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TABLE OF CONTENTS

	<i>Page</i>
<i>General Editor and Contributors</i>	vii
<i>Preface</i>	xi
<i>Acknowledgement</i>	xiii
<i>Table of Precedents</i>	xix
<i>Table of Cases</i>	xlvii
<i>Table of Legislation</i>	cxliii

Paragraph

PART A ADMIRALTY

Edward Alder and Thomas Yeon

1 Admiralty	1-01
-------------	------

PART B ARBITRATION

John Choong, Chan Yong Wei, and Jacky Fung

2 Arbitration	2-01
---------------	------

PART C ASSIGNMENT OF CONTRACTUAL RIGHTS

John Choong and Justin Chow

3 Assignment of Contractual Rights	3-01
------------------------------------	------

PART D BANKING AND FINANCE

Kenneth Lee, Tanie Toh, and Thomas Yeon

4 Bankers	4-01
5 Bills of Sale	5-01
6 Bonds	6-01
7 Guarantees	7-01

PART E BUSINESS LAW

Michael Kan and Keith Brandt

8 Credit, Finance and Leasing	8-01
9 Commission Agents	9-01
10 Factoring and Liens	10-01
11 Set Off	11-01
12 Sale of Goods	12-01
13 Title to Goods – Torts Against Goods	13-01
14 Surety	14-01

PART F COMPETITION

15 Competition Law

Hectar Pun SC, Isabel Tam, and Emily Ting

15-01

PART G COMPUTERS AND INFORMATION TECHNOLOGY

16 Computers and Information Technology

Kaiser Leung

16-01

PART H CONSTRUCTION

17 Construction Law

Wing So

17-01

PART I DEFAMATION18 Libel and Slander
19 Malicious Falsehood*Tommy Cheung and John Hui*

18-01

19-01

PART J ECONOMIC TORTS20 Civil Claims in Fraud: An Introduction
21 Fraudulent Misrepresentation or Deceit
22 Conspiracy
23 Intentional Economic Torts
24 Bribery
25 Constructive Trusts and Tracing*Ronald Tong and Joanne Choy*

20-01

21-01

22-01

23-01

24-01

25-01

PART K EMPLOYMENT26 The Labour Tribunal
27 Common Law Claims in the High Court or District Court
28 Industrial Actions, Trade Unions and Economic Torts
29 Discrimination and Harassment*Billy Liu*

26-01

27-01

28-01

29-01

PART L ENVIRONMENTAL CLAIMS30 Environmental Torts and Nuisance
31 *Rylands v Fletcher**Joseph Chung and Vivien Wong*

30-01

31-01

PART M EQUITABLE REMEDIES32 Introduction
33 Accounts
34 Injunction
35 Receivers
36 Rectification
37 Rescission
38 Specific Performance*Kareena Teh*

32-01

33-01

34-01

35-01

36-01

37-01

38-01

PART N INSOLVENCY AND COMPANIES39 Schemes of Arrangement
40 Bankruptcy
41 Compulsory Winding-up
42 Voluntary Winding-up*Bryan O'Hare and Pui Yip Leung*

39-01

40-01

41-01

42-01

PART O INSURANCE43 Insurance
44 Miscellaneous Insurance
45 Life Insurance
46 Motor Vehicle Insurance*Giovanna Kwong and Kieran Humphrey*

43-01

44-01

45-01

46-01

PART P INTELLECTUAL PROPERTY47 Intellectual Property and Confidential Information
48 Copyright and Related Rights
49 Passing Off
50 Patents
51 Registered Designs
52 Registered Trade Marks*Andrew Cobden and Douglas Clark*

47-01

48-01

49-01

50-01

51-01

52-01

PART Q JUDICIAL REVIEW

53 Applications for Judicial Review

Hectar Pun SC and Anson Wong Yu Yat

53-01

PART R LANDLORD AND TENANT

54 Landlord and Tenant

Teresa Wu and Martin Lau

54-01

PART S PRIVACY

55 Privacy

Kyle Wombolt and Jojo Fan

55-01

PART T PROFESSIONAL LIABILITY

Edward K H Ng and Stephen Ku

56 Professional Liability 56-01

PART U PROPERTY

Tommy Cheung

57 Common Intention Constructive Trust, Proprietary Estoppel and Resulting Trust 57-01
 58 Adverse Possession 58-01
 59 Sale of Land 59-01
 60 Partition 60-01
 61 Easements 61-01

PART V RESTITUTION

Michael Lok and Terri Ha

62 Restitution 62-01

Index 1695

TABLE OF PRECEDENTS

CHAPTER 1: Admiralty

1. Writ of Summons in Admiralty action <i>in rem</i>	1-A01
2. Writ of Summons in Admiralty action <i>in rem</i> in Sister Ship Action	1-A02
3. Writ of Summons in Admiralty action <i>in rem</i> in respect of Loss of Life/ Fatal Accident	1-A03
4. Writ of Summons in Admiralty action <i>in personam</i>	1-A04
5. Indorsement on Writ for a claim by sole owners for declaration of ownership and for possession	1-A05
6. Indorsement on Writ for a claim by part owner for a declaration of ownership	1-A06
7. Indorsement on Writ for a claim by part owner for possession	1-A07
8. Indorsement on Writ for a claim in co-ownership dispute	1-A08
9. Indorsement on Writ for a claim in respect of a mortgage	1-A09
10. Indorsement on Writ for a claim for damage received by a ship in collision	1-A10
11. Indorsement on Writ for a claim for damage received by ship and cargo in collision	1-A11
12. Indorsement on Writ for a claim for damage received by a ship otherwise than by collision	1-A12
13. Indorsement on Writ for a claim for damage to ship lying in defective berth	1-A13
14. Indorsement on Writ for a claim for damage done by a ship	1-A14
15. Indorsement on Writ for a claim for personal injuries sustained on board a ship	1-A15
16. Indorsement on Writ for a claim for damage sustained by cargo in collision	1-A16
17. Indorsement on Writ for a claim for damage to cargo	1-A17
18. Indorsement on Writ for a claim for damage to cargo and for declarations as to general average and salvage	1-A18
19. Indorsement on Writ for a claim for breach of charterparty	1-A19
20. Indorsement on Writ for a claim for salvage	1-A20
21. Indorsement on Writ for a claim for towage	1-A21
22. Indorsement on Writ for a claim for pilotage	1-A22
23. Indorsement on Writ for a claim for goods and materials supplied to a ship	1-A23
24. Indorsement on Writ for a claim for repair of a ship	1-A24

Claim by shipowner for general average	1-A79
Claim under bottomry bond	1-A80
Defence to claim for damages sustained by a ship in defective berth	1-A81
Defence to fatal accident claim	1-A82
Defence in salvage action denying salvage	1-A83
Defence in salvage action admitting salvage	1-A84
Defence in claim for repairs	1-A85
Defence to claim for agent's disbursements	1-A86
Notice of Originating Motion	1-A87
Writ of Summons for Limitation of Liability for Damage Arising out of a Collision	1-A88
Statement of Claim in Limitation Action	1-A89
Alternative Indorsement on Writ of Summons for limitation of liability for damages arising out of a collision	1-A90
Summons for Decree of Limitation	1-A91
Summons for Decree of Limitation of Liability: Short form	1-A92
Affidavit in Support of Summons for Decree of Limitation	1-A93
Defence in limitation action	1-A94
Summons to Set Aside Decree of Limitation of Liability	1-A95
Notice by defendants that they no longer dispute the Plaintiffs' right	1-A96
Notice of Motion for appraisalment and sale <i>pendente lite</i>	1-A97
Notice of Motion for determination of priorities and payment out	1-A98
Preliminary Acts	1-A99
Summons for Directions on collision action	1-A100
Agreement of settlement of liability	1-A101
Claim on Reference to Registrar	1-A102
Agreement in settlement of quantum	1-A103
Preliminary Act: Damage to Cargo on Collision	1-A104
Claim for Fatal Accident on collision	1-A105

1. Admiralty Jurisdiction of the Court of First Instance

The Admiralty jurisdiction of the Court of First Instance is defined and limited by subject matter. As discussed below, if a shipping-related claim is commenced *in personam* in the Admiralty list, the subject matter jurisdiction may not be of much significance. However, an *in rem* claim must be commenced in the Admiralty list and a pre-condition of commencing *in rem* proceedings (giving rise to the right to arrest) is that the claim must fall within one of the heads of subject matter over which the Court of First Instance has Admiralty jurisdiction. For this reason, it is important to examine the heads of subject matter comprising the Admiralty jurisdiction of the Court of First Instance. Admiralty *in rem* writ is issued (*The Ruby Star* [2015] 1 HKLRD 543). That said, provided matters fall within the jurisdiction conferred by the District Court Ordinance, the District Court has jurisdiction over matters that fall within the jurisdiction of the Court of First Instance, as the High Court Ordinance does not confer such jurisdiction exclusively on the High Court (*Morpol SA v Blue Anchor Line* [2017] 3 HKLRD 501).

Admiralty jurisdiction is invoked by the commencement of either an action *in rem* or an action *in personam*. An action *in rem* proceeds against the property named in the writ until acknowledgement of service and as a hybrid action against the property and the defendant thereafter (*The Ruby Star* [2015] 1 HKLRD 543). An action *in personam* proceeds against the defendant named in the writ. The twofold purpose of commencing an action *in rem* is: (1) to obtain personal jurisdiction over a defendant which may well be out of the jurisdiction without the need to invoke O.11; and (2) to obtain security for a claim. A defendant is not entitled to an order that the action proceed without security if the vessel against which the *in rem* proceedings has been arrested and released from arrest; voluntary appearance without security may risk adverse costs orders, including costs against solicitors personally (*The Al Dhabiyyah* [1999] 4 HKC 414).

(a) Section 12A(1)(a) of the High Court Ordinance: questions and claims under s.12A(2)

Section 12A(2) of the High Court Ordinance (Cap.4) ("HCO") contains an exhaustive list of questions and claims which fall within the Court of First Instance's Admiralty jurisdiction (s.12A(1)(a)). Most of the heads of subject matter jurisdiction concern claims in connection with a "ship".

There is limited jurisdiction in respect of aircraft and cargo, including towage, pilotage, salvage and enforcement of charges over property.

Hong Kong's Admiralty jurisdiction in respect of ships is essentially an implementation of the International Convention for the Unification of Certain Rules relating to Arrest of Sea-going Ships 1952 as implemented in English legislation ("Arrest Convention"). As far as possible, Hong Kong courts construe the heads of s.12A(2) of the HCO in line with the Arrest Convention (*The Oriental Dragon* [2014] HKLRD 649). Other jurisdictions which base their Admiralty jurisdiction on the 1952 Convention include heads of jurisdiction that do not exist in Hong Kong, such as claims for insurance premiums and claims to enforce arbitration awards. Section 25 of the Crown Proceedings Ordinance (Cap.300) excludes actions *in rem* against Government ships.

"Ship" is defined at s.12E(1) as including "any description of vessel used in navigation and (except in sub-s.2(c) of this section) includes, subject to any regulations made by the Governor, a hovercraft". "Vessel" has been defined to refer to "craft larger than rowing boats and includes every description of watercraft used or capable of being used as a means of transportation on water" (*Steedman v Scofield* [1992] 2 Lloyd's Rep 163). Under

s.2 of the Merchant Shipping (Local Vessels) Ordinance (Cap.548), a "vessel" is defined as including: (a) any ship, junk, boat, dynamically supported craft, seaplane, or any other description of vessel used in navigation; and (b) any other description of vessel in Hong Kong or waters of Hong Kong not used in navigation or not constructed or adapted for use in navigation. In order for a vessel to be used as a means of transport on water, the waters must be *navigable waters* and she must be used in *navigation*. It is a question of fact in each case whether a vessel is being used in navigation on navigable waters as a means of transport on water. The courts will generally look at the purpose for which the body of water concerned and the vessel are used.

1-07 Section 12A(2) covers the following subject matters:

- (1) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (2) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- (3) any claim in respect of a mortgage of or charge on a ship or any share therein;
- (4) any claim for damage received by a ship;
- (5) any claim for damage done by a ship;
- (6) any claim for loss of life or personal injury sustained as a consequence of any defect in a ship or in her apparel or equipment, or as a consequence of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship; or 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;
- (7) any claim for loss of or damage to goods carried in a ship;
- (8) 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;
- (9) any claim;
 - (a) under the Salvage Convention 1989;
 - (b) under any contract for or in relation to salvage services; or
 - (c) in the nature of salvage not falling within items (a) or (b) above; or any corresponding claim in connection with an aircraft (replaced 35 of 1997 s.9);
- (10) any claim in the nature of towage in respect of a ship or an aircraft;
- (11) any claim in the nature of pilotage in respect of a ship or an aircraft;
- (12) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (13) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (14) 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);
- (15) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (16) any claim arising out of an act which is or is claimed to be a general average act;
- (17) any claim arising out of bottomry;
- (18) 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; or

- (19) any claim arising under s.7 of Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap.413) (replaced 37 of 1990, s.12(2)).

Any claim to the possession or ownership of a ship or to the ownership therein (s.12A(2)(a)) — This head extends to all questions relating to the possession or ownership of the ship, regardless of the nationality of the ship and whether registered or not and wherever the residence or domicile of their owners may be (s.12A(7)(a) of the HCO). Claims for possession may arise where a ship has been misappropriated or a charterer refuses to redeliver her after a lawful termination of a charter by the owners. An order for delivery of possession will usually also include an order for the handing over of the ship's papers unless there is a dispute as to title. The court has jurisdiction to determine all claims as to ownership whether legal or equitable (s.12A(7)(c) of the HCO). Claims as to ownership usually involve a party seeking a declaration that it is the legal owner of the ship and is entitled to be registered as such. Hong Kong courts have the power to rectify an entry in the Hong Kong register. The power will not be exercised against a *bona fide* purchase for good value without notice of an earlier fraud. Note, however, that a claim arising under a contract for the sale and purchase of a vessel may or may not be a claim for the "ownership" or "possession" of a ship under this head of jurisdiction, depending on what has happened (*The Hong Ming* [2011] 5 HKLRD 139; Admiralty jurisdiction).

Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship (s.12A(2)(b)) — This head usually concerns differences in opinion as to the employment of a ship. This head of jurisdiction was more relevant in the past where co-owners were viewed as tenants in common, but this position has now changed as the relationship between partners will usually be regulated by shareholder or partnership agreements. On application by a party, the court has the power to order restraint of the owners in possession of the vessel until security is given for the full value of the other owners' interest in the vessel, an account of profits or any account outstanding between parties, and to direct that the ship be sold and any other order it considers fit (s.12A(4) of the HCO).

Any claim in respect of a mortgage or charge on a ship or any share therein (s.12A(2)(c)) — This head is not confined to mortgages created under Hong Kong law. The court has the power to entertain claims in respect of mortgages or charges created and registered in a foreign jurisdiction, whether registered or not and whether legal or equitable (s.12A(7)(c) of the HCO). A foreign law opinion will have to be tendered confirming that the effect and validity of the security interest created by the mortgage or charge. This includes all claims for outstandings and interest secured under the mortgage. The usual practice of the court under this head is to allow simple interest only and no interest upon interest.

Any claim for damage received by a ship (s.12A(2)(d)) — This head includes claims for damage caused other than by a ship (which would be collision damage), for example buoys (*The Hoegh Silvercrest* [1962] 1 Lloyd's List Law Reports 9), pier heads (*The Uperne* [1912] P 160), and product liability claims against a manufacturer of a product that has caused damage to a ship (*Hindustan Steam Shipping Co Ltd v Siemens Bros & Co Ltd* [1955] 1 Lloyd's Rep 167).

Any claim for damage done by a ship (s.12A(2)(e)) — This head refers to damage satisfying the following three criteria: (1) the damage must be caused by something done or omitted to be done by those engaged in the navigation or management of the ship in a physical sense; (2) the ship must be the "actual or noxious instrument" by which the damage

was done (*The Asian Atlas* [2008] 3 HKLRD 461); and (3) the damage must be sustained by a person or property external to the ship, so crew and passengers injured while on board must proceed under other heads (*The Vinalines Pioneer* [2016] 1 Lloyd's Rep 278) (*The Asian Atlas* [2008] 3 HKLRD 461). The damage must have been done by the ship, and not just arising out of the damage done (*The Vera Cruz (No.2)* (1884) 9 PD 96). However, there need not be direct physical contact between the ship and damaged thing or person, for example, ship may cause a wash (swell/wave) that causes damage, ship 1 may cause ship 2 to collide with ship 3, so that ship 2 can claim indemnity against ship 1 even though it was ship 2 that was the "instrument" that physically hit ship 3, and the ship may "drive away" another ship, that is, ship 1 causes ship 2 to take evasive action that somehow incurs loss to ship 2. In *The Chr Knudsen* [1932] Lloyd's Rep 423 ship 1 collided with ship 2 so that ship 2 sank on the claimant's dock who spent money raising the wreck of ship 2. The claim against ship 1 was within the head against ship 1 even though it was ship 2 that struck the dock. *The Prince* was in tow of *The Night Watch* and was brought into collision with another vessel and *The Night Watch* was held liable to the other vessel under this head, *The Night Watch* 1892 LT VII 396. The damage suffered by the claimant need not be physical damage, as long as it has a valid cause of action in tort for financial loss (*The Dagmara and Ama Antixine* [1988] 1 Lloyd's Rep 431) including a claim for indemnity for liability to others (*The Asian Atlas* [2008] 3 HKLRD 461). The most common example of a claim under this head is for damage arising from a collision between two ships, including costs incurred for repairing a damaged vessel and ensuring that cargo arrived at its destination (see, eg, *The Darya Bhakti* [2013] 1 HKLRD 543; plaintiff's claim was rejected on the basis of lack of evidence of the costs sought being incurred. Appeal dismissed: [2014] 6 HKC 478). A further common example is damage done by an allision between a ship and a fixed object, such as a dock or jetty. It also extends to cover any claim in respect of liability for oil pollution incurred under Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap.414) (see, eg, *The Eschersheim* [1976] 1 Lloyd's Rep 81).

1-13 Any claim for loss of life or personal injury (s.12A(2)(f)) — This head includes the jurisdiction to hear and determine any claim for loss of life (eg, a claim under the Fatal Accidents Ordinance (Cap 22)) or personal injury. As to the joint and several liability of shipowners if two or more vessels are at fault, and as to the right of contribution between them: the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap.508), ss.3-6). The claim can be brought by a person onboard the ship or by persons onboard another ship or ashore as a consequence of: (1) "any defect in a ship or her apparel or equipment"; or (2) any "wrongful act, neglect or default" of the owners, charterers or persons in possession or control of the ship or of the master ("Master" is defined under s.12E(1) of the HCO and includes every person (except a pilot) having command or charge of a ship) or crew. The act, neglect or default must have been one of: (1) neglect or default in navigation or management of the ship; (2) loading, carriage or discharge of goods ("goods" includes baggage: s.12E(1) of the HCO) on, in or from a ship; or (3) the embarkation, carriage or disembarkation of persons on, in or from the ship (s.12A(2)(f) of the HCO).

1-14 Any claim for loss of or damage to goods carried in a ship (s.12A(2)(g)) — This head includes the jurisdiction to hear and determine claims for loss of or damage to cargo and passenger baggage; it does not include the master or crew's personal effects (*The Eschersheim* (*supra*)). This exclusion however does not arise if the personal effects are lost

² This phrase is derived from the (now repealed) s.1 of the Fatal Accidents Act 1846. It covers a "negligent breach of contract" — meaning the breach of a term not to be negligent: *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370.

in a collision or where loss arises due to damage done by another ship, in each case such claim would fall within the ambit of s.12A(e) of the HCO. This is the head invoked for ordinary cargo claims for cargo carried on the offending ship, but also covers damage to cargo carried on another ship.

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 (s.12A(2)(h)) — This head adopts language that is wide enough to cover claims in contract or tort as long as they arise out of an agreement relating to the carriage of goods in a particular vessel (*Schwarz & Co Ltd v St Elefterio ex Arion (Owners)* [1957] P 179). It does not cover claims relating to carriage in unidentified vessels. There is no need for a direct contractual relationship or nexus between the parties, as long as there is a reasonably direct connection with the carriage of goods or use or hire of a vessel; however, to fall within this provision, an agreement must have a reasonably direct connection with the carriage of goods on a ship (*Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255). The most common claims are claims for breach of a charterparty, claims for breach of a bill of lading contract and claims for freight and demurrage. It is also wide enough to cover claims for an indemnity against the ship owner for losses or damage arising from the contract of carriage of cargo (see, eg, *Tasmania Feedlot Pty Ltd and Others v Toll Global Forwarding (Hong Kong) Ltd* [2024] HKCFI 2708). Claim in negligence brought by sub-charterers against head owners for overloading cargo (*Samick Lines Co Ltd v Owners of the Antonis P Lemos* [1985] AC 711), or antedating bills of lading (*Schwarz & Co Ltd* (*supra*)). The second part of the head includes claims arising under a towage contract (*The Conoco Britannia* [1972] 2 QB 543). The jurisdiction does not extend to include claims arising under ship management agreements, unless the managers were entitled to enter into charterparties for the owners (*The Stella Nova* [1981] Com LR 200), claim for non-payment of container hire under a container leasing agreement (*Gatoil International Inc* (*supra*)). The head does cover claims that are in effect for enforcement of an arbitration award made under an arbitration agreement in a charterparty, but the drafter of the general indorsement should take care to identify the underlying claim under the charterparty itself (which survives merger) rather than any claim directly on the award (*The Alas* [2014] 4 HKLRD 160).

Any claim for salvage (s.12A(2)(i)) — In summary, this head confers jurisdiction on the court to hear and determine any claim in relation to salvage. It covers claims as follows:

- (1) Claims arising under the Salvage Convention 1989 (as it has effect under s.9 of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap.508): s.12A(6)(a) of the HCO).³ A salvage operation must have (i) had a useful result in order to give rise to a right to a reward (art.12) and (ii) no payment is due unless services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose (art.17);
- (2) Claims under any contract for or in relation to salvage services (includes any claim arising out of such contract, whether or not arising during the provision of such services: s.12A(6)(b) of the HCO). Under common law, salvage has been defined as "a service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty

³ Article 1(a) of the Salvage Convention 1989 defines salvage operation as "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever".

owed to the owner of the salvaged property nor to the interest of self-preservation" (*The Cythera* [1965] 2 Lloyd's Rep 454); or

- (3) Claims in the nature of salvage, but not falling within a claim defined under s.12A(2)(i)(i) or (ii) of the HCO;
- (4) or any corresponding claim in connection with an aircraft.

1-17 The court has jurisdiction to award salvage remuneration for services rendered to a ship, her cargo or apparel or any other property belonging to her (*Wells v Owners of the Glas Float Whitton (No.2)* [1897] AC 337) and to award interest on a salvage award (*The Aldora* [1975] QB 748). An owner of an aircraft which renders salvage services is entitled to the same reward if an aircraft is used (s.9(1)(a) of the Civil Aviation Ordinance (Cap.448)) as is the Hong Kong Government.

1-18 **Any claim in the nature of towage and pilotage** (s.12(A)(2)(j) and (k) respectively) — This head includes the jurisdiction to hear and determine any such claim in respect of a ship or aircraft. Towage can be defined as "the employment of one vessel to expedite the voyage of another, where nothing more is required than the accelerating her progress" (*The Princess Alice* (1849) 166 ER 914) and a claim in the nature of towage is not confined to actual towage but extends to escorting services by a tug from outside a port into a port (*The Leoborg* [1962] 2 Lloyd's Rep 146). In relation to an aircraft, towage and pilotage means towage and pilotage while the aircraft is waterborne (s.12E(1) of the HCO).

1-19 **Any claim in respect of goods or materials supplied to a ship for her operation or maintenance** (s.12A(2)(l)) — This head includes the jurisdiction to hear and determine claims made not only by the supplier of goods or materials, including bunkers, but also claims by other persons such as masters or agents making advances to enable the purchase of goods or materials (*The Fairport (No.5)* [1967] 2 Lloyd's Rep 162). For claims for services which are said to come under this provision, the nature of the services must be judged as a question of fact as at the time the services were supplied (*The Oriental Dragon* [2014] 1 HKLRD 649). The court's *in rem* jurisdiction must exist at the time the writ was issued, if the basis of the *in rem* claim upon which jurisdiction exists arises only after the writ was issued, the Court would not have jurisdiction *in rem* over the vessel (*The Ruby Star (supra)*). The claim must be related to a particular vessel (*The Decurion* [2013] 2 HKLRD 930) so claims by agents against shipowners under standing agreements to supply multiple ships may not come within the head. It is also wide enough to include a claim for all "necessaries" including the provision of crew services (or payment of wages in that respect) (*The Nore Challenger and the Nore Commander* [2001] 2 Lloyd's Rep 103). It does not include a claim for hire of containers under a container lease agreement as it was held that the hire of containers had an insufficient connection with the operation of the vessel (*The River Lima* [1987] 2 Lloyd's Rep 106 (CA)) and in any event the underlying contract did not specify a particular ship (*The River Lima* [1988] 2 Lloyd's Rep 193 (HL)). Fees for management services may come within this head if sufficiently tied to the procurement of the goods and services or head (o), but claims for management fees in lieu of notice would not (*The Oriental Dragon* [2014] 1 HKLRD 649).

1-20 **Any claim in respect of the construction, repair or equipment of a ship, dock charges or dues** (s.12A(2)(m)) — It has been held that "equipment" connotes items of a more permanent nature, for example, anchors, cables, hawsers, sail ropes and such things as may be said to be part of a ship's equipment, but not consumable stores like fuel, oil, coal or food (*Secony Bunker Oil Co Ltd v Owners of the Steamship D'Vora* [1953] 1 WLR 34). A repairer that remains in possession of a ship has a common law possessory lien (*Smith's Dock Co Ltd v The St Merriel (Owners), The St Merriel* [1963] P 247).

1-21 **Any claim by a master or member of crew for wages** (s.12A(2)(n)) — includes the jurisdiction to determine claims in respect of sums allotted out of wages or adjudged by a

superintendent to be due by way of wages. Only a master or crew member, but not anyone else (eg, an assignee of a master's or crew's wages), can invoke the court's jurisdiction under this heading (*The King Coal* [2013] 2 HKLRD 620; *The Fearless I* [2013] 5 HKLRD 48 (a rare example of the head being read more narrowly than the corresponding head in the 1952 Convention)). In order to qualify as wages, the sums must have been earned in respect of work done on board a ship or in duties connected with it though not necessarily conducted on board the ship (*The British Trade* [1924] P 104). The following items have been held to be recoverable as wages within the head: (1) damages for wrongful dismissal (*The Pointer Apitong* [1991] 2 HKC 503); (2) wages earned after wrongful termination of the contract (*The Pointer Apitong (supra)*); (3) a bonus agreed to be paid on special conditions (*The Elmville (No.2)* [1904] P 422); (4) social benefits incorporated into the employment contract (*The Arosa Kulm* [1960] 1 Lloyd's Rep 97); (5) repatriation costs, foreign income tax and pension fund contributions (*The Westport (No.4)* [1968] 2 Lloyd's Rep 559). The commencement of proceedings to recover wages does not terminate the employment contract and wages continue to accrue and may be recovered in that claim (*The Fairport (No.2)* [1965] P 167).

A claim for master's and crew's wages gives rise to a maritime lien; this may extend to entitlement to unemployment indemnity (*The Pointer Apitong (supra)*). If a volunteer, such as a mortgagee bank or a person who has arrested the ship, pays wages, he will be entitled to be subrogated to the maritime lien in respect of the wages so paid, provided the payment is made with the sanction of court (*The Berostar* [1970] 2 Lloyd's Rep 403). Conversely, there will be no subrogation of such rights if payment was made without leave of court.

The court has jurisdiction to entertain a claim for wages by the master and/or crew that is brought against a foreign ship. However, notice of such actions must be given to the consulate in Hong Kong of the state concerned, if there is one in Hong Kong (O.75, r.5(5)).

Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship (s.12A(2)(o)) — This head includes jurisdiction to hear claims made by the master, shipper, charter or agent on account of a ship. "Master" includes every person (except a pilot) having command or charge of a ship (s.12E(1) of the HCO). A master can only claim disbursements properly incurred by him in the course of his employment and in his capacity as master where he had authority to pledge the owners' credit, that is, where the owner is liable for the expense (*The Ripon City* [1897] P 226). Furthermore, the disbursements must relate to the operational aspect of the ship (*The Oriental Dragon (supra)*). It does not include disbursements made by him which ought to have been for charterers' account (*The Turgot* (1886) 11 PD 21). A ship's agent may include a fee, charge or commission for his own fees provided the disbursements made or liabilities incurred were for a particular, identified ship (*The Westport (No.3)* [1966] 1 Lloyd's Rep 342).

Any claim arising out of a general average act (s.12A(2)(p)) — there is a general average act where "any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure" (s.66(2) of the Marine Insurance Ordinance (Cap.329)). Where the York-Antwerp Rules have been incorporated into the contract of carriage, the obligations of parties in respect of general average are contractual (*Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd* [1984] AC 226). Similar to s.66(2) of the Marine Insurance Ordinance (Cap.329), Rule A of the York-Antwerp Rules 2016 defines general average as "any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure". The ship owner has a lien on cargo for general average contribution (*Castle Insurance Co Ltd (supra)*) and may require payment of security in respect of cargo's general average contribution before agreeing to part with

the cargo. This lien is enforceable against the consignee of the cargo even though the consignee was not the owner of the cargo at the time of the average incident and hence under no personal liability for general average, subject to any limitation period defences (*Castle Insurance Co Ltd (supra)*). The ship owner will be entitled to recover all reasonable costs incurred in exercising a lien over cargo for general average contribution provided the lien was reasonably exercised (*The Lehmann Timer* [2014] QB 760).

1-26 **Bottomry** (s.12A(2)(q)) — These are actions that are brought for the purpose of enforcing bottomry bonds (contracts for a loan on the security of a ship for the duration of the voyage, with the risk of the loss to the lender of the ship) (see, eg, *The Atlas (Clark)* (1827) 166 ER 162). In other words, it is dependent on: (1) the necessity to obtain funds for the purpose of the voyage; and (2) the necessity of obtaining the funds by bottomry because it cannot be obtained any other way, that is, the distress of the vessel and the want of personal credit on the part of the ship owner. Bottomry bonds are obsolete in practice in this day and age due to the availability of credit and funds through means other than bottomry.

1-27 **Any claim for forfeiture, condemnation or restoration of a ship or of goods** (s.12A(2)(r)) — This head includes the jurisdiction of the court to grant a declaration in respect of the proceeds of sale of a ship forfeited or condemned by the court and held by the Bailiff (*The Skylark* [1965] P 474). The court may condemn or forfeit dangerous goods sent or carried on board any vessel of Hong Kong flag or foreign without being properly marked or without a written notice having been given of the description of the goods, or under a false description or with a false description of the sender or carrier.

1-28 **Droits of Admiralty** (s.12A(2)(r)) — This head includes the jurisdiction to determine claims on behalf of the Government to condemn as droits of Admiralty any goods found derelict on the sea, including flotsam (ie, goods which float when a ship is sunk), and jetsam (ie, goods thrown into the sea to lighten a ship which nevertheless sinks), or lagan (sometimes known as “ligan”; they are goods heavier than water so they will sink, cast into the sea from a ship which perishes — *Sir Henry Constable’s Case* (1601) 5 Co Rep 106a). If they have not touched the ground, they are Admiralty droits (*The King (in his office of Admiralty) v Forty-Nine Casks of Brandy* (1825) 1 Hag Adm 383). Such things must be returned to their true owner, if he appears in time, otherwise they will be condemned as droits (*The King (in his office of Admiralty) v Forty-Nine Casks of Brandy (supra)*). The Hong Kong Special Administrative Region’s Government’s right to claim wreck does not extend to unclaimed wreck found outside its territorial waters (*The Lusitania* [1986] QB 384).

(b) Section 12A(1)(b) of the High Court Ordinance: proceedings specified in s.12A(3)

1-29 Section 12A(3)(a) extends the Admiralty jurisdiction to any application to the Court of First Instance under the (i) Merchant Shipping Acts 1894–1979 in their application to Hong Kong, (ii) Merchant Shipping Ordinance (Cap.281), (iii) Merchant Shipping (Safety Ordinance) (Cap.369), (iv) Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap.414), (v) Merchant Shipping (Registration) Ordinance (Cap.415), (vi) Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap.434), (vii) Merchant Shipping (Local Vessels) Ordinance (Cap.548), and (viii) Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap.605).

1-30 The Admiralty jurisdiction also covers claims for damage, loss of life or personal injury arising out of a collision between ships (s.12A(3)(b)) and claims for limitation of liability in connection with a ship or other property for the legislation specified under s.12A(3)(c).

(c) Section 12A(1)(c) of the High Court Ordinance: any other Admiralty jurisdiction the Court of First Instance had immediately before the commencement of the Supreme Court (Amendment) Ordinance

Section 12A(1)(c) of the HCO extends the Admiralty jurisdiction to include any other Admiralty jurisdiction which it had immediately prior to the commencement of Supreme Court (Amendment) Ordinance 1989. This includes the historic jurisdiction over acts done on the high seas, claims for necessities and the power to award interest. **1-31**

2. Maritime and Statutory Liens

1-32 **Maritime liens:** A maritime lien operates effectively as a charge on the particular ship that gave rise to a particular claim that will follow the ship, notwithstanding a subsequent change of ownership. It adheres to the ship from the time the facts happened which gave rise to the maritime lien, and continues until it is discharged by way of being satisfied, laches of the lienee, the lienee’s lack of reasonable diligence in enforcing the maritime lien (see, eg, *The Bold Buccleugh* (1851) 13 ER 884), or in any other way which it may be discharged by law (*The Two Ellens* (1871–73) LR 4 PC 161) (eg, by a court sale: O.75, r.19(5)), total or permanent destruction or capture of the *res* and condemnation as prize. Under Hong Kong law, claims arising from damage done by ships, salvage, bottomry and respondentia (ie, when the cargo alone is hypothecated), and seamen’s wages and/or disbursements are the only claims recognised as giving rise to maritime liens.⁴ A maritime lien is a personal privilege which enures to the sole benefit of the maritime lienee, and is not capable of transfer (notwithstanding s.9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23) (*The Sparti* [2000] 3 HKLRD 561)), subject to the point in §1-22 above.

1-33 **Statutory/in rem liens:** Although the other claims identified in s.12A(2) of the HCO do not give rise to a maritime lien, they are enforceable by an action *in rem* and arrest of the vessel (or sister vessel) and are commonly referred to as giving rise to statutory liens. The right to arrest in respect of such claims is lost by virtue of a subsequent change of ownership of the vessel but the right will be protected as against the new owner if proceedings are commenced prior to the change of ownership. Thus, intending buyers of ships will usually carry out writ searches to ascertain whether such proceedings exist. An example of such a statutory lien is a claim by a master, shipping, charterer, or agent in respect of disbursements made on account of a ship (s.12A(2)(o) of the HCO).

3. Admiralty Proceedings

1-34 Admiralty proceedings are issued out of the High Court Registry in the usual way (see O.6, r.7) but subject to the provisions of O.75 (O.75, r.3). Admiralty actions bear the prefix “HCAJ” and are presided over by an Admiralty Judge. Although no rule of O.75 says so in terms, by longstanding practice all applications within the Admiralty jurisdiction are made by motion rather than summons and heard in open court, subject to the discretion of the Judge to adjourn simple applications to chambers so that solicitors may appear. There is no Admiralty Master in Hong Kong, although certain Admiralty matters such as assessments

⁴ Note: following the repeal of s.94 of the Merchant Shipping (Seafarers) Ordinance (Cap.478) (s.56 of the Merchant Shipping (Seafarers) (Amendment) Ordinance (2013)), a master no longer has a maritime lien for all disbursements or liabilities properly made or incurred by him on account of a ship.

of damages and references under O.75, rr.41–43 can be referred to the Registrar. Practice Direction 1.1 governs both *in rem* or *in personam* Admiralty actions. For matters which are not specifically dealt with by O.75 or the Practice Direction 1.1, practitioners should consult Practice Directions relating to cases in the General List.

4. The Writ of Summons

1–35 An Admiralty action *in rem* and an action *in personam* cannot be commenced in the same writ; separate writs must be issued.⁵ In an action *in rem*, all of the plaintiff's claims must fall within the Admiralty jurisdiction of the court and there can be no "piggy-backing" of non *in rem* claims in an *in rem* action (*The Oriental Dragon* [2014] HKRLD 649). The writ must be indorsed with either a general indorsement of claim or a statement of claim in the usual way: O.6, r.2(1)(a). A writ *in rem* cannot be served out of the jurisdiction. An Admiralty jurisdiction writ *in personam* may be served out under O.75, r.4 (rather than O.11).

(a) Writ *in rem*

1–36 A writ *in rem* may be issued against the *res* in the prescribed form, but only when the Admiralty jurisdiction can be properly invoked (s.12B(2), 12B(3), 12B(4) and 12B(5) of the HCO). Where a *res* previously arrested in other *in rem* proceedings has already been sold by the court, a further writ *in rem* by a different claimant may be issued against the proceeds of sale. It is usual practice for the plaintiff to be named. However, if the action is being brought by owners of a ship or cargo, the plaintiff is usually described as "the owners of the ship or vessel 'X'" or "the persons entitled to sue in respect of a cargo lately laden on board" the offending ship. However, a defendant may apply to court for the solicitors of the plaintiff as named on the writ to name all parties for whom the solicitors were authorised to issue the writ (*John Harvey v The Owners of the Screw Steamship "Euxine"* (1871) 17 ER 283).

1–37 The writ should be issued against the "owners or other persons interested in" the property proceeded against, and not the defendants, that is, the registered owners, in name (see Form no.1 in Appendix B). If the ship is sold after the writ is issued, the usual procedure is for the previous owners to acknowledge service of the writ and for the new owners to intervene in the proceedings as persons interested in the property pursuant to O.75, r.17. The same is the case where there has been no change of ownership between the incident and the filing of the writ, but a person other than the registered owner claims to be the real or beneficial owner: such party should not file an acknowledgement but should intervene and any acknowledgement will be struck out (*The Tian Xiang 2 Hao* (HCAJ 322/2001, 8 October 2003)). This general rule is to be departed from if the writ has to be issued against particular named persons due to the nature or circumstances of claim, for example, claims against a co-owner of a ship pursuant to s.12A(2)(b) of the HCO.

1–38 Sister-ship *in rem* proceedings (except claims solely for the enforcement of maritime liens) are usually commenced against a ship and all other ships which are in the registered owner's ownership at the time the writ is issued, that is, her sister ships. In cases where

⁵ Order 75, r.3 of the HCO provides that a writ by which an Admiralty action *in rem* is begun must be in Form no.1 in Appendix B, while a writ by which an Admiralty action *in personam* is begun must be in Form no.1 in Appendix A.

sister ship actions are contemplated, the writ should name the offending ship and all other ships which at that time are in the defendant's registered ownership. In practice, the writ is usually directed against the "owners and/or other persons interested in the ship or vessel X and her sister-ship particularised in Schedule A of this writ". Once a ship named in the writ has been served with the writ or arrested, the writ must be amended immediately by striking out the names of the remaining ships. This follows the rule that only one ship can be served with a writ or arrested for one cause of action (s.12B(8) of the HCO; *The Banco* [1971] 1 Lloyd's Rep 49). In practice, it is not unusual for claimants to issue separate writs against each sister ship to preserve their cause of action against each ship. This is allowed under s.12B(8) which provides that it does not "prevent the issue of, in respect of any one such claim, of a writ naming more than 1 ship, or if 2 or more writs each naming a different ship".

(b) Writ *in personam*

A writ *in personam* is issued against one or more named defendant(s) personally. It differs from other High Court actions founded in tort or contract in that it is specifically subject to the provisions of HCO s.12B and O.75. Unlike an action commenced *in rem*, an action commenced *in personam* does not entitle a claimant to any security as of right, as the claim is brought against the defendant personally and not the property forming the subject matter of the claim.

5. Arrest of a Ship or Property

For cases falling within s.12A(2)(e)–(q) of the HCO, it is necessary to consider s.12B(4) of the HCO. It is divided into two parts: the first part deals with the identity of the "relevant person" (as referred to in s.12B(4)(b)), and the second part deals with the requirement that the relevant person was at the time of the cause of action the "owner or charterer or in possession or in control of the ship". The onus lies on the plaintiff to prove so with "strong and cogent" evidence (*The Fan Yun 123* [2006] 1 HKC 603). The "relevant person" refers to the person who would be liable in an action *in personam* on the assumption that the action succeeded; for the purpose of establishing the court's Admiralty jurisdiction, it is not necessary to establish jurisdiction to prove that the person was in fact liable on the *in personam* claim (*The Bo Shi Ji 393* [2015] 3 HILRD 424).

As to whether the relevant person was "owner ... of the ship" in *Re Resource 1* (2000) 3 HKCFAR 187⁶ the Court of Final Appeal held that, absent exceptional circumstances such as fraudulent procurement of a registration, the registration of a person as owner of a ship in the port of registry was "virtually conclusive" of the ownership of the vessel "in the general run of things". However, it can be relevant to consider whether someone is the "beneficial owner" of the ship in question. A court would be ready to draw an inference that a registered owner of a ship is its legal and beneficial owner, the key question being purely one about title to property; it is only in exceptional circumstances it would be prepared to find otherwise (*Re Resource 1* (2000) 3 HKCFAR 187; *The Convenience Container* [2007] 3 HKLRD 575). That said, following the Court of Appeal's decision in *The Almojil 61* [2015] 3 HKLRD 598, registered ownership itself may not be conclusive of the beneficial ownership of a vessel (albeit the name registered on shipping registers would still be of fundamental importance in establishing legal and beneficial ownership). A court is entitled

⁶ The case is also reported at *The Tian Shang No.8* [2000] 2 Lloyd's Rep 430.

to look behind the registered ownership to determine whether the registered owner held shares (or part of the shares) in the ship on trust for a third party; if a true trust existed, then the requirements of s.12B(4)(i) and (ii) may not be satisfied.

1-42 As to whether the relevant person was “charterer ... of the ship”, this is not limited to demise charterers but includes voyage, time and slot charterers (*The Decurion No.2* [2013] 2 HKLRD 930). As to whether the relevant person was “in control”, in the same case it was held that the person’s connection with the ship must involve either full possession or a contractual right of control and that the relationship to the ship cannot be merely casual, the person be in control of the ship not in control of the company which was the charterer of the ship, the person must be in the position of a charterer (even if not described as such) with a contractual power of control over that ship, such a power of control would involve having the right to direct the master as to how the ship was to be employed and its existence would not be consistent with some other party having a superior contractual power of control.

1-43 For claims falling within s.12A(2)(a), (c) or (r) of the HCO or for claims solely upon maritime liens or charges, it is necessary to consider s.12B(2) and (3) of the HCO under which the claim may only be brought against the ship in question.

1-44 As noted above, after acknowledgement of service an *in rem* action proceeds as a hybrid action, *in rem* against the property and *in personam* against the defendant. Thereafter, subject to O.75 and the Admiralty Jurisdiction Practice Direction, the usual rules apply. Admiralty jurisdiction actions are liable to applications for stays on the basis of *forum non conveniens* (*Bright Shipping Ltd v Changhong Group (HK) Ltd* [2019] 5 HKLRD 30, [2020] 2 Lloyd’s Rep 1 (CA), [2020] HKCFA 24; *The Milano Bridge* [2022] HKCA 749, [2022] 1 HKLRD 1151, [2022] 1 Lloyd’s Rep 441 (CA)).

(a) Procedure and purpose of arrest

1-45 The main purpose of arrest within the action *in rem* is to obtain security for damages to be awarded in due course in litigation or arbitration. The plaintiff is entitled to sufficient security to cover the amount of its claim with interest and costs on the basis of its reasonably arguable best case up to the value of the ship (*Hua Tian Long (No.1)* [2008] 4 HKLRD 719).

1-46 Arrest with the ultimate purpose to obtain security for foreign proceedings and foreign or local arbitration is allowed. The fact that the dispute is subject to an ongoing arbitration, or that the dispute is governed by an arbitration clause, must be disclosed in the affidavit supporting the warrant of arrest; the presence of arbitration proceedings may affect the Court’s exercise of discretion in releasing security unconditionally: *The Rena K* [1979] QB 377; *The Britannia* [1998] 1 HKC 221. This is done by way of arresting the property named in the writ *in rem* within the territorial jurisdiction of the court and thereafter negotiating security for its release, usually an insurer’s letter of undertaking or payment into court, or applying for an order *pendente lite* for the sale of the property by way of a court sale. The court has jurisdiction to maintain an arrest where the purpose of the arrest is to obtain security an *in rem* claim to be stayed in favour of arbitration under the Arbitration Ordinance (Cap.609) s.20(6) and HCO s.12B(6A) (*The “Alas”* [2015] 6 HKC 557). Once security is furnished, the *in rem* proceedings will be stayed in favour of arbitration.

1-47 The arrest process is initiated by filing the following documents with the Registry (O.75, r.5): (i) a Warrant of Arrest; (ii) an Affidavit to lead the Warrant of Arrest; and (iii) an undertaking to pay the Bailiff its reasonable costs and expenses incurred in the arrest. In addition to these documents, if the claim is for possession of a foreign ship belonging to a port of a state with a consulate in Hong Kong, a notice that action has begun must be given to the consul; if the claim is for bottomry and the bottomry bond is in a foreign language,

a notarial translation must be submitted to the Registry. In considering an application for a warrant of arrest, while arrest remains discretionary in Hong Kong (cf England & Wales) the Registrar does not consider the threshold sufficiency of the merits of the plaintiff’s claim, but only whether the plaintiff has identified a cause of action which if true forms a basis for an action *in rem* (*The Amigo* [1991] 2 HKC 491). This is subject to the observation that under the duty of disclosure it would be incumbent on the plaintiff to disclose the existence of facts that showed that the plaintiff in truth had no claim at all (*The Asian Atlas* [2008] 3 HKLRD 461).

(b) Affidavit to lead the Warrant of Arrest

This is the crucial document in an arrest application. There is no prescribed form. The affidavit has to be made by the plaintiff or its agent with personal knowledge of the facts deposed to and must give full particulars of the nature of the claim (or counterclaim), that it is a claim falling within the Admiralty jurisdiction of the court, that the claim has not been satisfied, and the name and nature of the property to be arrested. The relevant provision of s.12B of the HCO should be identified. If the property is a ship, the port of registration of the ship has to be specifically identified (such as to minimise the risk of the wrong ship being arrested).

For claims falling under s.12B(2)(d)–(q) of the HCO, the affidavit must state the following:

- (1) the name of the person who would be liable on the claim in an action *in personam* (the relevant person);
- (2) that the relevant person was, when the cause of action arose, the owner, or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and
- (3) that at the time of issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required, or, where appropriate, the charterer of it under a charter by demise is required to give full and frank disclosure of all material facts giving rise to the dispute.

Where the arrest is of a sister-ship, the affidavit must state that the registered owners of the sister-ship at the time the action is brought were the owners or charterers or in possession or control of the ship in respect of which the claim arises at the time when the action arose. The most obvious example is the ability to dictate what is to be done in relation to the vessel. The mere fact that a party is described as “operator” or may be the parent of the charterers is not conclusive evidence that the party has control over a ship. Information about ownership is usually obtained from online service providers such as Lloyd’s List, Equasis and Seaweb. It is also good practice to exhibit a copy of the ship’s current Transcript of Register.

There is no Admiralty jurisdiction to arrest to enforce an arbitration award directly (*The Chong Bong* [1997] 3 HKC 579); however, *in rem* proceedings may be commenced if the underlying claim is pleaded as being in respect of one of the subject matter jurisdictions and not as a claim to enforce an arbitration award (*The “Alas”* (*supra*)).

Material non-disclosure or false or inaccurate statements contained in the affidavit can lead to the warrant of arrest subsequently being set aside, the ship being released from arrest and security returned. Generally, a plaintiff is not required to depose to the merits of its claim (*Sin Hua Enterprise Co Ltd v The Owners of the Motor Ship “Harima”* [1987] HKLR 770). However, it must give full and frank disclosure of all facts relevant to whether he has a cause of action falling within the Admiralty jurisdiction of the court, or he risks the claim being struck out and the warrant of arrest being set aside (*The Hong Ming* (*supra*)).

1-65

Preliminary acts are filed in actions arising from claims for damage, loss of life or personal injury arising from a collision between ships in lieu of ordinary pleadings. The essence of preliminary acts is that each side "pleads blind" that is to say simultaneously without sight of the opposing party's pleading. The general rule is that the plaintiff must

7. Preliminary Acts

A person claiming to have a right of action against any property that is under arrest or the proceeds of sale thereof, and who wants to be served with notice of any application to court in respect of that property or proceeds of sale may, on filing a praecipe, enter a caveat against release of that property or payment out of the proceeds of sale (O.75, r.14). The purpose of a caveat is to prevent the release of the property under arrest or payment out of the proceeds of sale (O.75, r.13(3)). A plaintiff who has issued an *in rem* writ against the property in another action should consider entering a caveat in the action in which the property has been arrested, in order to receive notice of applications made in the latter action.

(b) Caveat against release

A surety must make an affidavit stating that he is able to pay the sum for which the bond is given (O.75, r.16(2)). No affidavit is required if the surety is a corporation, unless required by the opposite party (O.75, r.16(3)).

1-63

make it susceptible to claims of different parties in different actions without the consent of the plaintiff and the sureties (*The Tai Yau 8* [1998] 4 HKC 108).

1-62

Bail must be given by way of bond in Form No.11 in Appendix B (O.75, r.16); if a party filing a bail bond wishes to indicate that the filing does not amount to submission to jurisdiction, it should append a notice to the form (*The Djalbart* [1997] 4 HKC 548). The sureties to the bond must enter into the bond before a commissioner for oaths or a solicitor so authorised under s.7A of the Legal Practitioners Ordinance (Cap.159). The bail bond represents *the res* in the action and the court has no authority to interfere in its wording to

1-61

Where a solicitor fails to comply with a written undertaking to acknowledge issue or service of the writ in the action, give bail, or pay money into court in lieu of bail, the solicitor shall be liable to committal for failure to comply with the terms of the undertaking (O.75, r.9).

1-60

It is mandatory for a party applying for a warrant of arrest to, prior to applying for the warrant, conduct a search of the caveat book to ascertain whether a caveat is in force against the property (O.75, r.5(3)). The applicant will be entitled to a reasonable opportunity of assessing whether the undertaking contained in the caveat is satisfactory and whether it ought to be accepted. If the undertaking is not satisfactory, the applicant need not accept it and he will not be penalised in costs and damages for procuring the warrant

1-59

However, where any property with respect to which a caveat is entered is arrested, the party who issued the caveat may apply by motion to the court for an order that the warrant be set aside. Unless the court is satisfied that the party who applied for the warrant had good and sufficient reason for doing so, the court may order the discharge of the warrant of arrest and payment of damages for loss suffered as a result of the arrest (O.75, r.7).

1-58

The fact that there is a caveat against arrest in force does not prevent the issue of a warrant of arrest of the property to which the caveat relates (O.75, r.6(2)). The purpose of the caveat procedure is to avoid the necessity of going through the usual procedure of arrest and causing security to be furnished (*The Jian She 33* [2001] 2 HKC 493).

1-57

A person who desires to prevent the arrest of any property can file a caveat against arrest. This is done by filing a notice, called a praecipe for a caveat (O.75, r.6(1)). The praecipe must be in Form No. 5 of Appendix B, signed by the person or his solicitors undertaking to (i) acknowledge issue or service of the writ in any action commenced against the property (r.6(1)(a)), and (ii) within three days of receiving notice that such action has been begun, to give bail in the action in a sum not exceeding an amount specified in the praecipe, or to pay the amount into court (r.6(1)(b)). On filing the praecipe, a party may cause a caveat against the issue of a warrant to arrest the property described in the praecipe to be entered into the caveat book maintained by the Registry.

(a) Caveat against arrest

6. Caveats

may or may not be within Admiralty jurisdiction and creditor's appropriation of payments, see *The Ruby Star*, above.

As noted, there can be no "piggy-backing" of non *in rem* claims in an *in rem* action (*The Oriental Dragon* [2014] HKRLD 649). For treatment of a running account of items that

tion exists (*The Rolia* [1989] 1 HKLR 394, 396; *The Ruby Star* [2015] 1 HKLRD 543). challenged, a plaintiff has to show by evidence on a balance of probabilities that jurisdic-

tions", *Re Resource 1* (2000) 3 HKCFAR 187, 211. Where the jurisdiction of the court is intended to be a comprehensive and exclusive code for the taking of jurisdictional objec-

ant is entitled to challenge the exercise of Admiralty jurisdiction in respect of those claims under O.12, r.8 (see, eg. *The Decurion (No.2)* [2013] 2 HKLRD 930). Order 12 r.8 "is

1-56

If part of the plaintiff's claims do not fall within the Admiralty jurisdiction, the defend-

(d) Challenge procedure

in the statutory form; or (c) payment of cash into court.

shipowner provides security to the plaintiff by either: (a) a letter of guarantee or undertak-

When the amount of security has been agreed or determined by the court, the defendant

the claim is held to be smaller than the amount of security provided: [2008] 4 HKLRD 745).

ant for fortification of undertaking by the plaintiffs to repay excessive security in the event

increased on appeal upon receipt of fresh evidence, unsuccessful application by the defend-

ters that may be involved in the case (*Hua Tian Long (No.1)* (*supra*); amount of security

treated on a "broad brush" basis but not a minute examination of any over-complex mat-

237/1999, 21 September 2000)). This application, being interlocutory in nature, would be

mine the amount of security required to secure the release (*The Tung Shing No.8* (HCAJ

court may at the same time with or without an order for sale *pendente lite* appraise or deter-

1-54

Upon an application for the release of an arrested vessel, if the parties cannot agree the

(c) Release and appraisal and payment of security

the arrest (*The Fearless I (supra)*).

arresting and maintaining the ship, even if the creditors derived any *de facto* benefit from

malice or gross negligence. A wrongful arrestor would not be entitled to any costs for

[1995] 1 HKLR 255; *The Hong Ming (supra)*). The onus is on the defendant to establish

1-53

A court will order an inquiry into damages for wrongful arrest if the arrest was con-

within two months after service of the writ on the defendant, and the defendant must within two months after acknowledging issue or service of the writ file a preliminary act in the Registry; Part Two of a preliminary act shall be deemed to be that party's pleadings (O.75, r.18(2)). The obligation to file a preliminary act extends not only to owners of the colliding vessels but to all parties involved in the collision action. The court's discretion to dispense with the filing of preliminary acts is to be exercised judicially, considering whether the prejudice suffered by the defendant is irreparable; if it is not, the action should be allowed to go forward so that it can be determined on its merits rather than struck out (*Wong Wai Fong (Administratrix of the Estate of Wong Fok, deceased) v Leung Cho Sze* [1982] HKC 263).

1-66 A statement of fact contained in a preliminary act is a formal admission and the court will hold the parties to statements contained in the preliminary acts.

1-67 The court has the power to order the amendment of a defective preliminary act. Contents of the preliminary act, divided into Parts One and Two must contain the particulars and pleas set out in O.75, r.18(2). Applications for particulars of damages and assessment of damages is to be made to the Registrar. The established practice of the Admiralty Court is to first determine liability before an assessment of damages to be carried out; cogent reasons are required for this order to be reversed (*Calandra Shipping Co Ltd v Noor Maritime Ltd* [2014] 2 HKLRD 242).

8. Limitation Proceedings

1-68 A ship owner and other designated parties are entitled to limit their liability arising out of a single maritime incident to a particular sum, irrespective of the total number of claims and their amounts. The act of invoking limitation of liability does not constitute an admission of liability as such. If a limitation decree is granted, the ship owner (and others) will set up a fund and all claimants can only look to the fund for satisfaction of their claims, but not otherwise. In the ordinary course of things, a claimant will accept a pro-rata share of the limitation fund in satisfaction of the entirety of its claim. In Hong Kong, the law on limitation can be found in the Convention on Limitation of Liability for Maritime Claims 1976 (also known as the London Convention) (set out in Sch.2 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap.434) (liability increased by the Protocol to the London Convention, adopted on 2 May 1996 and entered into force on 13 May 2004). Article 1 of the London Convention defines "shipowner" to include owners, charterers, managers and operators of a ship. Shipowners, salvors and liability insurers of all the foregoing groups of persons may limit their liability in accordance with the London Convention. As to charterers' ability to limit in respect of claims by owners, see *The MSC Flamina* [2025] UKSC 14.

1-69 Liability may be limited in respect of loss of life, personal injury, loss of or damage to property occurring on board in connection with the operation of the ship or salvage operation, and consequential losses arising therefrom (art.2(1)(a) of the London Convention). Limitation depends on the type of claim and the size (tonnage) of the ship involved in the claim. There are four bands of claims in respect of loss of life and person injury and four for any other claims (art.6(1) of the London Convention).

1-70 Claims under art.2(1)(e) and art.2(1)(f) are subject to limitation even if brought by way of indemnity, as construed within the context of art.2(2) of the London Convention (*Sun Wai Wah Transportation v Cheung Kee Marine Services Co Ltd* [2010] 1 HKLRD 833). They are, however, not subject to limitation to the extent that they relate to remuneration under a contract with the person liable (art.2(2) of the London Convention). In Hong Kong, since s.15 of the Merchant Shipping (Limitation of Shipowners Liability)

Ordinance (Cap.434) disappplied art.2(1)(d) of the London Convention, claims in respect of wreck removal expenses are not subject to limitation (*Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd* (2023) 26 HKCFAR 297).

However, under art.4 of the London Convention, a person will be barred from claiming limitation if a claimant establishes by evidence that (i) the loss resulted from the plaintiff's personal act or omissions of which the person was reckless, and (ii) actual knowledge of the person that the very loss in question would probably result. The burden of establishing that the plaintiff is not entitled to limit liability rests on the party seeking to break the limit under art.4. The right to limit is regarded as "almost indisputable" (*Floata Consolidation Ltd v Man Lee Hing Vehicles Ltd* [2016] 2 HKLRD 1091) or "virtually unbreakable" (*The Realice* [2014] 2 Lloyd's Rep 315). If the ship in question is owned by a corporation (which is invariably the case in practice), it is necessary to identify a person (either a director or at least someone sufficiently senior within the plaintiff's management) who can be regarded.

The procedure for the commencement of limitation proceedings is set out in O.75, rr.37-40. Proceedings are commenced by the issuance of a writ (Appendix B Form No.2 and Form No.2A for service out of jurisdiction) in the Court of First Instance's Admiralty jurisdiction. The party seeking limitation relief shall be named as the plaintiff in the action (O.75, r.37(1)) and at least one person with claims arising out of the casualty must be named⁷ as a defendant in the action; additional defendants may be described generally (O.75, r.37(2), (5)). Limitation may also be pleaded as a defence in an appropriate action (O.18, r.22).

Within seven days after the acknowledgement of service of the writ by one of the defendants named therein or (if none of them acknowledges service) within seven days after the time limited for acknowledging service, the plaintiff, without serving a statement of claim must take out a summons returnable before the Registrar in Chambers for a decree limiting its liability, or (in default of such a decree) for directions for the further proceedings in the action (O.75, r.38(1); *The Equator Crystal* [1998] 4 HKC 568). The summons must be supported by affidavit(s) proving the nature of the plaintiff's case in the action and (if none of the defendants named in the writ by their names has acknowledged service) service of the writ on at least one of the defendants so named.

The affidavit must state the full names of all persons who, to the knowledge of the plaintiff, have claims against him in respect of the casualty (O.75, r.38(3)). On the hearing of the Summons, the following may take place:

- (1) if it appears that the plaintiff's right to limit is not disputed, the Registrar may make a decree limiting liability, and fix the amount to which liability is to be limited (r.38(5)).
- (2) if it appears to the Registrar that any defendant has insufficient information to enable him to decide whether or not to dispute the plaintiff's right to limit, the hearing may be adjourned to enable the defendant to obtain such information (r.38(6)).
- (3) if the Registrar does not make a decree of limitation, he must give such directions as to further proceedings in the action as appear to him to be appropriate (r.38(7)).

If a limitation decree is not made, the parties may be ordered to file pleadings in the action. The plaintiff may ask for a declaration of the tonnage of the ship for limitation purposes and offers to pay into court the alleged limitation amount together with interest from

⁷ "Name" includes a firm name or the name under which a person carried on its business, and where any person with a claim against the plaintiff in respect of the casualty as the owner of (or as bearing some other relation to a ship), he may be so described: O.75, r.37(5).