii) For losses incurred by the owner of the ship by reason of the delay caused by the greater time required to procure the security, or
- (iii) For losses incurred as a result of the owner being unable to provide the excessive security?

It generally does not arise that a shipowner actually puts up excessive security for an exaggerated claim. This is because immediately following arrest the ship owner can promptly bring the matter before a judge who assesses the level of security at a short hearing. This is done on the basis of the claimant's "best reasonably arguable case" in respect of each of principal, interest and costs. The shipowner is then only required to put up security at the level fixed by the judge. That aside, a demand for excessive security is not in itself considered a category of, or akin to, 'wrongful arrest'.

The arrestor would only be liable if either bad faith, gross negligence or malicious intent is proved. Please refer to the answer to Question 2(b).

- (d) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

Yes. Please refer to the answer to Question 2(b).

6. If the person allegedly liable for the arrest claim is largely solvent and it is possible to enforce judgments or arbitration awards against him, e.g. He owns many ships (not under separate corporate veils), which call regularly at ports where enforcement can take place:

- (a) Can the arrest be considered wrongful as a result, so as to attribute liability to him under your national law?

Such an arrest is not wrongful. A claimant is entitled to arrest no matter what the asset position of the shipowner.

- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

NA.

7. Are there other circumstances in which, under your national law, an arrestor can be held liable in damages for the arrest of a ship?

No. The arrestor would only be liable if either bad faith, gross negligence or malicious intent is proved. Please refer to the answer to Question 2(b).

8. Does your national law provide for a penalty or other sanction to be levied upon the arrestor, separate and distinct from any damages, if he is held liable for the arrest?

No.

9. Would a court in your country, seized with a claim for damages for the arrest of a ship in another country, apply the law of the country of arrest (*lex forum arresti*) in that regard, or would it apply its own substantive national law (*lex fori*), or would it apply the substantive law applicable pursuant to the general international private law rules of its country?

When Hong Kong courts are seized with a claim for damages for the arrest of a ship in another country, the claim is treated as one in tort. The Hong Kong rule on the law applicable to foreign torts is complex, but the general principle is that the conduct must be actionable under both Hong Kong tort law and the tort law of place where the events took place.

The claimant must therefore demonstrate that the claim satisfies the requirements of *both* systems of law. However, it may be possible to argue that only the law of the country of arrest (*lex forum arresti*) should be applied.