



January 2017

## Club Cover &amp; Rules

# Ship arrest and security

## Introduction

P&I clubs are often contacted by members with requests for security to be provided, so as to avoid the arrest of a ship or to release a ship from arrest. The arrest of a ship is one method that a potential claimant may use to secure their claim, with other means including, but not limited to: liens, attachments and freezing injunctions. In many jurisdictions, the arrest process is relatively straightforward. Significantly, as a matter of English law, unless exercised with bad faith or gross negligence, there is no remedy for a shipowner even if it transpires that the ship in question was wrongfully arrested. Thus, it is a powerful weapon for a claimant as, without a detailed examination of the claim, the defendant's ship can be stopped from trading with often only a remote possibility of the claimant having to pay damages for wrongful arrest.

## What does ship arrest mean?

A ship travelling the world's oceans is likely to get involved in disputes, whether by its operation or its trade. These can be related to collisions, salvage, towage and pollution incidents as well as contractual claims with cargo interests, passengers, charterers and insurance disputes.

Historically, the ship in a claimant's jurisdiction may have been the only asset against which a claimant may have been able to claim. Ship arrest operates by way of a special legal regime that offers a remedy for security of a claim by considering the ship itself as the defendant, otherwise known as an 'in rem' claim.

## International law

In many countries, maritime law and, in particular, the right to arrest a ship reflects the provisions of two international conventions: The International Convention Relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952 (the Arrest Convention 1952) and the Collision Convention 1952. It should be noted that the Arrest Convention 1999, although adopted, is limited in its application, being in force in only a few countries, with the dominant convention remaining the 1952 Convention. The UK is a signatory to the Arrest Convention 1952, which has been enacted into statute and falls under the Admiralty Jurisdiction of the English High Court.

Under the Arrest Convention 1952, 'arrest' is defined in Article 1(2) as: "*the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment*". Under the Convention, therefore, a claimant may arrest where the claimant alleges that a 'maritime claim' exists in its favour, but the arrest must take place before a court judgment or arbitration award has been issued in respect of said claim. The Arrest Convention goes on to list the circumstances in which a maritime claim may arise (as does English Law by virtue of the Senior Courts Act 1981). These include, but are not limited to, the following: damage caused by a ship, e.g. collision, death or personal injury caused by a ship or operation of a ship, salvage and crew wages.

## Club support

The Rules of the all the clubs in the International Group (IG) are similar in that there is no obligation upon the clubs to provide security on behalf of members, with provision of security always being discretionary (see our [club rule 9](#)). Nevertheless, The Standard Club recognises the importance of assisting members and helping to prevent delays to the member and its ship so far as possible.



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### Advantages of club LOUs

In the event that an arrest is made or threatened in respect of a claim of a P&I nature, the club will act swiftly to try and secure release of the ship by providing a Letter of Undertaking (LOU).

In *The Oakwell*<sup>1</sup>, the English court noted the various advantages for all parties of club LOUs:

- Speedy security in a negotiated amount;
- No need for actual payment of money or putting up a bank guarantee;
- Negotiated choice of jurisdiction;
- Avoidance of the delay, cost and inconvenience which an arrest inevitably causes;
- Continuing security for the claimant without risk.

The club sees the LOU system as a cornerstone of the service and reputation of the club and the IG. Provision of security by an IG club also has the backing of the IG reinsurance arrangements. Given that the IG clubs insure approximately 90% of the world's tonnage and the reinsurance arrangements are unparalleled in the market, this is significant backing.

### How is security agreed and on what form?

Claimants requesting security for their claim will usually have a firm idea of the available means of security, particularly in the more sophisticated maritime jurisdictions. The club LOU has become generally acceptable in these jurisdictions. The position is often more difficult where the claimants are not accustomed to the P&I club system or have their own internal requirements.

The club will have to consider a number of factors before providing security in the form of a LOU. These include, but are not limited to, the following key considerations:

- Entry of the ship with the club at the time of the incident;
- All financial requirements in place, including all premiums paid and no outstanding debts or warranties on cover;
- Reasonable level of security;
- Reasonable and acceptable security (LOU) wording;
- Ship in Class and compliant with regulations;
- Security request for losses occurred and not merely anticipatory.

All clubs have their own standard LOU wording but generally they all provide for the same basic information in relation to: the name of the ship, incident or claim description, name of beneficiary, quantum and law, and jurisdiction. The LOU should incorporate reference to a fixed amount, inclusive of interest and costs. In addition, the LOU wording should set out that the 'trigger' for payment under the LOU is made once the member's legal liability has been established. The wording should also limit payment either in accordance with an agreement reached by the parties or following a final unappealable decision by an arbitral tribunal or the courts.

In some jurisdictions, the role of the local correspondent can be invaluable, as the clubs will often rely heavily upon them for advice concerning the provision of security. The club correspondent has knowledge of the idiosyncrasies of the local environment and the local judicial system and can provide valuable advice regarding the provision of security. In certain jurisdictions, a correspondent's LOU, counter secured by the club, is the only form of security other than a bank guarantee that will be acceptable to the claimant.

### Other forms of security

Where a club LOU is not acceptable to the claimants, other forms of security can be provided although they are usually slower and subject to more procedural steps. These include: a bank guarantee, bail bond, insurance company's bond and, in rare occasions, cash deposit into court.

In the case of the *Atlantik Confidence*<sup>2</sup>, the club obtained a Court of Appeal ruling that a limitation fund can be established through a LOU, rather than payment into court. The ruling means that a LOU is now an acceptable alternative to a cash deposit, at least under English law. See our previous [web alert](#) for more information.

**Members requiring further information on this topic should direct their enquiries to their usual contact at the club or the authors.**

1. *The Oakwell* [1999] 1 Lloyd's Rep 249
2. *The Atlantik Confidence* [2014] EWCA Civ 217

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