

Shipping & Transport - South Africa

Admiralty procedure: more than just 'associated ship' arrests

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South Africa continues to be a popular jurisdiction for maritime creditors to obtain security for claims. While the outstanding feature of the country's admiralty procedure remains the well-known 'associated ship' arrest, a number of other aspects also contribute to its potency. This update examines the South African arrest regime from a broader perspective, serving to highlight its liberal nature and the possibilities open to creditors in the current distressed market.

Creditors are not obliged to commence a substantive admiralty action in South Africa to pursue a maritime claim, but have the freedom to arrest property in South Africa simply to obtain security for a claim which is or may be the subject of arbitration or any other proceedings elsewhere. In other words, the choice of forum for dispute resolution imposes no restriction on the ability to obtain security in South Africa, provided that the court is satisfied that the claimant has a *prima facie* case which is enforceable in the nominated country of its choice.

It is not necessary for the claimant to have commenced its claim already; it is sufficient that proceedings are merely contemplated. This means that a claimant may avoid the expense of commencing proceedings until it is certain that it has security in place, which gives the claimant immediate leverage over the debtor. Further, the claimant need not put up counter-security as a precondition for commencing arrest proceedings in South Africa.

While the usual targets of arrest are ships, bunkers and occasionally cargo, a claimant is free to arrest any property owned by the defendant within the jurisdiction of the South African court for the purpose of providing security only for a maritime claim.

The nature of the underlying claim seldom imposes a restriction on the claimant. South African legislation recognises 32 categories of maritime claim, which include all of those itemised in Article 1 of the 1952 Arrest Convention, as well as many others, including a 'catch-all' provision which gives the court admiralty jurisdiction over any matter which, by virtue of its nature or subject matter, is a marine or maritime matter.

Neither the place where the claim arose nor the flag of the vessel, nor the residence, domicile or nationality of its owner or of the claimant, is relevant to the question of whether the South African courts have admiralty jurisdiction.

In broad terms, the 'associated ship' provisions may be utilised to arrest ships as security for claims not only against shipowners, but also against charterers. In regard to claims against owners, a claimant may look behind the confines of the owning entities of the ships in question (ie, the 'guilty' ship and the 'target' ship) until a common owner or controller is found. An array of intelligence resources is available to a claimant to unearth evidence of association, much of which is now freely available on the Internet.

As regards claims against charterers, the associated ship provisions have been used to good effect by parties looking to secure claims for unpaid hire and early re-delivery following the market collapse in 2008. In short, South African legislation deems the charterer of the guilty ship to be the 'owner' of that ship for the purposes of establishing an association with the target ship. By way of illustration, if the chartering entity is itself a shipowner or a subsidiary of a corporate structure that owns ships (directly or indirectly), then those ships may be susceptible to arrest.

It does not follow automatically from a subsequent setting aside that the arrest was wrongful. The onus is on the affected party to prove that the claimant obtained the arrest without reasonable and probable cause and that the affected party suffered loss or damages as a result. For this reason, arrests in South Africa seldom give rise to actions for damages.

The arrested property may be released on the giving of security, which may include,

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amongst others, a protection and indemnity club letter of undertaking, a bank guarantee and, increasingly, an escrow arrangement.

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