

SHIP ARRESTS IN PRACTICE

TWELFTH EDITION
2020

A COMPREHENSIVE GUIDE TO SHIP ARREST &
RELEASE PROCEDURES IN 93 JURISDICTIONS

WRITTEN BY MEMBERS OF
THE SHIPARRESTED.COM NETWORK



Welcome to the twelfth edition of *Ship Arrests in Practice*.

For more than a decade now, this publication has been circulated among the maritime industry. It is a very welcome guide for parties willing to arrest or release a ship worldwide: suppliers, owners, insurers, P&I Clubs, law firms, and banks are some of our day to day readers.

Thanks are due to all of the members contributing to this year's publication and my special thanks goes to the members of the Editorial Committee who, as busy as we all are, have taken the time to review the publication to make it the first-rate source that it is.

The law is stated as of 31st of December 2019.

Felipe Arizon

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N.B.: The information contained in this book is for general purposes, providing a brief overview of the requirements to arrest or release ships in the said jurisdictions. It does not contain any legal or professional advice. For a detailed synopsis, please contact the members' law firm.

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OVERVIEW

1. Please give an overview of ship arrest practice in your country.

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16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Generally, the arrest in the events mentioned in item 10 above are meant to support proceedings which, in turn, implies the review of a matter on the merits by the Court.

17. What is the procedure to release a ship from arrest?

The law provides that the plaintiff may unilaterally do so. Also by posting of security and filing a request. This could be made unilateral by the defendant/owner of the asset or a third party, or jointly by plaintiff and defendant/owner of the asset. Failure of the plaintiff to consign relevant maintenance amounts, after five days from a request, also allows the Marshall to proceed with the release.

18. What type of security needs to be placed for the release?

The law provides the following alternatives

1. Cash or Certificate of Judicial Deposit at the National Bank of Panama
2. Letter of Guarantee, Certified or Cashier's Cheque from a local bank holding a general license.
3. Surety from an insurance company licensed in Panama.
4. Other which the parties may agree.

19. Does security need to cover interest and costs?

Response. Yes, these would be assessed by the Judge upon fixing the amount of release bond. However the parties may agree in terms of amount, thus also excluding interest or costs.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

These are, but would need the acquiescence of the plaintiff.

21. How long does it take to release the ship?

Usually within the day of filing of the request (including if the necessary release bond is duly consigned with the Court)

22. Is there a procedure to contest the arrest?

Yes, this involves a motion duly supported for wrongful arrest, when there is a mistake in the asset to be attached or ownership thereof, the absence or inexistence of an alleged maritime lien causing the arrest or against an agreement not to arrest.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

As per 16, above, the complaint would have to be filed at the time of the request of the arrest. The Court would review if the underlying claim stands (prima facie) to initiate the proceedings with the admission of the complaint. The order for the arrest of a vessel would be served together with the complaint, and would trigger the term to answer the complaint, to start the proceedings.

24. Do the Courts of your country acknowledge wrongful arrest?

The law contemplates the following specific proof for wrongful arrest when:

- a) the arrest has been performed over property which is different from the one against which the suit was brought; or
- b) which does not belong to the defendant; or
- c) on which the maritime lien or in rem right for whose execution the arrest was requested is extinguished or inexistent; or
- d) if the arrest was requested in contravention of a prior agreement between the parties, as the case may be; as overall.

I have applied the rules of wrongful arrest to have successfully obtained the release of an injunction over the vessel, known as "flag arrest", and such mechanism is now being used by other colleagues.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

This would be in exceptional situations involving fraud or criminal actions, before competent courts in that respect. Therefore, it should be noted that Maritime Courts may be reluctant to do so, on strictly maritime causes of action, without an order or further support from a Penal Court.

26. Is it possible to have a ship sold *pendente lite*; if so how long does it take?

Yes, in the following situations:

- a) If the arrest may result in a deterioration of the vessel (depending on its type);
- b) After 30 days from date of the arrest;
- c) If the costs for custody and maintenance become excessive in respect to the sale value;
- d) If the complaint is not timely answered;

The first three scenarios would require the intervention of both parties, whilst the fourth, would proceed at the request of the claimant and in case of enforcement of naval mortgages, *ipso jure*. The proceeds would then be deposited at the National Bank of Panama, in an interest bearing account.

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- (n) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which under any law in force for the time being is recoverable as 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;”

6. Can you arrest a ship irrespective of her flag?

Yes. Irrespective of the flag of the vessel, anyone can file papers to arrest a vessel.

7. Can you arrest a ship irrespective of the debtor?

Yes. Immaterial of the debtor, if there is a prima facie claim for damages a ship can be arrested.

8. What is the position as regards sister ships and ships in associated ownership?

If the owner of a ship or ships is liable to a maritime claim, then not only the ship in respect of which the maritime claim arose may be arrested but also all other ships in the same ownership, when all the shares of those ships are owned by the same person or persons. However, Admiralty Jurisdiction Act is silent, on sister ships and associated ownership.

9. What is the position as regards Bareboat and Time-Chartered vessels?

If the registered owner of the ship is not liable for a maritime claim, then an arrest of a vessel under the bareboat or time charter is not possible. Only where the owner is found to be the debtor of the maritime claim an arrest is possible. Arrest of the vessel is not possible, if the time charterer or bareboat charterer is solely liable for the claim. A vessel can be arrested for a maritime lien, even if the vessel is on a bareboat or time charter. However if the claim is in respect of the property itself such as relating to the supply of bunkers to the vessel or unpaid repair bills which has enhanced the value of the property, the ship may be arrested even if it is under the bareboat or the time charter.

10. Do your Courts require counter-security in order to arrest a ship?

No. It is the debtor who has to provide security to have the arrested vessel released.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

Maritime claims for which a ship can be arrested are mentioned under under Section 2(1)(e) to (q) in the Admiralty Jurisdiction Act No. 40 of 1983. On the basis of these claims, a ship can be arrested provided the owner is the same at the time, the cause of action arose and is still the owner at the time of the arrest of the vessel.

Maritime liens however can be enforced irrespective of the ownership of the vessel. Maritime lien can be enforced even if the ownership has changed.

The procedure for arrest of a ship is the same whether it be for a maritime claim or arising out of a maritime lien.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes. Sri Lanka is a signatory to the International Convention on Maritime Liens and Mortgages, 1993. Maritime liens under the law of Sri Lanka are set out in Section 83 of the Merchant Shipping Act No. 52 of 1971 as follows:

“Maritime liens of a ship shall arise out of-

- (a) wages and other sums due to the master, officers and other members of the ship’s complement, in respect of their employment on the ship
- (b) port, canal and other waterway dues and pilot age dues;
- (c) claims against the owner (which term shall for the purposes of this section also include the charterer, manager or operator of the ship) in respect of loss of life or personal injury occurring, whether on land or water, in direct connection with the operation of the ship;
- (d) claims against the owner, based on a wrongful act and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the ship;

(e) claims for salvage, wreck removal and contribution in general average.”

Priority of liens it is set out in the Merchant Shipping Act, Section 84 as follows:

“84. The maritime liens set out in section 83 shall take priority over mortgages and preferential rights registered under Chapter 4, or arising under the Crown Debtors Ordinance or the Insolvency Ordinance, and no other claim shall take priority over them, except as is provided in section 86.”

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

An application to court can be made immediately, if all the documents to support the maritime claim or lien is ready with the affidavit of the plaintiff on an urgent basis once filed can be supported even after normal hours in the chambers of the judge.

14. Do you need to provide a POA or any other documents of the claim to the Court?

No Power of Attorney is required to arrest a ship. Normal proxy form has to be signed by the plaintiff, authorizing the instructing attorney appearing for the plaintiff to file papers. Thereafter an affidavit of the plaintiff fully setting out the maritime claim with all the supporting documents should be prepared and filed in court to proceed to arrest a vessel.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

Under Sri Lankan Law, filing of documents electronically is not yet in practice. All documents filed in courts can be certified as true copies by the instructing attorney of the plaintiff. When the case proceed to hear on merits, the original documents need to be produced in court.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Once the Admiralty Court orders the arrest of a ship, it retains jurisdiction to adjudicate the substantive claim of the plaintiff, unless there is exclusive agreement between the relevant parties to litigate in another jurisdiction or to submit their dispute to arbitration. In such a situation the arrest of the ship may not be maintainable.

17. What is the procedure to release a ship from arrest?

See Section 37(1) Admiralty rules

18. What type of security needs to be placed for the release?

Normally a Bank Guarantee issued by a first class Bank subject to the jurisdiction of Sri Lanka.

19. Does security need to cover interest and costs?

Yes.

20. Are P& I LOU accepted as sufficient to lift the arrest?

No.

21. How long does it take to arrest the ship?

It all depends on when security for claim is made.

22. Is there a procedure to contest the arrest?

Yes.

23. What period of time will be granted by the Courts in order for the Claimants to take legal action on the merits?

Once the ship is arrested on the ex-parte application of the plaintiff, court will grant time to file objections to the arrest. If no objections are filed to the arrest of the vessel, court acting under rules framed under the Admiralty Jurisdiction Act, will grant time to the plaintiff to file by way of a petition all matters to be adjudicated by court on the merits of the case.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

If a vessel is sold to a separate legal entity for the purpose of evading a claim, the court can examine the circumstances of the sale and in exceptional situations will allow the piercing of the corporate veil on grounds of fraud.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

A vessel can be sold, if the party who made the application for the sale of the vessel can show that the vessel had been arrested for some time and the ship is losing its value by deterioration. Therefore court can sanction the sale of the vessel by public auction and deposit auction money in a court account to settle claims arising in respect of the vessel. It is specifically provided under Section 7(3) of the Admiralty Jurisdiction Act No. 40 of 1983 that if the property arrested is "subject to speedy decay the court may on an application made in that behalf by the marshal direct that such property be sold and the proceeds deposited in courts, pending the determination of the action".

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SHIP ARREST IN VENEZUELA

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1. Please give an overview of ship arrest practice in your country.

Rules related to the arrest of ships in Venezuela have significantly improved with the enactment of the Law on Maritime Commerce (LMC) published in the Official Gazette No.38, 351 dated 5th January 2006. To some extent, the notion of an action in rem has been included in the LMC, in the sense that actions can be exercised against the ship and her Master, without being necessary to make mention of the owners (art. 15 LMC), whereas the writ can be served by handing it over to anyone onboard the ship, and even by fixing one cartel in the ship in the presence of two (2) witnesses, if there is no anybody onboard (art.110 LMC). The arrest or the prohibition from sailing will be carried out by notification effected by the court to the Port Captaincy where the vessel is found. In urgent cases, the legislation allows to inform prohibition from sailing by electronic means, as prescribed by article 104 of the LMC.

2. Which International Convention applies to arrest of ships in your country?

Arrest of ships under Venezuelan law is governed by the provisions contained within the LMC, incorporating very much the 1999 International Convention of Arrest of Ships.

3. Is there any other way to arrest a ship in your jurisdiction?

Together with the exercise of the arrest of a ship in the terms allowed by law or "preventive embargo", art. 103 of the LMC includes another mechanism to guarantee a maritime claim according to which the holder of a maritime claim in respect of a ship may request from the competent court a "precautionary measure of prohibition from sailing", in order to guarantee the existing maritime claim. The court shall agree on the petition without mayor formality, provided evidence is submitted from which it can be inferred presumption of the right that is claimed. If this evidence is not sufficient, the court may request a guarantee to decree this precautionary measure.

4. Are there alternatives e.g. saisie conservatoire or freezing order?

Following a ruling by the Supreme Court of Justice in 2004 it has been held that the arrest or preventive embargo does only proceed in the event of maritime claims as listed by the law. In case of credits different than those regarded as maritime claims then the prohibition from sailing is available pursuant the rules of the Civil Procedure Code.

5. For which types of claims can you arrest a ship?

Article 93 of the LMC contains the list of maritime claims giving rise to an arrest (embargo preventivo) of ship:

- a. - Loss or damage caused by the operation of the ship;
- b. - Loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- c. - Salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- d. - Damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs for reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature;
- e. - Costs or expenses relating to the raising, removal, recovery, destruction or the rendering armless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or

has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;

f. - Any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

g. - Any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

h. - Loss of or damage to or in connection with goods (including luggage) carried on board the ship;

i. - General average;

j. - Towage;

k. - Boating (Lanchaje);

L.- Pilotage;

m. - Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;

n. - Construction, reconstruction, repair, converting or equipping of the ship;

o. - Port, canal, dock, harbor and other waterway dues and charges;

p. - Wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

q. - Disbursements incurred on behalf of the ship or its owners;

r. - Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;

s. - Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

t. - Any dispute as to ownership or possession of the ship;

u. - Any dispute between co-owners of the ship as to the employment or earnings of the ship; and,

v. - A mortgage or a "hypothèque" or a charge of the same nature on the ship.

6. Can you arrest a ship irrespective of her flag?

Yes. As per art. 13 of the LMC domestic maritime courts are competent to know of proceedings involving a foreign flag ship in cases where according to domestic legislation it can be arrested, unless there is an arbitration agreement or attributing competence to another jurisdiction, in which case the arrest will be granted for the purposes of obtaining a guarantee to execute the eventual arbitration award or judicial decision.

7. Can you arrest a ship irrespective of the debtor?

Yes, it is possible to arrest a ship irrespective of the debtor being national or foreign.

8. What is the position as regards sister ships and ships in associated ownership?

The provisions set by the LMC allows the arrest of the ship in respect of which the maritime claim arose, as well as the arrest of a sister ship, but not one in associated ownership.

9. What is the position as regards Bareboat and Time-Chartered vessels?

As per art. 95 of the LMC the arrest of the bareboat ship is possible if the bareboat charterer by the time the maritime claim arose is obliged by virtue of the relevant credit. Time-Chartered ships, however, may be subject to a preventive measure of prohibition from sailing.

10. Do your Courts require counter-security in order to arrest a ship?

Art. 97 of the LMC states that the court, as a condition to grant the arrest of the ship, may request to the claimant the submission of a guarantee in the amount and subject to the conditions determined by the former, for the claimant to answer for the damages that may cause as a consequence of the arrest. Usually, this guarantee may take the shape of a bond equivalent to 30% of the claim amount as a maximum legal costs, plus the double of the said claim amount.

As per art. 98 of the LMC the defendant may oppose the arrest or request the lifting of it, if in the opinion of the court sufficient security has been provided, except in cases in which a ship has been arrested in respect of any of the maritime claims related to ownership or co-owners disputes. In these cases, a bond or a Letter of Undertaking issued by a reputable P&I Club can be used if acceptable by claimants.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

In practice there is no difference, other than for the purposes of the priorities in the concurrence of credits.

12. Does your country recognise maritime liens? Under which International Convention, if any?

The LMC has incorporated the main provisions of the 1993 Convention on Mortgages and Maritime Liens. Consequently, the country does recognize maritime privileges or liens on a ship.

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

Petition of arrest has to be filed before the First Instance Maritime Court, and formalities can be arranged preferably 96 hours in advance, provided needed documentation is available.

14. Do you need to provide a POA or any other documents of the claim to the Court?

Power of Attorney will be needed to appear in court, together with any public or private document, accepted invoice, charter-party, bill of lading or similar document proving the existence of a maritime claim.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

The Law on Maritime Procedures (published in the Official Gazette Extraordinary No.5, 554, dated 13th November 2001) allows the use of the electronic Power of Attorney; for the purposes of submittal and admission of a lawsuit or any other petition, representation of the plaintiff may be proved by written or electronic means, provided it is accompanied by a guarantee of 10,000 units of account; however, this must be later replaced by the formally granted POA. All supporting documentation must be submitted in original duly notarized with the Apostille formalities as per the 1961 Hague Convention and translated into Spanish by public translator.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

According to art. 100 of the LMC the Court granting the arrest or receiving the guarantee to allow the release of the ship will be competent to deal with the merits, unless the parties have validly agreed to submit the matter to arbitration or to a foreign jurisdiction.

17. What is the procedure to release a ship from arrest?

A writing of opposition to the arrest (embargo or prohibition from sailing) must be submitted, either before the serving of the writ or within the three days following it. An eight days period is then opened to promote evidence, at which time the court should take a decision on the second day. This decision is subject to appeal before the Superior Maritime Court.

18. What type of security needs to be placed for the release?

Security may take the shape of a bond issued by an insurance company or a bank of recognised solvency, as well as a cash deposit.

19. Does security need to cover interest and costs?

Procedural rules only prescribe that the security must be equivalent to 30% of the claim amount for legal costs (interest included), plus de double of the said claim amount.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

LOUs by reputable P&I Clubs can be used before the maritime courts, provided it is acceptable to the opponent party or claimant. Even so, it is a matter of discretion for the court.

21. How long does it take to release the ship?

Difficult to give a precise time frame, since this may depend upon the facts of the specific case. Bearing in mind that maritime courts work only by court days, so excluding the non working days and weekends, the release could take not less than 13 days.

22. Is there a procedure to contest the arrest?

The Law on Maritime Commerce refers to the opposition as the mechanism to contest the arrest; however, the governing provisions are prescribed by the Civil Procedural Code and some others of the maritime legislation.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

Art. 14 of the LMC states that the court shall suspend any anticipated arrest granted prior to legal proceedings, if within the following ten (10) running days to be counted from the date of the arrest was effected, the lawsuit is not filed. This happens when the arrest is requested by way of petition for prohibition from sailing without filing the lawsuit with arrangement to art. 10 and 103 of the LMC. If granted the arrest or submitted the guarantee to release the ship, the Court is not competent to deal with the merits a period of time shall be given for the lawsuit to be brought either in the competent court or arbitration as per art. 101 of the LMC.

24. Do the Courts of your country acknowledge wrongful arrest?

Eventual damages for wrongful arrest are prescribed by article 99 of the LMC, according to which the court which grants the arrest of a ship, will be competent to determine the extent of liability of the claimant, for any loss which may be incurred by the defendant as a result of the arrest in consequence of:

- a) the arrest having been wrongful or unjustified; or
- b) excessive security having been demanded and provided.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Although it has been accepted in some employment cases, this has had little development and there are no precedents in the maritime field at the moment.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

Art. 106 of the LMC states that after 30 continuous days following the arrest of the ship, without the shipowner not attending to proceedings, the court at the request of the claimant, may order the anticipated auction of the ship, subject to the claimant submitting sufficient guarantee, provided the claim exceeds the 20% of the value of the ship and it is exposed to ruin, obsolescence or deterioration.

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