



THE WORLD LEADING SHIP ARREST INFORMATION PORTAL

Members

Publication

In the international environment of maritime affairs and commercial business, world online information is of utmost value.

On this premise NetManager Consulting company pioneered the development of different products with the aim to provide the most relevant information, online and freely accessible on a worldwide scale.

One of its product is the shiparrested.com portal, based on a network of leading maritime law firms. This portal includes direct information on port authorities, P&I Clubs, shipowners, international organizations and law firms in order to meet the essential needs of any company involved with a ship arrest anywhere around the globe.

Key players of this network are medium size firms with excellent practise, new ones like Theunis & D'Hoine, Abogados Asociados (AACNI) or the finest multinational law offices (Clyde and Co, Phillips Fox, Anga & Emuwa, Shepstone & Wylie, etc.).

From Singapore to Texas Gulf, they have joined this network and provide today top information ensuring that ship arrest/release practise and expertise are improving and increasing.

About this new bulletin:

NetManager Consulting company is proud to present a freely printed edition of several shiparrested.com members' contributions on how to arrest a ship in 21 different world jurisdictions.

Additional articles can be found at www.shiparrested.com portal.

Meanwhile these papers are not intended to provide legal advises, we recommend all users or already members to log on at www.shiparrested.com.

For further information, visit the world leading ship arrest information portal, [**www.shiparrested.com**](http://www.shiparrested.com).

SHIP ARREST IN AUSTRALIA

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Introduction

Admiralty jurisdiction is exercised by the Federal Court of Australia and Supreme Court of each State and Territory under the Admiralty Act 1988 (Cth) ('the Act'), which follow a uniform procedure set out in the Admiralty Rules ('the Rules').

Maritime Claims

There are two types of maritime claims defined in the Act:

Proprietary maritime claims

These are defined in section 4(2) as:

- (a) a claim relating to:
 - (i) possession of a ship
 - (ii) title to, or ownership of, a ship or a share in a ship
 - (iii) a mortgage of a ship or of a share in a ship
 - (iv) a mortgage of a ship's freight
- (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of a ship
- (c) a claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other property in a proceeding in rem in the nature of a proceeding in Admiralty
- (d) a claim for interest in respect of a claim referred to in paragraph (a), (b) or (c).'

General maritime claims

These are defined in section 4(3) as:

- (a) a claim for damage done by a ship (whether by collision or otherwise)
- (b) a claim in respect of the liability of the owner of a ship arising under Part II or IV of the Protection of the Sea (Civil Liability) Act 1981 under a law of a State or Territory that makes provision as mentioned in subsection 7(1) of that Act
- (c) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship
- (d) a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:
 - (i) the owner or charterer of a ship
 - (ii) a person in possession or control of a ship
 - (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable being an act or omission in the navigation or management of the ship, including an act or omission in con-

nection with:

- (iv) the loading of goods on to, or the unloading of goods from, the ship
- (v) the embarkation of person on to, or the disembarkation of person from, the ship and
- (vi) the carriage of goods or persons on the ship
- (e) a claim for loss of, or damage to, goods carried by a ship
- (f) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise
- (g) a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land)
- (h) a claim in respect of general average
- (j) a claim in respect of towage of a ship
- (k) a claim in respect of pilotage of a ship
- (m) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance
- (n) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched)
- (o) a claim in respect of the alteration, repair or equipping of a ship
- (p) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship
- (q) a claim in respect of a levy in relation to a ship including a shipping levy imposed by the Protection of the Sea (Shipping Levy) Act 1981, being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia
- (r) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship
- (s) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship
- (t) a claim by a master, or a member of the crew, of a ship for:
 - (i) wages
 - (ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation by law, including the operation of the laws of a foreign country
 - (u) a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the Arbitration (Foreign Awards Agreement Act 1974) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs
 - (v) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.'

Proceedings in rem

Claims against ships are commenced by issuing proceedings

in rem. The mere presence of a vessel in Australian territorial waters is sufficient to found jurisdiction in Australia. Proprietary maritime claims give an automatic right to proceed in rem because the cause of action relates to the vessel itself, without reference to its ownership. A general maritime claim gives right to proceed in rem but there is a further requirement relating to ownership. In particular, such proceedings can be commenced where a 'relevant person' (the owner or charterer) was, when the cause of action arose, the owner or charterer of, or in possession of or control of the ship or property, and is, when the proceeding is commenced, the owner or demise charterer of the ship in question.

The main difference between proprietary maritime claims and general maritime claims is that proprietary maritime claims against vessels are preserved even when ownership is transferred. Bearing in mind that most vessels are owned by one-ship owning companies with that ship being the company's only asset, it is important for claimants to ensure that they are adequately secured for their claims.

Jurisdiction

Federal Court of Australia

The Act confers Admiralty jurisdiction on the Federal Court of Australia, which has jurisdiction over the whole of Australia, her external territories and territorial waters.

Supreme Courts

Each of the Supreme Court of a State and Territory also exercise Admiralty jurisdiction under the Act and the Rules, but are more limited in their application as jurisdiction is confined to that State, at least so far as arrest is concerned. However, the state courts are invested with Federal Jurisdiction in respect of proceedings that may, under the Act, be commenced as actions in personam (section 9) and in rem (section 10).

Arrest

Once proceedings in rem have been issued, an arrest warrant will automatically be issued upon application to the Court Registrar, unless a caveat has been lodged. If there is a caveat on the Registry, the caveator must, within 3 days, pay into court the amount specified in the caveat or the amount claimed, whichever is the less, or cause a bail bond in that amount to be entered, and enter an appearance in the proceedings. A person who enters a caveat and then fails to comply with the foregoing requirements, is liable to committal.

Australia is a signatory to the Brussels Arrest Convention 1952. Articles 2 and 8 of that Convention effectively provide a right of arrest of any vessel, whether flying the flag of a signatory country or not. In addition, the Convention specifically provides for the arrest of a vessel to obtain security in respect of proceedings properly commence in another jurisdiction.

The Brussels Convention and the Act specifically prohibit the re-arrest of a vessel in respect of the same maritime claim.

However, applications may be made to the Australian court for an order permitting re-arrest, should there be a default in the performance of a guarantee or undertaking given to procure the release of the vessel from arrest or for 'other sufficient reason' (section 21).

Sister ship arrest

Section 19 of the Act provides:

'A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if:

- (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession of or control of, the first-mentioned ship
- (b) that person is, when the proceedings are commenced, the owner of a second-mentioned ship.'

Security

Australian courts will accept security for principal, interest and costs from a carrier in the form of a written undertaking given by a recognised P&I Club: *Freshpac Machinery Pty Limited v The Ship 'Joana Bonita'* (1994) 125 ALR 683 (FCA).

If the plaintiff ordinarily resides outside the jurisdiction, the court has discretion to order that plaintiff to provide security for costs.

Damages for wrongful arrest

Section 34 of the Act provides:

'Where, in relation to a proceeding commenced under this Act:

- a) a party unreasonably and without good cause:
 - i) demands excessive security in relation to the proceeding
 - ii) obtains the arrest of a ship or other property under this Act
- b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property

the party or person is liable in damages to a party to the proceedings, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

SHIP ARREST UNDER BRAZILIAN LAW

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I – Arrest: typical provisional remedy

In a broad sense, arrest is a specific or typical¹ provisional remedy provided by law so as to ensure satisfaction of a judgement in a future action at law brought to enforce collection of a debt (mainly as regards collection of a sum certain) through a preventive and provisional seizure of assets of value sufficient for the settlement of the debt.

The circumstances in general in which such provisional remedy may be requested are explained in Article 813 of the Brazilian Code of Civil Procedure. In short, such measure may be adopted when, in certain situations and in an attempt to evade the payment of its debts, a debtor intends to leave its civil domicile or perform certain acts envisaging the alienation of property, thus disposing of the assets necessary for the settlement of all its liabilities.

Further, in general, Article 814 of the Code of Civil Procedure establishes that the requirements for the judge to grant the provisional measure upon examining the motion for arrest are: i) unquestionable evidence that the debt exists and is a sum certain; and ii) proof of the existence of one of the circumstances foreseen in the aforementioned Article 813 is actually the case at hand, whether through supporting documents or evidence produced in a hearing specifically held for this purpose (“justification hearing”), which may be avoided if the creditor posts a bond, pursuant to Article 816, subparagraph II.

Note that, pursuant to the sole paragraph of Article 814 of the Code of Civil Procedure, a judgment or arbitration award ordering the debtor to pay its debt in cash, or through any other means that can be converted into cash, is held to be sufficient proof that the debt exists and is a sum certain. However, a judgment or arbitration award rendered in a foreign country will require prior ratification by the Federal Supreme Court in order to produce effects in Brazil.

1. Note: In Brazil, provisional measures are classified as “nominada” or “típica” (specific or typical) meaning that they are specifically provided by law, such as arrest, seizure, judicial notification, etc. “Inominada” or “atípica” (non-specific or non-typical) measures are remedies not specifically provided by law, which may be claimed by the plaintiff and granted or not, according to the discretion of the court.

II – Ship Arrest: typical provisional measure with specific requirements

The arrest of ships, also known as “embargo” of ships, like arrest in general, is a typical provisional remedy adopted to secure future collection of a debt. However, the difference lies in the nature of the asset to be provisionally and preventatively seized: debtor’s ship or ships.

Therefore, in view of the distinctive characteristics of the commercial relationship, especially within the scope of Maritime Law, such type of arrest received special treatment by the Brazilian legislator, by the inclusion of provisions for specific events and requirements, mostly regulated by Articles 479 to 483 and 607 to 609 of the Brazilian Commercial Code and by the International Brussels Convention of 1926, in force in Brazil by virtue of Decree No. 351 of 10.01.1935.

Thus, the applicability of a measure implying the arrest of a vessel, whether Brazilian or foreign, under Brazilian commercial legislation must take into account the distinction between two possible situations: a) the arrest is grounded on one of the credits qualified by the Commercial Code as “privileged”; and b) the arrest is grounded on credits qualified by the Commercial Code as “not privileged”.

Below is a brief analysis of such events:

i) Arrest grounded on “privileged credits”:

Privileged credits are not only those listed in Articles 470 and 471 of the Commercial Code, but also those provided by complementary legislation, which, under Brazilian law, accompany the ship wherever it may be, namely:

1. Taxes due to the State and court costs and expenses;
2. Salaries due for services rendered aboard ship;
3. Salvage indemnity claims;
4. Obligations assumed by the ship master while exercising the powers conferred upon him by law, falling upon the ship’s hull or equipment, whether or not represented or not by notes (promissory notes, bills of exchange, etc.) signed by the master;
5. Indemnification for general average;
6. Indemnification for marine accidents;
7. Credits secured by marine mortgage;
8. Debts owed to private port operators;
9. Expenses with depositaries, as well as storage costs relating to the ships instruments;
10. Expenses incurred with the ships costs and maintenance;
11. Shortages on delivery of cargo and damage thereto;
12. Debts deriving from the contracts for construction and purchase of the ship; and

13. Debts deriving from costs incurred in the repair of the ship and its installations and equipment.

ii) Arrest grounded on "non-privileged" credits:

Any other credit of nature and origin other than as stated above, is qualified under Brazilian law as "non-privileged", therefore it does not accompany the ship wherever it may be.

Therefore, the arrest based on such type of credit is enforceable only at the port where the ship has been registered and, even so, only upon the posting of a bond and after the filing of the applicable action to collect the debt of whatever nature. This means that in such event, the provisional measure requesting the arrest may only be instituted as an ancillary proceeding, not before the main action is filed.

Nevertheless, whatever the nature of the credit (privileged or non-privileged), pursuant to Article 479 of the Commercial Code, only ships without cargo or with no more than 25% of its cargo capacity onboard may be arrested. However, whatever the amount of cargo onboard, by virtue of the same legal provision the arrest will never be allowed if the ship has already obtained all required authorizations to depart, given by the competent port authorities, unless the credit being claimed arises from bunkering and catering carried out at the same port and for the same voyage.

SHIP ARREST IN ENGLAND AND WALES

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Jurisdiction for Arrest

English law provides that arrest proceedings may be commenced following the issuing of an in rem claim (a claim against a ship). The right to bring proceedings in rem is governed by the Supreme Court Act 1981. Under Section 20 of this Act the following claims may be brought in rem, and a ship arrested in respect of them.

Section 20(1)(A)

(a) Any claim to the possession or ownership of a ship or to the ownership of any share therein.

(b) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship.

(c) Any claim in respect of a mortgage of or charge on a ship or any share therein.

(e) Any claim for damage done by a ship.

(f) Any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of –

(i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible.

being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship.

(g) Any claim for loss of or damage to goods carried in a ship.

(h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

(j) Any claim –

(i) under the Salvage Convention 1989;

(ii) under any contract for or in relation to salvage services; or

(iii) in the nature of salvage not falling within (i) or (ii) above;

or any corresponding claim in connection with an aircraft.

(k) Any claim in the nature of towage in respect of a ship or an aircraft.

(l) Any claim in the nature of pilotage in respect of a ship or an aircraft.

(m) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.

(n) Any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues.

(o) 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).

(p) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.

(q) Any claim arising out of an act which is or is claimed to be a general average act.

(r) Any claim arising out of bottomry.

(s) Any claim for the forfeiture or condemnation of 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.

Section 20(1)(B)

(b) Any action to enforce a claim for damage loss of life or personal injury arising out of -

(i) a collision between ships; or

(ii) the carrying or omission to carry out a manoeuvre in the case of one or more of two or more ships; or

(iii) non-compliance on the part of one or more of two ships, with the collision regulations.

The following claims may be brought in rem irrespective of ownership of the ship and therefore allow arrest proceedings to be commenced notwithstanding who actually owns the vessel at the time the action is commenced.

(i) Any claim for possession or ownership of a ship or to the ownership of any share therein.

(ii) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship.

(iii) Any claim in respect of a mortgage or a charge on a ship or any share therein.

(iv) 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.

(v) Any claim which gives rise to a maritime lien. The following claims fall into this category:

- claims for damage done by a ship.

- claims for salvage.

- claims for masters wages and disbursements and seamen's wages.

- claims for bottomry and respondentia.

All other claims are limited by considerations of ownership and can only be brought in rem and thus against a particular ship if the following conditions are satisfied:

(i) the claim arises in connection with a ship; and

(ii) the person who would be liable on the claim if sued personally was the owner or the charterer or in possession or control of the ship when the cause of action arose; and

(iii) at the time when the action is brought i.e. when the claim is issued, the person who would be liable on the claim if sued personally was the beneficial owner of all the shares in the ship or was the demise charterer of it.

A claim form can only be issued and a ship arrested in these circumstances if between the date of the cause of action i.e. the matter or breach of contract complained of, and the date the claim form is issued:

1. the ownership remains unchanged; or

2. the demise charterer is unchanged.

Procedure for Arrest

To obtain an arrest the following documents need to be prepared.

(i) Claim form (this needs to be drafted and issued).

(ii) Warrant of arrest.

(iii) Application and undertaking to the Admiralty Marshal.

The undertaking is to pay the Admiralty Marshals fees and any expenses incurred by him in respect of the arrest of the ship, the care and custody of it while under arrest and the release or endeavours to release it. The Admiralty Marshal is the Court officer who deals with the administrative functions of arrest, sale and appraisal of property in Admiralty proceedings.

The undertaking covers all the expenses the Admiralty Marshal incurs such as hiring a launch or instructing agents to serve the arrest papers on the ship. It can also include port charges and the cost of local agents to victual and bunker the vessel during the arrest.

The undertaking is given by the solicitors acting for the arresting party. This obviously imposes a risk on the solicitors for the Admiralty Marshals fees. Therefore before signing the undertaking solicitors may require their clients to provide them with an undertaking to indemnify them against any costs incurred as a result of their undertaking to pay the Admiralty Marshals fees.

(iv) Affidavit.

This must contain certain specified details such as the nature of the claim, details of the parties and ownership of

the ship. This affidavit is sworn by the solicitor representing the arresting party

After in rem proceedings have been commenced, the arresting party may make an application for arrest by filing at the Court:

- (i) the warrant of arrest.
- (ii) the application and undertaking to the Admiralty Marshal; and
- (iii) the affidavit.

Before the ship is arrested a search must be made of the caveat book at the Admiralty and Commercial Registry in London to ensure no caution (caveat) against arrest has been lodged. A caution against arrest is an official notice, filed with the Court, undertaking to provide security for any claim against the ship in return for the ship not being arrested. If a caution has been lodged, the person who lodged it (the caveator) must, within 3 days of notice being given that the action has begun, provide security in the amount stated in the caution. If a caution against arrest has been filed, a party arresting that ship can still do so but must have a but good reason, failing which the Court has a discretion to order the vessel to be released and can order the arresting party to pay compensation.

Organising the Arrest

The procedure for organising an arrest is, in most cases, straightforward. As a guideline, a minimum of 6 hours notice is preferable to allow the necessary documents to be drafted and searches made.

The following information is required to prepare the arrest documents.

- 1. Details and proof of ownership of the ship.
- 2. Details of the ships proposed port of call.
- 3. Documents supporting the arresting party's in rem claim.

In addition some firms require an undertaking to indemnify them for the solicitors undertaking to the Admiralty Marshal for his fees (see above), and an advance payment of £1,000 for Court fees and disbursements.

Serving the Warrant

The warrant of arrest is executed and served by the Admiralty Marshal or his substitute. This is usually done by the Admiralty Marshal telephoning the relevant Customs officer at the port in question and instructing him to arrest the ship. This is then followed up by sending a "Note of Action" by fax confirming the instructions to arrest the ship. An officer from HM Customs then arrests the ship. The original Claim Form is also sent to Customs and served on the ship.

A warrant of arrest can be served anywhere within the jurisdiction of the Court, although in practical terms this is only possible when a vessel is within the limits of a port, either at anchor or alongside.

Security

Once the ship has been arrested it will be released when the arresting party consents, or the Court orders release, following reasonable security having been given. Reasonable security is calculated on the basis of an amount sufficient to cover the arresting party's reasonable best case, together with interest and costs. The amount of security cannot, however, exceed the value of the ship arrested.

Security is normally provided by way of a bank guarantee issued by a 1st class bank in London, P&I letter of undertaking, a payment into Court (a payment of a sum of money into the Courts account) or a bail bond (an undertaking to the Court backed by sureties).

Release

Once reasonable security has been provided the ship will be released on the filing of an application for release together with the consent of the arresting party. The party at whose instance the release is issued pays any costs incurred in releasing the ship.

Where another person claims to have a right in rem against a ship which has already been arrested, they may file a caution (caveat) against the release of the ship at the Admiralty Registry, which prevents the ship being released without their consent. This prevents the need for another party to arrest a ship already under arrest. Once security has been provided for the original arrest the person who has filed a caution against release can take over the arrest.

Re-arrest

Once the ship has been released there remains a right to re-arrest her if the security is insufficient. However, the amount of security provided cannot exceed the value of the ship at the time she was initially arrested.

Costs

Court fees:

<u>Amount of Claim</u>	<u>Fee for issue of in rem Claim</u>	<u>Fee for warrant of Arrest</u>	<u>Total</u>
Less than £50,000	£350	£100	£450
Greater than £50,000	£500	£100	£600

Solicitors fees:

These vary but are around £1,500 for the arrest itself.

Admiralty Marshals Fees:

A personal undertaking is given by the solicitor acting for the arresting party to pay the Admiralty Marshals costs and

expenses incurred in arresting the ship and maintaining the arrest. These are usually around £200 but can run to thousands of pounds if berth charges, victualling and tug charges are incurred over a prolonged period of arrest. The Admiralty Marshal can ask for his costs to be reimbursed monthly. These costs are recovered by the arresting party on appraisal and sale of the ship (see below), but only if the sale value of the ship is more than the Admiralty Marshals costs.

Sister Ship Arrest

A sister ship can be arrested provided:

- (i) the claim arises in connection with a ship; and
- (ii) the person who would be liable on the claim if sued personally was the owner or the (demise) charterer or in possession of the ship at the time the cause of the action arose; and
- (iii) at the time when the claim form is issued the person who would be liable on the claim if sued personally, is the beneficial owner of all the shares in the sister ship to be arrested.

Arrest after Judgment

It is possible to arrest a ship once judgment has been given against the ship.

Counter Security

No security is required to arrest a ship, apart from the undertaking given by the solicitor to pay the Admiralty Marshals fees and any expenses.

Wrongful Arrest

Damages for wrongful arrest will only be awarded where it is proved by the owners of the arrested ship that the action was brought either with malice or gross negligence.

Selling the Ship

If security has not been provided, an order can be obtained for appraisal and sale of the ship. The ship is valued by a Court-appointed valuer (appraised), and sold after being advertised and sealed bids received. If the bids are below the appraised value, the Admiralty Marshal will seek the consent of the arresting parties and cautioners to allow him to accept the highest bid. If there is no agreement he will seek directions from the Court.

A buyer of a ship sold by the Court takes the ship free of all liens and encumbrances. A bank with a registered charge can bid for the ship and if successful will buy it clear of all liens and encumbrances.

Any bunkers on board a ship being sold are separately accounted for and do not form part of the proceeds of sale of the ship. The proceeds of sale of the bunkers are returned to their owners. Subject to the proof provided, they will be paid into Court if owned by the owners of the ship or to the charterers or, if they have not yet been paid for, the bunker suppliers.

Proceeds of Sale

The proceeds of sale of the ship are distributed in the following order of priority.

1. Admiralty Marshals costs, fees and expenses.
2. Court fees and expenses
3. Costs of the arrest of the arresting parties.

Competing claims are then settled in the following order.

1. Any claim with a maritime lien e.g. damage done by a ship; salvage; masters wages and disbursements and seamen's wages.
2. Any claim of a mortgagee or any other party with a charge over the ship.
3. Any claims of any others entitled to proceed in rem will rank equally, however some in personam claims will also rank equal to these.
4. Any other claims of in personam creditors (not included in 3. above).

If the arresting party has no priority, in that he has no registered charge over the ship, his claim will fall into category 3 and he will recover in proportion to the other unsecured creditors. It is only the costs of the arrest and the Admiralty Marshals costs he has incurred that will take priority. Arrest does not give the arresting party's claim priority over the claims of other creditors.

If, following distribution of the proceeds of sale according to the above priorities, there is any remainder, it is returned to the owners of the ship sold.

A SHIP ARREST IN ESTONIA

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Background

Estonia's main sea port is Tallinn and since 1990 it has experienced considerable growth of transit of cargo. Estonia has ratified the 1999 Convention On Ship Arrests and it has also incorporated the principles of the Convention into the national legislation regulating arrest of the ships. Such legislation is mainly Law of Property of Ships and Code of Civil Proceedings.

Jurisdiction

The presence of a ship in Estonian territorial sea is sufficient to found jurisdiction in Estonia. A claim on ship arrest, as a tool to secure the claim, should be presented, as a general rule, to the same court, which according to jurisdiction rules will decide over the principal claim.

General possibility of arrest

The Law Of Property of Ships determines the meaning of maritime claim and provides that a ship may be arrested to secure a maritime claim only. Maritime claim in Estonian legislation has wider meaning than in the above-mentioned arrest conventions.

Time available to submit the Statement of Claim

If the Court applies the arrest of ship, as a provisional security measure, before a principal claim is submitted to the Court then the principal claim shall be submitted in 30 days. In case of failure to submit the principal claim to the Court within the specified term by the Court, the interim security measure shall be repealed.

Security

The Court while deciding over a claim on arrest of ship may require that a plaintiff submits security (cash deposit) for covering losses of defendant, which might arise in relation to the arrest of ship. After ruling of the Court entered into force based on which the principal claim was declined a defendant has the right to claim damages incurred because of unjustified arrest of ship.

The Courts arrest order

Court issues a ruling over a claim on arrest of ship not later than the next day as of the day of receiving the claim from the plaintiff. The Court issues a ruling without informing a defendant and other interested persons. An appeal may be submitted against a ruling of the Court, however the

appeal does not suspend the enforcement of the Courts ruling.

Enforcement of the Courts arrest order

The Courts ruling to arrest of ship has to be enforced under accelerated procedure. The Bailiffs office having received Courts ruling to arrest the ship has to start its enforcement proceedings immediately. The Courts ruling to arrest of ship does not apply to cargo of the ship. Arrest of ships registered in Estonia is enforced by entering respective notes in the Ship Register and appointing a person responsible for maintenance of the ship. Arrest of the foreign ships is different in a way that in practise an Act of Arrest is presented to port authorities.

Release of the ship from the arrest

Upon application of the defendant the Court may decide but is not obliged to replace the arrest of the ship with suitable security (deposit or bank guarantee). No release from the arrest may occur if plaintiff is claiming ownership over the ship or the dispute is between owners of the ship over the use of the ship. In case parties to the dispute do not agree upon the security, it may be determined by the court.

Practicalities of the arrest

Any document of foreign origin submitted to the court should be translated and in some cases apostilled or legalized. The document shall be in a form of original or certified copy. However, in urgent cases it is possible to submit documents in required form after submitting initially copies only. By the end of 2001 Estonian courts and bailiffs have acquired remarkable experience in arresting the ships. Estonia is a party to Hague Convention on abolishment of legalisation of the documents.

VESSEL SEIZURES IN THE SOUTHERN DISTRICT OF FLORIDA

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This article provides a very general overview of the complex framework of laws and procedures governing vessel seizures in the United States Southern District of Florida (hereinafter "Southern District"). The Southern District includes the Ports of Miami, the Miami River, Key West, Port Everglades, Ft. Pierce and West Palm Beach, Florida.

I. United States Federal Law Governs Vessel Seizures in the Southern District

Vessel seizure actions are procedurally and substantively governed by U.S. law (not Florida law). Seizure actions are thus filed in U.S. federal courthouses, and U.S. federal maritime law determines the validity of the seizure.

The United States is not a party to the 1926 and 1967 conventions entitled "International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages;" nor is the United States a party to the "International Convention Relating to the Arrest of Seagoing Ships, 1952." These conventions therefore have no applicability to vessel seizures in the Southern District.

II. Common Methods of Vessel Seizure: Arrest and Maritime Attachment

"Arrest" and "maritime attachment" are common methods utilized in the Southern District to effect vessel seizures.

Arrest

"Arrest" is the seizure method used to enforce "U.S. maritime lien rights" against a vessel. Examples of persons/entities with U.S. maritime lien rights are crewmembers seeking unpaid wages; suppliers of goods and services to a vessel; owners of cargo damaged during transport aboard a vessel; vessel salvors; ship mortgage holders, and claimants suffering bodily injury or property loss due to a casualty involving a vessel or its appurtenances.

U.S. maritime lien rights can be used to arrest a vessel even though the vessel's owner is not liable in personam to the holder of the maritime lien. This is based on the unique American concept of "vessel personification." Vessel personification treats vessels as distinct legal entities that can be

sued for incurring debts and committing torts.

Vessel salvors must generally enforce their U.S. maritime lien rights within two years of rendering the salvage services. For other types of lienors, there is no specific time frame within which a claimant must initiate an arrest to enforce U.S. maritime lien rights. U.S. maritime lien rights may be found to be unenforceable, however, if the lienor "unreasonably delays" in initiating an arrest. Arrests initiated within three years of acquisition of the lien rights (two years for salvors) are generally considered timely.

U.S. maritime lien rights are generally discharged only by a "judicial sale" conducted by a U.S. court. Non-U.S. court proceedings may also discharge U.S. maritime lien rights, however, if the foreign proceedings are substantively identical to a U.S. judicial sale.

Maritime lien rights provided by foreign (non-U.S.) laws can provide the basis for an arrest of a vessel docked in the Southern District. Generally, a non-U.S. maritime lien will be enforced if U.S. law recognizes a maritime lien under circumstances similar to those giving rise to the foreign lien.

Maritime Attachment

In the context of vessel seizure, "maritime attachment" outwardly appears identical to "arrest." Unlike an arrest seizure, however, an attachment seizure need not be based on any circumstance involving the particular vessel that is seized. The right of maritime attachment permits seizure of any tangible or intangible property of the owner that can be located in the Southern District, including but not limited to the owner's vessels.

There are generally two prerequisites that must be met to utilize maritime attachment. First, the seizing party must have an in personam claim against the vessel owner that is within U.S. maritime tort or maritime contract jurisdiction. Maritime tort jurisdiction in the U.S. is generally limited to torts occurring on navigable waterways. Maritime contract jurisdiction in the U.S. is generally limited to contracts that are directly and intimately related to the operation of a vessel.

Secondly, to pursue attachment, the vessel owner must "not be found" in the Southern District. This requirement is generally met if, after a diligent search, no agent for service of process for the vessel owner can be found in the Southern District.

An attachment action must be initiated within the statute of limitations period prescribed for the in personam maritime claim upon which the attachment is based. This may be anywhere from one to five years from the time the claim

accrues, depending on the substantive nature of the in personam claim.

III. Initiating Arrest and Maritime Attachment Seizures

Arrest and attachment seizures in the Southern District are initiated by filing a “verified complaint.” The complaint must set forth the grounds upon which the seizure is based. The complaint must be signed by the seizing party, swearing under penalty of perjury that the contents of the complaint are accurate. In the case of attachment only, an additional affidavit must be filed swearing under oath that the owner of the vessel “cannot be found” in the Southern District. If the party initiating the seizure itself has no agent in the Southern District, an attorney authorized to practice in the Southern District can sign the complaint (and affidavit if applicable) on the seizing party’s behalf.

Physically effecting an arrest or attachment requires the seizing party’s attorney to assist Southern District court officials in the preparation and filing of numerous additional documents. In some cases, the seizing party’s attorney must also accompany Southern District court officials during the actual seizure of the vessel.

Once arrested or attached, a vessel remains in the custody of the court until a bond is posted by the vessel owner in an amount roughly equivalent to the amount of the seizing party’s claim. The proper amount of the bond is often a strongly debated issue, and the bond amount is usually fixed only after a “post-seizure evidentiary hearing” conducted by the court.

IV. Attorneys Fees and Costs Involved in Arresting or Attaching a Vessel

Too many variables exist to provide generalized guidance on the amount of attorneys fees that will be incurred by the seizing party in an arrest/attachment action. Depending on the facts and circumstances of a particular case, attorneys fees incurred may be anywhere from U.S.D. \$2,500 to U.S.D. \$50,000.

The costs incurred also vary from case to case. Generally, there are “initial costs” and “custodial costs.” Initial costs are predictable. They are made up of administrative court costs required to initiate the seizure. Initial costs are presently approximately U.S.D. \$2,500, varying slightly depending on the size of the vessel seized. A large portion of initial costs is in the nature of a deposit that is often returned to the seizing party at the conclusion of the case.

Custodial costs are less predictable. Custodial costs are the

expenses of caring for the vessel (and crew, if any) during the time the vessel remains “seized” in the custody of the court. These costs vary significantly depending on the size of the vessel, and depending on how long the vessel remains in the custody of the court. For example, a large vessel may accrue as much as U.S.D. \$30,000 in a one-week period for dockage and related expenses. The seizing party remains responsible for custodial costs in the first instance, and generally seeks to add the expenses to principal value of its claim.

If a seizure is ultimately deemed invalid, the seizing party remains personally liable for all of the custodial costs incurred. Additionally, local admiralty rules in the Southern District state that a monetary award “shall” be made against the seizing party in favor of “any person” caused to suffer legal expenses due to an invalid seizure. The potential of becoming liable for custodial costs and legal expenses strongly cautions against careless or negligent use of the arrest and attachment procedures in the Southern District.

SHIP ARREST IN FRANCE

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1. Applicable Conventions and Laws

France ratified the International Convention on the Arrest of Sea-Going Ships (10 May 1952) and implemented it through its publishing by Decree n°14 dated January 4, 1958. The provisions of this Convention are, therefore, mandatorily applicable to all ships flying the flag of another Contracting State and calling at French ports.

Statute n°67-5 of January 3, 1967, the Decree n°67-967 of October 27, 1967 and their respective amendments govern all arrests of ships falling outside the scope of application of the 1952 Brussels Convention.

2. Nature of the Claim underlying the Arrest

a) Under the 1952 Brussels Convention:

In regards to their interpretation of the Convention, the French judges have been more or less in line with the jurisprudence of the majority of the other Contracting States, in relation to the prerequisite of the maritime nature of the underlying claim as per the list 1 (a to q).

b) Under Domestic Law:

The ship can be arrested for any claim of any type whatsoever the arrestor may have against the owner of the ship, provided the claim is proven to be serious and grounded in principle ("créance paraissant fondée en son principe").

3. Ships that can be subject to Arrest

a) Action in Rem:

The French judges have regularly dismissed any request for an arrest made against the successive owner(s) of the ship initially pertaining to the debtor, save strictly when it is established that the claimant reasonably thought the obligation was concluded on behalf of the current owner of the ship or that the claimant holds a maritime lien against the ship. In fact, with respect to the ships flying the flag of a Contracting State, it is only recently and after a waltz of hesitation that the French judges have resigned to apply the provisions of article 3.1 of the 1952 Convention.

b) Sister Ships:

Sister ships may be arrested provided the fictitious character of the company owning the ship is proven. Various indica-

tors are taken into account: same beneficial or associated owner; concurrency of the assets and/or debts; unicity of management; lack of mutual partnership to the benefits and/or debts of the company; unequal distribution of the share capital, existence of a subordination bond between the existing entities, etc.

c) Immune Ships:

In accordance with the 1926 Immunity Convention, warships and State-owned ships employed in a public non-commercial service may not be subject to arrest.

4. Time bar

a) Claims for which a ship may be arrested are subject to the time limitation prevailing under the law of the contract.

b) The time bar of the maritime lien is governed by the provisions of the International Convention of Brussels dated 10 April 1926 on Maritime Liens and Mortgages (Article 9) when applicable or by Article 39 of the domestic Statute dated 3 January 1967:

(i) The time limitation is one year for the claims listed in Articles 2.1 to 2.4 of the 1926 Convention of April 10 1926 as well as for those listed in Articles 31-1 to 31-5 of the 1967 Statute:

and (ii) The time limitation for claims listed under Articles 2.5 of the 1926 Convention, or Article 31-6 of the 1967 Statute, is six months running from the date of the supply.

5. Procedure

a) Applicable laws:

It is mandatorily governed by the *lex fori*, i.e., French law: the 1967 Decree plus Statute n°91-650 of July 9, 1991 and Decree n°92-755 of July 31, 1992.

b) Competent jurisdiction:

The authority competent to order the arrest is the President of the Tribunal of Commerce, or failing that, the Civil Judge ("Juge d'instance") of the ships port of call.

c) Documents to be provided:

The documents needed to arrest a ship are those evidencing the claim (such as contracts, invoices, letters requesting payment, etc.)... Most Presidents of the Commercial Tribunals (who are not professional magistrates but businessmen and, for that reason often conversant in English) will not request a translation of these documents when they are in English. However, when the supporting documents are in other languages a translation may be requested. In this case, an office translation will suffice.

Documents need not be notarised or otherwise authenticated in France.

No Power of Attorney is requested from the attorney representing the claimant.

d) Counter-Security:

French law practice does not impose on the claimant the deposit of a counter-security to cover costs, charges, damages, fees or other expenses deriving from a potential wrongful arrest.

e) Action on the merits:

The claimant must institute legal proceedings on the merits before the competent court (under international law rules), within one (1) month after the arrest is performed, otherwise the arrest will be held null and void.

In this respect, the Forum Arresti concept is not applicable in France; therefore, a French court may not hold itself automatically competent to try the case on its merits by the sole fact that the ship was arrested within its jurisdiction.

6. Release from Arrest

The owner of the ship may demand the release of the ship from arrest before the same judge that ordered the arrest. He may request the immediate release upon providing a sufficient Bank or P&I guarantee covering the amount of the claim of the arrestor.

7. Wrongful Arrest

French judges are reluctant to countenance a claim for compensatory damages for wrongful arrest unless the bad faith or malice of the arrestor is established.

8. Costs

a) Court costs:

The court fees are minimal, in the region of 750 FRF.

b) Bailiffs costs and fees:

The arrestor must pay the costs and fees of the bailiff who will serve the arrest upon the vessels master or the ship agent and also upon the Port Authorities and Customs, since the notification of the arrest to the aforementioned persons and public bodies is compulsory under French law. The costs and fees of the bailiff depend very much on the amount for which the vessel was arrested, as well as the urgency of the matter. They could go up to 15 000 FRF.

c) Attorneys fees:

Usually the lawyers fees are calculated on an hourly basis. However, a lump sum fee taking into account the delicacy and urgency of the matter could be agreed with the client.

The above costs and fees are recoverable if and when substantive proceedings are instituted in France.

SHIP ARREST IN GHANA

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Before independence from colonial rule was attained by Ghana in 1957, the law practised in this jurisdiction was largely English Law with such amendments as were provided under statute to suit local conditions. English traditions, rules of practice and procedures were largely followed. English authorities were freely cited and these were binding on our courts. Ghana attained independence on the 6th day of March 1957. Since then, the position is that English authorities have ceased to be binding; however, they, like the authorities of other countries having similar legal system, continue to have persuasive force and are accordingly cited and taken cognisance of in appropriate cases. As of now, the law of this country is made up of the 1992 Republican Constitution, statutes, existing law and the common law. "The Common Law" is made up of The Common Law as inherited from Great Britain as amended by changes introduced by the Constitution of Ghana, statute, decided cases, established doctrines and principles of customary law and the rules and doctrines of equity.

As may be expected, statutes enacted in this jurisdiction generally follow the form and substance of relevant legislation in the United Kingdom and other common law countries. This trend is more marked in legislation affecting Business Law.

Order 2 of the High Court Civil Procedure Rules provides that all civil proceedings must be commenced by Writ of Summons and must be filed with a Statement of Claim. Every Writ of Summons must contain concise statement of the nature of the claim or relief or remedy sought in the action. After the Writ of Summons has been filed in the High Court of Justice, a Court bailiff is assigned to effect service of the Writ of Summons and accompanying Statement of Claim on the Defendant.

In admiralty actions, the Writ of Summons is served on the Captain of the ship and a copy is posted on the ship.

After service of the Writ of Summons, the Plaintiff files an Ex Parte application for an Order for a warrant for the arrest of the ship. Our Rules of Court provide that a warrant for arrest may be issued at any time after the Writ of Summons has been issued, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed and the following provisions complied with:

(a) The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or counter-claim, the name and nature

of the property to be arrested, and that the claim or counter-claim has not been stratified;

(b) In an action of wages or of possession the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the commencement of the action has been given to the Consul of the State to which the vessel belongs, if there be one resident in Ghana, and a copy of the notice shall be annexed to the affidavit;

(c) In an action of bottomry, the bottomry bond, and if in a foreign language also a certified translation thereof, shall be produced for the inspection and perusal of the registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit;

(d) In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address and description of the party holding the same;

(e) The lodging of an undertaking in writing by the solicitor who applies for the issue of the warrant to pay the fees and expenses of the Marshal.

The application for an order for warrant of arrest not being on notice can be filed, heard and granted on the same day or the following day. After the grant of the order a bailiff of the High Court is assigned to serve the Order on the Captain of the vessel. A copy of Order is also served on the Harbour Master, the Port Authorities and Customs Excise and Preventive Service at the port where the vessel is berthed.

A defendant who is served with an Order of arrest may apply to the High Court of Justice which granted the Order to have the order set aside or provide adequate security for the satisfaction of the Plaintiff's claim. If the defendant is able to provide adequate security to the satisfaction of the Court, the Court may vacate the order on terms and conditions as in the opinion of the Court is just and appropriate. Upon service of the order vacating the warrant of arrest, the Harbour Master and the Port Authorities will grant the Captain of the vessel unconditional leave to sail from the port of call.

Where the Defendant disputes the claim of the Plaintiff, our Rules of Procedure require the Defendant to enter an Appearance to the Plaintiff's Writ of Summons within Eight (8) days of service of the Writ of Summons. The Defendant is required to file his Statement of Defence to Plaintiff's claim within Fourteen (14) days after the entry of Appearance.

Under our Rules of Court a Plaintiff has a right to file a Reply to the Statement of Defence filed by the Defendant and to have the Suit set down for hearing.

It must be observed that admiralty actions do not travel beyond the order for arrest. In most cases, either the sum owed is paid immediately the vessel is arrested or satisfactory arrangements are made to provide security for the repayment of the sum owed.

ARRESTS OF SHIPS IN GIBRALTAR

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Gibraltar's standing as an arrest port was recently confirmed by the arrests of both the Abu Dhabi fleet and a fleet of Renaissance cruise liners.

Indeed, the Government of Gibraltar, in an effort to attract even more fleet arrests, is in the process of adapting Gibraltar's laws to maximize recovery for the banks which direct fleets to be arrested and sold in Gibraltar. The Government has, in the past, recovered a fee of 1% of the sale proceeds as have the courts brokers. Under the imminent reforms which will be effective as from 1st November 2001, the fees payable will be reduced.

A fee of 1% will apply for the first £15,000,000 paid in the case of a single ship or cargo and thereafter dropping to 0.75%.

These changes are even more favourable for fleet sales where fees payable will be calculated according to a sliding scale ranging from 0.8% (or the above formula, whichever is the lower) to 0.6%. Thus, the greater the fleet sale price, the lower the fee payable.

The impetus behind Gibraltar's development as an arresting port is its growing international recognition as a quick and efficient jurisdiction. Gibraltar's English-based Admiralty laws coupled with its strategic position at the entrance to the Mediterranean give it an edge over other European ports where proceedings to arrest vessels and the court hearings that determine their future have often been known to drag on for many months. In Gibraltar, on the other hand, claimants are on average required to wait little more than a few weeks before they are paid. A welcome bonus is Gibraltar's experienced and ever-helpful Admiralty Marshal, Katie Dawson, who ensures that arrests run as smoothly as possible.

Another feature which makes Gibraltar attractive as an arrest port is the ability to speed up the sale of an arrested ship by applying for court approved private sale. Such applications are usually made by the mortgage bank and, if successful, the Admiralty Marshal will give clean title to the proposed purchaser. The Courts main concern in such applications is for the sale price to be appropriate and it is customary for the applicant to produce two "desk top" valuations from reputable brokers in support of the application. The main benefits of this procedure are (a) the speed of sale procedure ensuring reduced expenses of arrest and maximum recovery and (b) that the brokers commission is

not payable, again ensuring maximum recovery.

Even if there is no specified buyer and the usual "auction" process is followed the Admiralty Marshal permits surveyors to be instructed immediately after arrest (rather than 14 days after the arrest when owners must confirm whether or not they intend to contest the proceedings). This gains time and represents a considerable saving for the banks.

The Marshalls brokers, JE Hyde & Co, have also improved their marketing of court sales in Gibraltar by posting information listing court auctions on their internet site (www.jehyde.co.uk).

Registration

Despite the relatively recent re-opening of the Gibraltar Registry, the number of ships currently registered in Gibraltar is increasing year on year. Captain Chowdhury has been Gibraltar's Maritime Administrator for the last 2 years or so and he is keen to ensure that the Registry continues to grow and that it provides a first class service. Indeed, Captain Chowdhury is proud that customers and prospective customers alike get a reply to inquiries within 48 hours (unlike many other administrations). Owners who may often start by registering one ship in Gibraltar usually end up registering putting more of their tonnage on Gibraltar's books. The Registry appears to be particularly popular with German owners.

There are a number of reasons why the Gibraltar Registry is proving to be so attractive. Gibraltar forms part of the Category 1 Red Ensign Group Register and provides for full and bareboat registration and even for registration of ships under construction.

There is no tonnage restriction, and most types of ships (excluding nuclear powered and fishing vessels) irrespective of size, may register. Gibraltar registered vessels fly the British Red Ensign and have access to EU cabotage trade (unlike some of the other Red Ensign registries). Further, Gibraltar has the added advantage of its unique status as a VAT-free British port within the EU making it one of the most appealing registries for many ship owners.

There are a wide range of entities entitled to own Gibraltar ships and there is provision for the registration of foreign maritime entities. Manning requirements although responsible are also flexible.

Gibraltar's laws in this field have recently seen the introduction STCW 95 the aims of which are the safe operation of vessels and the protection of the environment. This provides a common standard for training and certification and a standard documentation procedure that allows for easy identification of documents from member states.

WHY IT IS EASY TO ARREST SHIPS IN HONG KONG

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Hong Kong law is very similar (but not identical) to English law upon which it is closely modeled.

A ship, or one of her sister ships, may be arrested where:

- i. Claimant's cause of action carries with it a right of arrest; and
- ii. An in rem writ has been issued; and
- iii. The ship, or one of her sister ships, is available in Hong Kong; and
- iv. No caveat against arrest has been entered.

The claimant's solicitor will apply to issue a warrant of arrest, supported by an affidavit 'to lead warrant'.

The warrant once issued is filed with the bailiff, together with request to execute the warrant and an undertaking to pay the costs of arrest.

The affidavit consists of a written statement of facts and information and belief, with the sources and grounds thereof and made under oath. It constitutes the only evidential requirement for arrest.

There are no specific requirements in the form of claim documents, apart from such minimum copy documents to be exhibited to the affidavit to establish a prima facie right to arrest. The affidavit must state certain specified details such as the nature of the claim, details of the parties and the ship.

The purpose of an action in rem is to obtain **security** in respect of a judgment of the court in that action and the court should not exercise its **jurisdiction** to arrest ships or to keep ships under arrest for other purposes. However, it is possible to invoke the exercise of the court jurisdiction to secure claims in arbitration where the law of the place governing the arbitration permits this.

Arrest purely to force the party on the receiving end to agree a foreign **jurisdiction** is ultra vires, or outside, the purpose of an action in rem.

Additionally, where a plaintiff has already commenced action in a foreign jurisdiction for the claim, any duplicate action in rem commenced locally will be considered vexatious and be liable to be set aside.

The court will not insist on hearing an entire action commenced by the issuance of a writ followed by an arrest. It

remains open to the parties to agree an alternative jurisdiction (indeed this frequently does happen in cases of collisions in international waters).

Normally an agreed form of contractual **security** usually a P&I Club letter of undertaking) is provided without the need for application to court. Alternatively, a bail bond can be provided to the satisfaction of the court. The adequacy of security in support of a bail bond is a subject of court discretion and the court will usually order bank or corporate sureties or the defendant to pay cash into court in lieu.

No **counter security** is required from a claimant. Where the plaintiff is foreign, the defendant can apply to the court for an order to compel the plaintiff to give security for the defendant's litigation costs, subject to the discretion of the court.

Court fees only amount to about equivalent to US\$300.

Solicitors' fees depend on numerous factors such as the time spent, complexity of the case, documents to be perused. Estimates can usually be given by solicitors for specific cases.

Bailiffs' expenses for maintaining the vessel under arrest include watchman's fees, launch hire, provision of crew, victualling, bunkers etc., if required. These can be expected to be around HK\$3,500 per day, depending upon the particular circumstances, including the size of vessel arrested. They are recovered as a high priority claim ahead of maritime lien and mortgage claims.

To **release**, the following need to be filed:

- i. Release together with Praeipe; and
- ii. Solicitors undertaking to pay bailiffs fee.

It is also a prerequisite that the agreement of the plaintiff and all caveators be obtained. The bailiff then releases the vessel. A release can usually be obtained promptly, subject to the requirements being satisfied (especially, of course, the provision of satisfactory security).

Claim documents will normally need to be in English or Chinese (the official language of the court).

No power of attorney from the claimant is necessary, although written instructions are invariably insisted upon.

Arrest documents can normally be issued within a matter of hours. These may, subject to certain difficulties, be issued and executed on emergency application to a duty judge out of normal hours. This can usually be achieved on the basis of the claimant's solicitors undertaking to issue a writ and swear an affidavit in support of the warrant at the first available opportunity when the court has re-opened.

Where it is desired to arrest a foreign ship which belongs to a port of a state having a consulate in Hong Kong for possession of the ship or for outstanding crew wages, notice of action must be sent to the consul and a copy of the notice annexed to the affidavit to lead warrant of arrest.

A SHIP ARREST IN LATVIA

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Background. Latvia's main ports are Riga, Ventspils and Liepaja. Latvia is a party to Brussels Arrest Convention of 1952 and Maritime Code of Latvia incorporates the rules of the Convention. Therefore, the ship arrest in Latvia has rather good legal framework, however, successful arrest sometime faces procedural difficulties defined in the Civil Procedure Law.

Jurisdiction. Latvian courts have the same principles as in Lithuania and Estonia - the presence of a ship in territorial sea is sufficient to found jurisdiction in Latvia. In general, a claim on ship arrest, as a tool to secure the claim, should be presented to the same court, which according to jurisdiction rules will decide over the principal claim. If the value of the principal claim exceeds 30000 Lats (about \$ 50 000), either Liepaja (for Ventspils and Liepaja ports) or Riga District Courts will have the jurisdiction over the principal claim and a claim on security measure (e.g. arrest of ship).

General possibility of arrest. The Civil Procedure Law establishes that the arrest of assets belonging to and in possession of the defendant or other persons, e.g. arrest of ship, is one of the measures securing the principal claim. Difficulties may arise when the dispute between the parties is subject to foreign law and/or court or arbitration.

Time available to submit the Statement of Claim. If the Court applies the arrest of ship, as a provisional security measure, before a principal claim is submitted to the Court, the Court should specify term for submitting a principal claim, which varies between two week and one month.

Requirements for the successful arrest. Due to lack of practice of some judges the plaintiff submitting a claim to the Court on arrest of ship may be asked to prove that in the absence of the arrest of the ship an enforcement of the Court judgement may be burdened or become impossible.

Security. The Court while deciding over a claim on arrest of ship may require that a plaintiff submits security for covering costs of defendant which might arise in relation to

the arrest of ship. After ruling of the Court entered into force based on which the principal claim was declined a defendant has the right to claim damages incurred because of unjustified arrest of ship.

The Courts arrest order. Court should issue a ruling over a claim on arrest of ship not later than the next day as of the day of receiving it from the plaintiff. An appeal against a ruling of the Court to arrest the ship, as a provisional security measure, does not suspend the enforcement of the Courts ruling.

Enforcement of the Courts arrest order. The Courts ruling to arrest of ship, as a provisional security measure, is to be enforced under accelerated procedure. The Bailiffs office having received Courts ruling to arrest the ship has to start its enforcement proceedings immediately. In addition, bailiff must also take measures to find debtors other property.

Release of the ship from the arrest. Upon application of the defendant the Court may decide but is not obliged to replace the arrest of the ship with security deposit. The security deposit shall be paid in local currency into the Bailiffs account and the deposit remains interest free until the case is resolved.

Practicalities of the arrest. The practical difficulties related to the ship arrest are connected with getting the power of attorney duly legalised in due time. Latvia is a party to Hague Convention 1961 Nevertheless, the arrest procedure still remains unpredictable due to unpredictable deviations in the court practices due to limited practice in application of the Civil Procedure Law jointly with the Arrest Convention. However, new Maritime Code is in the pipeline and that may help to develop consistent practice. The amendments to the Civil Procedure Law will also provide for the possibility of the weekend arrests.

SHIPS ARREST IN LATVIA THEORY AND PRACTICE

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At the present time Latvia is a party of Arrest Convention of 1952 and its provisions are incorporated into Latvian Maritime Code (valid since 1994). But in October 2001 Latvia has ratified new - 1999 Arrest Convention - and when it enters into force its provisions will prevail over the Latvian legislation.

In general in Latvia any claimant has right to attach an asset in supporting his claim (including future claim) for a debt due from either the owner or person, other than the registered owner. The vessel can be arrested for a debt due from either charterers or bareboat charterers or demise charterers without any real risk of a counterclaim for wrongful arrest by the registered owner. In rem principle is not known to Latvian legislation but on practice we often include the vessel itself into the list of the defendants and this is accepted by the judges.

Claimant has legal right to arrest vessel to secure his claim before claim on merits is arisen in the court. If ruling of arrest the vessel is obtained the court obliges the claimant to bring suit on merits during fixed period of time, usually - one month.

There are no specialized maritime courts in Latvia taking into account that there was no lump of maritime cases at all and ship arrest cases in particular till last years. So petitions to arrest the vessel are tried by the courts of common jurisdiction. But recently quantity of maritime cases increases in Latvia and it became result for specialization of concrete judges in maritime cases, including ship arrest cases.

There are two types of courts in Latvian legal system, which can issue ruling to arrest a ship. Regional courts try pecuniary claims till 30,000 Lats (equal to approx. US\$ 46,000). Claims in amount more than 30,000 Lats are triable to the District courts. Minimum amount of claim for which a ship may be arrested is not determined by the law.

In accordance with the Latvian Civil Procedure Code court must decide either to arrest the vessel or not during 24 hours after petition of the plaintiff and all relevant documents are delivered to the court. But on practice to obtain arrest in Regional court is more quicker than in District court

taking into account high level of bureaucratic protracted in the District courts. On practice it is really to obtain ruling in the Regional court during 1-2 days, and in the District court it is necessary 3-4 days after petition and all relevant documents are delivered to the court to obtain the ruling.

State tax to "freeze" asset of a debtor is 10 Lats (equal to approx. US\$ 16) before hearings on merits.

Petition of a claimant and documentation enclosed must show to the judge ground, proof and validity of the claim. To arrest the vessel copies of attached documentation are sufficient if they are certified by the claimant (by stamp of its company and signature of authorized person). If in the future the claim will be heard on merits it will be necessary to deliver to the court originals of the supporting documentation. Originals will be returned to the Plaintiff after hearings.

On the first stage besides petition and supporting documentation relevant Power of attorney (POA) to local lawyers is required in original. The signatures of the person giving powers and the Notary must be covered by Apostile if the Hague Convention of 5th November 1961 has been ratified. If the Convention has not been ratified, the Notary's signature must be legalized by the nearest Latvian Consul or at the consular section of the Latvian embassy.

Language of the hearing is Latvian one and all documentation to be presented to the court in the language. So to save time on the initial stage, we ask the Principals to send us all documents which can proof the claim by fax or by e-mail as soon as possible to start translation into Latvian language by a sworn translators immediately. On practice it is necessary about 1-2 days to make translation into Latvian language, depending on quantity of the documents.

Ruling to arrest the vessel is decided by a sole judge on ex parte basis and must be executed by a court executor immediately. On practice it is fulfilled. Court executor notifies the Harbour Master about ruling of the court and on the ground the Harbour Master issues order to detain the vessel in the port. Appeal of the ruling can not suspend the enforcement of the ruling.

In theory an arresting party could be required by the court to put up security for a wrongful arrest, but generally on practice it is not required. Only in one case since 1997 (when we started to arrest ships in Latvia) it was required security from the claimant. Amount of the claim was US\$ 500,000, amount of security required by the judge was US\$ 70,000. Security was transferred to the court executor's deposit account.

Claim for a wrongful arrest must be arisen in a court in a common way.

Security to release the vessel from arrest is known to Latvian legislation and accepted by judges. Kinds of security could be different - P&I Club' letter of undertaking, deposit to the court executor account, bank guarantee. The main idea is that if security is not accepted by the plaintiff it could be sufficient and must cover the claim. In such case arrest may be lifted by the judge.

To release the vessel is not quick procedure taking into account that the order to release the vessel must be done by judge in a court trial, with participation both plaintiff and defendant. In accordance with law trial to lift arrest may be held in one month after Claimant delivers petition that he is satisfied by the defendant and asks to lift arrest. Practically such trial can be achieved during 3-5 days after petition to release the vessel was delivered to the court.

Outside the normal working hours of the court it is not possible to apply for the arrest. But now Latvian government considers amendments to Latvian Civil Procedure Code regarding duty judges. If these amendments come into force it will be possible to arrest any vessel any time, including Saturdays, Sundays and holidays.

As per our experience and practice of Latvian courts majority of claims what became ground to arrest ships in Latvian ports, were:

- outstanding bunkers and disbursements
 - debts in favour of shipyards
 - outstanding wages for the crews
 - collision cases
-

A SHIP ARREST IN LITHUANIA

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Background. Lithuania's main sea port is Klaipėda. From all the Baltic States the Lithuania is the most difficult country where to enforce the ship arrest. Lithuania is not a party to Brussels Arrest Convention of 1952, however it may ratify it soon. Therefore, the ship arrest in Lithuania is regulated mainly by the Code on Civil Proceedings.

Jurisdiction. The presence of a ship in Lithuanian territorial sea is sufficient to found jurisdiction in Lithuania. A claim on ship arrest, as a tool to secure the claim, should be presented to the same court, which according to jurisdiction rules will decide over the principal claim. If the value of the principal claim exceeds 100'000 Litas (about \$ 25000), the Klaipėda District Court has the jurisdiction over the principal claim and a claim on security measure (e.g. arrest of ship).

General possibility of arrest. The Code On Civil Proceedings establishes that the arrest of assets belonging to and in possession of the defendant or other persons, e.g. arrest of ship, is one of the measures securing the principal claim (in addition to ban on defendant to perform certain acts, ban for other persons to transfer to defendant property or perform obligations to him, etc).

Time available to submit the Statement of Claim. If the Court applies the arrest of ship, as a provisional security measure, before a principal claim is submitted to the Court, the Court should specify term for submitting a principal claim, which may not exceed 14 days. In case of failure to submit the principal claim to the Court within the specified term by the Court, the interim security measure shall be repealed.

Difficulties may arise when the dispute between the parties is subject to foreign law and/or court or arbitration

Requirements for the successful arrest. The plaintiff submitting a claim to the Court on arrest of ship has an obligation to prove that in the absence of the arrest of the ship an enforcement of the Court judgment may be burdened or become impossible. Provided a plaintiff submits the statement of claim on the arrest of ship, as a provisional security measure, to the Court, the plaintiff must present evidences certifying certain threats to its inte-

rests. In addition, the plaintiff shall indicate to the Court reasons why the principal claim was not submitted together with the provisional security measure.

Security (deposit). The Court while deciding over a claim on arrest of ship may require that a plaintiff submits security for covering costs of defendant which might arise in relation to the arrest of ship. After ruling of the Court entered into force based on which the principal claim was declined a defendant has the right to claim damages incurred because of unjustified arrest of ship.

The Courts arrest order. Court issues a ruling over a claim on arrest of ship not later than the next day as of the day of receiving it from the plaintiff. The Court issues a ruling without informing a defendant and other interested persons. An appeal does not suspend the enforcement of the Courts ruling.

Enforcement of the Courts arrest order. The Bailiffs office having received Courts ruling to arrest the ship has to start its enforcement proceedings immediately. In addition, bailiff must also take measures to find debtors other property.

Release of the ship from the arrest. Upon application of the defendant the Court may decide but is not obliged to replace the arrest of the ship with security deposit. The security deposit shall be paid in local currency into the Bailiffs account and the deposit remains interest free until the case is resolved.

Practicalities of the arrest. There are certain procedural difficulties, such as: power of attorney has to be legalized if issued foreign country. Lithuania is a party to the Hague Convention concerning legalization of documents. In addition, procedural difficulties might arise in delivering court notifications to the foreign claimant and/or defendant. Formally it has to be done through the Ministry of Justice of Lithuania. The court practice on the arrest of the ships is inconsistent and therefore unpredictable.

ARREST OF SHIPS IN MALTA

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A. Introduction

This article deals with the arrest of ships in Malta as a precautionary measure, either before an action on the merits of the relative claim is brought or, alternatively, during the applicable proceedings (*pendente lite*).

B. The applicability or otherwise of international conventions

Malta is not a party to the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships. Neither is Malta a party to any of the International Conventions on maritime liens and mortgages (the 1926 and 1967 International Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages and the 1993 International Convention on Maritime Liens and Mortgages).

Recently there appears to have been a marked shift in favour of the adoption and incorporation into Maltese law of the 1999 International Convention on Arrest of Ships (signed in Geneva on the 12th March 1999) and the 1993 International Convention on Maritime Liens and Mortgages. Indeed recent amendments made to the Merchant Shipping Act [Cap. 234 of the Laws of Malta] by virtue of section 99 of Act no. XXII of the 4th August 2000 have introduced a new provision in the said Act (section 375). This new provision facilitates the adoption and incorporation of a number of international treaties and conventions addressing merchant shipping matters into Maltese law. In terms of such new provision the Government of Malta is empowered to ratify or accede to (as the case may be) the treaties and conventions mentioned therein, including the 1999 Arrest Convention (section 375 (2)(n)) and the 1993 Maritime Liens and Mortgages Convention (section 375 (2)(m)). Furthermore the Minister responsible for merchant shipping in terms of the Act is empowered, upon such ratification or accession, to make these Conventions applicable domestically by promulgating regulations giving effect to the provisions thereof.

C. Arresting ships in Malta

Clearly the arrest of ships (and therefore the exercise of admiralty jurisdiction) entails two related matters:

- the substantive grounds for the arrest of a ship; and
- the procedural measures available to arrest a ship.

In Malta these matters are regulated by two separate legal enactments: the Merchant Shipping Act and the Code of Organization and Civil Procedure [Cap. 12 of the Laws of Malta] ("the COCP").

The judicial authority competent to arrest a ship in Malta is the Civil Court, First Hall (section 32 (2) of the COCP). No other court or institution has the authority to arrest a ship.

D. The substantive grounds for the arrest of a ship under Maltese law

In this regard three distinct possibilities may be identified.

(1) In terms of the COCP, if Maltese courts enjoy jurisdiction over the defendant, any property belonging to such defendant that is present in Malta may be seized by order of the competent court (made subsequent to, or in anticipation of, an action brought against the defendant). The grounds on which Maltese courts will accept jurisdiction are contained in section 742 of the COCP. These grounds are all based on jurisdiction in personam: in other words they presuppose the (alleged) liability of the defendant. The civil courts of Malta (including the Civil Court, First Hall) enjoy jurisdiction to try and determine all actions concerning the following persons:

- a) citizens of Malta (provided they have not fixed their domicile elsewhere);
- b) any person as long as he is either domiciled or resident or present in Malta;
- c) any person, in matters relating to property situate or existing in Malta;
- d) any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta;
- e) any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta; provided in either case such person is present in Malta;
- f) any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body having distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta;

g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

(2) Furthermore Maltese civil courts also exercise a special jurisdiction that pre-supposes a right to bring an action directly against a ship (by way of an action in rem). Recent amendments to the COCP have made it possible for a plaintiff to file any judicial act directly against the ship (section 181A (3) of the COCP). This jurisdiction in rem is intrinsically based on three ancient statutes that were originally in force in Malta when it was a dependent territory of the United Kingdom. These enactments are the Admiralty Court Act 1840 (3 & 4 Vict. Cap. 65), the Admiralty Court Act 1861 (24 Vict. Cap. 10), and the Vice-Admiralty Courts Act 1890.

In terms of section 370 (1) of the Merchant Shipping Act the competent court in Malta (at present, the Civil Court, First Hall) exercises the jurisdiction previously exercised by the Commercial Court by virtue of the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance 1892. This latter Ordinance was itself repealed by the Merchant Shipping Act. The 1892 Ordinance provided that: 'the jurisdiction hitherto exercised by the Vice Admiralty Court, or conferred by the Act of the [British] Imperial Parliament, called "The Colonial Courts of Admiralty Act, 1890", on the Colonial Admiralty Court, shall be exercised by His Majesty's Commercial Court, as part of its ordinary jurisdiction.'

Accordingly the grounds for arresting a ship in Malta by virtue of an action in rem are solely the following:

a) all claims and causes of action of any person in respect of any mortgage of any ship, provided such ship, or the proceeds thereof, is arrested by a competent court (section 3 of the 1840 Act);

b) all questions as to the title to or ownership of any ship (or of the proceeds thereof remaining in the registry) arising in any cause of possession, salvage, damage, wages or bottomry instituted in a competent court in Malta (section 4 of the 1840 Act);

c) all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in Malta, or any share thereof (section 8 of the 1861 Act);

d) all claims and demands whatsoever in the nature of salvage for services rendered to any ship, provided such ship was within the body of a county or on the high seas at the time when the services were rendered (section 6 of the 1840 Act);

e) all claims and demands whatsoever in the nature of damage received by any ship, provided such ship was within the body of a county or on the high seas at the time when the damage was received (section 6 of the 1840 Act);

f) all claims and demands whatsoever in the nature of towage, provided such ship was within the body of a county or on the high seas at the time when the services were rendered (section 6 of the 1840 Act);

g) all claims and demands whatsoever for necessaries supplied to a foreign ship, provided such ship was within the body of a county or on the high seas at the time when the necessaries were furnished (section 6 of the 1840 Act);

h) all claims for necessaries supplied to any ship elsewhere than in the port to which she belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in Malta (section 5 of the 1861 Act);

i) all claims for the building, equipping or repairing of any ship (section 4 of the 1861 Act);

j) all claims for damage done by any ship (section 7 of the 1861 Act);

k) claims by any seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise (section 10 of the 1861 Act);

l) claims by the master of any ship for wages earned by him on board the ship (section 10 of the 1861 Act); and

m) claims by the master of any ship for disbursements made by him on account of the ship (section 10 of the 1861 Act).

(3) Finally, in terms of section 50 of the Merchant Shipping Act a ship may also be seized under the authority of a competent court by virtue of the existence of a special privilege (or lien) thereon. The special privileges recognized under section 50 of the Merchant Shipping Act are the following:

a) judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;

b) fees and other charges due to the registrar of Maltese ships arising under the same Act;

c) tonnage dues;

d) wages and expenses for assistance, recovery of salvage and for pilotage;

e) the wages of watchmen, and the expenses of watching the ship from the time of her entry into port up to the time of sale;

f) rent of the warehouses in which the ships tackle and apparel are stored;

g) the expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port;

h) wages and other sums due to the master, officers and other members of the ships complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

i) damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;

j) moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage: provided that such privilege is not competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner;

k) ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege under paragraphs (a) to (i), though in any case for a sum in the aggregate not in excess of four thousand units (the value of which is determined by the Minister responsible for merchant shipping in concurrence with the Minister responsible for justice as set out in section 372C of the Merchant Shipping Act);

l) moneys lent to the master for the necessary expenses of the ship during her last voyage, and the reimbursement of the price of goods sold by him for the same purpose;

m) moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage: provided that such privilege is not competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner;

n) damages and interest due to the freighters for non-delivery of the goods shipped, and for injuries sustained by

such goods through the fault of the master or the crew;

o) damages and interest due to another ship or to her cargo in cases of collisions of ships;

p) the debt due in respect of the balance of the price from the sale of a ship (as also specified in section 2009 (d) of the Civil Code).

The above mentioned special privileges will also apply against any proceeds from any indemnity arising from collisions and other mishaps, and against any insurance proceeds, payable to the owner(s) of a ship secured thereby (section 50 of the Merchant Shipping Act).

E. Procedural measures available to arrest a ship in Malta

A ship belonging to a proper defendant may therefore be arrested in Malta (even as a precautionary measure) provided the relative claim is based:

§ either, on any one of the in personam grounds of jurisdiction set out in section 742 of the COCP - in which case any ship belonging to such defendant may be arrested;

§ or, on one of the in rem grounds of jurisdiction applied in terms of section 370 of the Merchant Shipping Act - in which case only the ship belonging to such defendant and having given rise to the cause of action in question may be arrested;

§ or, on the basis of one of the special privileges contemplated in section 50 of the Merchant Shipping Act - in which case only the ship in respect of which the privilege has arisen may be arrested.

In either hypothesis the arrest is made by virtue of the issue of one or more precautionary acts or warrants.

Under Maltese law a precautionary act or warrant may be issued and carried into effect without the necessity of a previous judgment (section 829 of the COCP). The application (in the prescribed form) for the issue of any such act or warrant must state the origin and nature of the debt or claim and the approximate amount or value thereof, and must be confirmed on oath by the creditor (sections 831 (2) and 832 of the COCP). The creditor must also make the appropriate declaration on oath if the warrant is, for reasons of urgency, to be served after eight o'clock at night and before six o'clock in the morning (sections 280 (2) and 838 of the COCP). The application must also indicate the place where the notice of execution is to be given or left (section 834 (2) of the COCP). Any such warrant may only be issued under

the authority (in exceptional cases even oral) of a competent court (section 831 (4) of the COCP).

In terms of section 836 (1) of the COCP any precautionary act or warrant may be revoked by the competent court upon a demand to that effect by the debtor (or other person against whom the precautionary act or warrant has been issued) on any of the following grounds:

- a) if the precautionary act or warrant ceases to be in force (lapse of time to bring the action on the merits of the claim; infra); or
- b) if any one of the conditions requested by law for the issue of the precautionary act or warrant does not in fact subsist; or
- c) if other adequate security is available to satisfy the creditor's claim; or
- d) if it is shown that the amount claimed is not prima facie justified or is excessive; or
- e) if the security provided is deemed by the court to be sufficient; or
- f) if it is shown that in the circumstances it would be unreasonable to maintain in force the precautionary act or warrant in whole or in part, or that the precautionary act or warrant in whole or in part is no longer necessary or justifiable.

The court may also (in terms of section 836 (8) and (9) of the COCP) condemn the creditor who has issued a precautionary act or warrant to pay a penalty and damages in favour of the debtor in each of the following cases:

- a) if the creditor does not bring the action in respect of the claim within the time established by law;
- b) if the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor was notorious;
- c) if the creditor's claim is malicious, frivolous or vexatious.

The competent court may also, upon a demand by the debtor, order the creditor issuing a precautionary act or warrant to give, within a time fixed by the court, sufficient security for the payment of the penalty that may be imposed and of damages and interest and, in default, to rescind the precautionary act or warrant (section 838A of

the COCP).

In terms of the provisions of the COCP a ship may be 'arrested' by serving thereon through the relevant court machinery a warrant of impediment of departure. The warrant may only be issued in respect of claims amounting to at least Lm 3,000 (section 861 of the COCP). The object of such warrant is to secure a claim that may be frustrated by the departure of the ship in question. A statement to such effect must therefore be made on oath by the creditor in order for the warrant to be issued (section 860 of the COCP). By virtue of such warrant the court marshal is ordered by the court to detain a ship and to deliver to the Comptroller of Customs and the officer responsible for ports in terms of law a copy of the warrant enjoining them not to grant clearance to that ship (section 856 of the COCP). A copy of the warrant is also served on the owner or the master or the agent of the ship (section 857 of the COCP). Any person who disobeys such order will be guilty of contempt of court and a warning to such effect is contained in the warrant (section 858 of the COCP).

This warrant may not be issued against:

§ any ship wholly chartered in the service of the Government of Malta (section 870 (1) of the COCP);

§ any ship employed in any postal service either by the Government of Malta or by any other government (section 870 (1) of the COCP); and

§ any ship of war (section 870 (2) of the COCP).

In all other cases if the warrant is issued upon a demand made maliciously the creditor may be condemned to a penalty being not less than Lm3,000 (sections 836 (8) and 864 of the COCP). If the warrant was otherwise unjustly obtained the creditor may be held liable for damages and interest in addition to the aforesaid penalty (section 865 of the COCP). The owner, master or other person in charge of a ship detained by such warrant may accordingly demand from the court an order to the creditor to give, within a time fixed by the court, sufficient security in an amount not less than Lm3,000 for the payment of the penalty, damages and interest and, in default, to rescind the warrant (section 866 of the COCP).

Whenever such warrant is issued as a precautionary measure the creditor must bring the action on the merits of the claim within six working days from the issue of the warrant (section 867 of the COCP). Moreover, in such case, the creditor may be held liable in damages and interest (section 867 of the COCP).

The warrant of impediment of departure of a ship may be revoked (in terms of the provisions of section 836 (1) of the COCP) if other adequate security is available to satisfy the creditor's claim. However in such case the debtor must also appoint a regular attorney or mandatory to judicially represent the ship (section 870 (2) of the COCP).

In addition to the warrant of impediment of departure, in practice a warrant of seizure (also in terms of the provisions of the COCP) is also served on the ship in order to secure its 'arrest.' Ships wholly chartered in the service of the Government of Malta are also not subject to seizure under such warrant (section 304 (f) of the COCP). By virtue of such warrant the court marshal is ordered by the court to seize from the possession of the debtor the ship or any other movable object indicated in the warrant (sections 284 and 846 (1) of the COCP). Such seizure may be partial (for example limited to the seizure of the ships certificates which would then be delivered to the court registrar, or the removal from the ship of certain parts which prevent her from sailing) or total (in which case a representative is appointed by the marshal for the safe keeping of the ship and the shipowner is thus fully dispossessed of the ship). The court marshal may also appoint (even upon the request of the creditor) a suitable person as a consignatory to take charge of the ship (sections 291 to 299 of the COCP).

Whenever such warrant is issued as a precautionary measure the creditor must bring the action on the merits of the claim within four working days from his receipt of the notice of execution of the warrant or within twelve days from the issue of the warrant, whichever is the earlier (section 846 (2) of the COCP). Otherwise the warrant shall cease to be in force (section 846 (2) of the COCP). Once the action on the merits of the claim is commenced the court may also, upon an application by the creditor, order the sale *pendente lite* of the ship seized if it appears that the debtor is insolvent or otherwise unlikely to be able to continue trading and maintaining the ship (section 847 of the COCP).

In order to obtain the issue of either of the warrants the claimant must file an application before the court requesting the issue of the warrant. Where the plaintiff is applying for a precautionary warrant the contents of the application must be confirmed on oath. No other evidence is required and the application for the issue of the warrant is considered by the court *in camera* and no hearing takes place in open court.

Any such warrant may be rescinded if the defendant provides an adequate security to safeguard the claim (section 830 (2) of the COCP).

SHIP ARREST IN THE NETHERLANDS

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1. Introduction

The Netherlands are known as convenient jurisdiction for ship arrests. This article is meant for users of the website shiparrested.com and therefore written from a practical perspective. It provides for a brief and general overview of the requirements to arrest a ship in Dutch waters, but does not contain any legal advice.

2. Types of claim

In principle, an arrest –conservatory or executory- on a ship, located within Dutch jurisdiction, can take place for any claim against the owner of a ship, regardless of whether the claim has a maritime character or is connected with the ship to be arrested. Arrest of a "sistership" is therefore possible. However, some restrictions are created by the following conventions to which the Netherlands are a party:

- the 1926 Convention on Immunity of State-owned Vessels;
- the 1952 Brussels Arrest Convention;
- the 1969 Bilateral Treaty between the Netherlands and the USSR (prolonged by Russia and the Ukraine).

Under specific circumstances it may be possible to arrest a ship for a claim against a debtor not also being the ship owner, i.e. for claims against the bareboat charterer of subject ship, cargo claims and claims for keeping the vessel in operation, such as claims for unpaid bunkers, supplies and the like. Dutch courts are not inclined to "pierce the corporate veil", i.e. to allow a ship arrest for a claim against a third party closely linked to the ship owners.

3. Documentation

When applying for an arrest, it is not necessary to submit written documents. The court assumes and trusts that the lawyer requesting permission to arrest has seen and examined the supporting documents. However, in case the ship owner applies for release in summary proceedings, the claimant must be able to show his claim documentation. Originals are not needed, nor a power of attorney. Documents in another language than English, French or German may have to be translated. Claim documents can be provided through any means of communication.

4. Arrest Proceedings

The procedure starts with submitting an arrest petition to the president of the court in whose jurisdiction the ship is located or is expected to arrive shortly. It can be filed any time of day, even during out of office hours or in the weekend, if it can be made clear to the judge that time is of the essence. Leave for arrest can therefore be obtained within a few hours notice. The petition should contain the full style of the claimant and debtor, the grounds for the arrest and the amount of claim. The court's decision is placed on the arrest petition, which will then be forwarded to a bailiff who actually enforces the arrest. In practice, an arrest means that the port authorities are informed and will not allow the ship to order for a pilot in case the ship wishes to leave the port. When granting the arrest, the court determines a time limit within which the arrestor must file his claim in main proceedings before the proper court or arbitrators, whether in the Netherlands or elsewhere. The claim amount for which the arrest is granted is usually raised with 30% for future interest and costs.

5. Counter Security

Dutch law does not provide for the obligation to put up countersecurity prior or during the arrest. However, the court does have the discretionary power to demand security for eventual damages caused by the arrest in case it would later on appear to be wrongful. In practice, it rarely happens that the arrestor must put up security.

6. Release from Arrest

The arrest should be lifted when the ship owner has offered acceptable alternative security. Accepted by Dutch courts is a guarantee issued by a first class bank in the Netherlands or P&I Club of good standard. The wording of the guarantee is usually based on the standard Rotterdam Guarantee Form. Alternatively, the ship owner may ask for a court order in summary proceedings for release from arrest. Such proceedings can take place on a very short notice, usually within a few days after the arrest. Decision will be rendered a few days later or even earlier. The court examines whether the claim will have sufficient merit in order to justify maintaining the arrest on the ship. For the ship owner it is usually an uphill battle to convince the court that the claim is fully unfounded. Release is to be effected by the bailiff. The port authorities will be informed accordingly and the ship can ask for a pilot to lead the ship through the port on its way out. In practice, release takes place within the hour.

7. Liability wrongful arrest

The arrestor is fully liable for damages resulting from a wrongful arrest. Ship owners are however legally obliged

to limit their damages, i.e. by way of offering alternative security.

8. Does the arrest create jurisdiction?

It does, but international conventions to which the Netherlands are affiliated may provide otherwise. Jurisdiction clauses also play a role. In case Dutch courts have no jurisdiction in the main proceedings, such does not stand in the way of an arrest in the Netherlands.

9. Costs

Disbursements such as court and bailiff fees roughly amount US\$500. Lawyer fees are usually based on an hourly fee, which therefore depends on the time spent. Part of these costs can be reclaimed from the ship owner afterwards in the main proceedings. Excluded from this estimate are the costs for defence in case the ship owners would initiate summary proceedings for release of the arrest, as well as the costs for filing the claim in the main proceedings.

SHIP ARREST IN NEW ZEALAND

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New Zealand law provides that after the issue of a notice of proceeding or counterclaim in rem, the plaintiff or the defendant to the notice or counterclaim may apply for the arrest of the ship against which the action or counterclaim is brought. The purpose of an arrest is to obtain security for the applicants claim. Upon provision of adequate security either the applicant for arrest or a party interested in the ship may apply for its release.

A ship or one of her sister ships (if any) may be arrested where:

1. The applicants claim comes within one of the categories set out in the Admiralty Act 1973 which provides for the extent of the Courts in rem jurisdiction.
2. In rem proceedings have been commenced in the High Court.
3. The ship or one of her sister ships (if applicable) is in New Zealand.
4. It has been established from the central registry of the Court that no caveat against arrest has been entered.

The application for a warrant of arrest must be supported by an affidavit. The affidavit must depose to:

- (i) The name and description of the party at whose instance the warrant is to issue; and
- (ii) The nature of the claim; and
- (iii) The name or nature of the property to be arrested; and
- (iv) The extent to which the claim has been satisfied, the amount claimed paid into Court, or security for payment of the claim which has been given to the Registrar; and
- (v) Whether any caveat against the issue of a warrant of arrest has been filed and, if so, whether a copy of the notice of proceeding or a notice requiring payment or security has been served on the caveator.

The applicant must also give an indemnity to the Registrar and, if requested, pay an amount by way of security to the satisfaction of the Registrar for fees, expenses and harbour dues (if any). Whilst the ship remains under arrest the Registrar may from time to time require additional security to cover fees, expenses (such as watchmen and crew sustenance) and harbour dues (if any).

Provided the above matters are complied with the Registrar must issue a warrant of arrest.

Service of the warrant of arrest

The warrant must be served by the Registrar or any person lawfully authorised to act as the Registrar. The warrant may be served on any day including public holidays, Sundays, Good Friday or Christmas Day. The warrant covers the ship and everything belonging to it. Once the warrant has been served it is contempt of court for the Master or any other person having notice of the arrest of the ship to move that ship from where it is lying or interfere with the ship in any way without the consent of the Registrar.

Court fees

Court fees for the issue and service of a warrant of arrest are approximately NZ\$1,000.

Form of security

Most commonly, contractual security is agreed between the parties, usually in the form of a P&I Club letter of undertaking. Other acceptable forms of security are payment into Court and a bail bond.

Release

To obtain a release from arrest the following documents are filed either by the applicant for arrest or by a party interested in the ship:

1. Request for release from arrest
2. Draft release from arrest

Payment of costs upon release

Liability to pay the costs, charges and expenses due in connection with the care and custody of the ship while under arrest is on the party who requests the release.

It is not difficult to arrest a ship in New Zealand. Provided the ship is in New Zealand, an arrest can usually be effected within hours of receiving instructions. By obtaining security for its claim, the applicant can ensure that it does not ultimately obtain an empty judgment against the ship and its owners.

SHIP ARREST IN NIGERIA

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Introduction

Nigerian law provides a simple and uncomplicated procedure for the arrest of ships thereby making the country a suitable and favourable jurisdiction for such proceedings.

The Admiralty Jurisdiction Act, 1991 and the Admiralty Jurisdiction Procedure Rules, 1993, govern admiralty matters. The Act provides for two general classes of maritime claims namely: proprietary maritime claims and general maritime claims. Nigeria has acceded to the International Convention for the Unification of Certain Rules Relating to the Arrest of Ocean Going Vessels, 1952 simply referred to as "The Arrest" Convention 1952". The Convention has not been promulgated into municipal law.

Jurisdiction in respect of admiralty matters is vested exclusively in the Federal High Court in the first instance. Appeals in respect thereof lie to the Court of Appeal and the Supreme Court. The court can order the arrest of a vessel in order to confer jurisdiction upon itself or to provide pre-judgment security for the applicant.

Procedure for arrest

Once an applicant has ascertained that his claim falls within the meaning of a maritime claim as defined by the Act (See attached schedule), he may commence the proceedings by filing an action in rem at the Federal High Court in the judicial division covering the port or area where the ship is located. He may at the same time file an ex-parte application disclosing a strong prima facie case for the arrest of the ship. This application must be supported by an affidavit deposed to by the applicant, his solicitor, or his agent stating the following:

- (i) The nature of the claim
- (ii) That the ship is within the jurisdiction of the court
- (iii) That the ship may leave the jurisdiction of the court at anytime thereby depriving the applicant of his pre-judgment security.

The applicant is also required to provide with the application the following:

- (i) Exhibits supporting the claim
- (ii) An undertaking to indemnify the ship against wrongful arrest.
- (iii) An undertaking to indemnify the Admiralty Marshal in

respect of any expenses incurred in affecting the arrest.

(iv) An affidavit of urgency stating facts why the application must be heard expeditiously.

Although, at this stage of the proceedings, the court may admit photocopies of exhibits and undertakings, the applicant would subsequently be required to provide the originals or certified true copies. The Registry of the Federal High Court is usually open between the hours of 8 a.m to 1.30 p.m on Monday to Friday. An arrest order can be obtained within 24 hours of filing the requisite processes. It is important to note that unlike certain jurisdictions where it is possible to obtain an arrest order prior to the entry of the ship into jurisdiction, the Nigerian courts will entertain an application for an arrest only when the ship has entered its jurisdiction. So where a prospective applicant is aware that a ship sought to be arrested is bound for a Nigerian port, it is advisable for him to instruct his solicitors in Nigeria as soon as possible so that the requisite processes can be prepared and filed immediately the ship enters Nigerian territorial waters.

Sister ships

An action may be commenced against a sister ship in respect of general maritime claims. However, the ship in relation to which it is a sister ship must be identified in the writ of summons. The writ of summons may identify more than one ship as a sister ship.

Services of processes

An arrest order is usually served along side an arrest warrant and the writ of summons and statement of claim by delivering same to the master of the ship or by affixing sealed copies of the processes to a mast or some other conspicuous part of the ship. Copies of the said processes must also be delivered to the appropriate officers of the Nigerian Port Plc, for example the Chief Harbour Master, Traffic Manager and Port Manager.

Security for costs

An applicant for an arrest order may be required to give security for costs. The court will order security for costs where the claim is in excess of One Million Naira (approximately USD10,000) or its foreign currency equivalent or where the plaintiff has no assets in Nigeria.

The form of security required is usually a deposit of the sum specified by the court; or a guarantee supplied by a Protection and Indemnity Club, an insurance company or a bank. In determining the quantum of security to be provided, the court shall have regard to all the circumstances of the case and shall not restrict itself to the costs of the legal proceedings.

Release from arrest

The court may order the release of a ship where the

amount claimed or the value of the ship is paid into court. The court may also order the release of the ship when a bail bond for the amount claimed or the value of the ship is posted into court or where the applicant gives his consent in writing.

Caveats

A caveat against arrest of a ship may be filed at the registry of the Federal High Court where the caveat book is kept. The filing of a caveat constitutes an undertaking by the caveator to appear in the proceedings and to provide bail. The Registrar may also require the caveator to produce an undertaking in writing issued by a Protection and Indemnity Club or a bank or an insurance company to satisfy any judgment for the amount specified in the caveat

Where a ship is already under arrest, other claimants may, in lieu of obtaining a further arrest order, file a caveat against release to prevent the release of the ship. It is important to note that if the original arrest order is withdrawn, it will be necessary for the caveator to obtain a fresh arrest order.

Caveats remain in force for a period of twelve months unless they are withdrawn or set aside before that period.

Time bars

Save where the parties have by agreement fixed the limitation period in respect of claims, maritime claims must be filed within three years from the accrual of the cause of action. The limitation period for certain claims is fixed by statute, for example, section 394 of the Merchant Shipping Act, Chapter 224, Laws of the Federation of Nigeria, 1990 stipulates a two year limitation period in respect of salvage claims and section 2 of the Carriage of Goods by Sea Act, Chapter 44, Laws of the Federation of Nigeria, 1990 stipulates a one year limitation period in respect of claims for loss or damage to goods under contracts of carriage subject to the Hague Rules.

Costs

The filing fees payable in court for arrest proceedings are assessed as follows:

- (i) Where the sum sought to be recovered does not exceed N20, 000 (USD 200), the fee payable is N1, 000 (USD 10).
- (ii) Where the sum exceeds N20, 000 (USD 200) but not above N100, 000 (USD 1, 000) the fee payable is N1, 500 (USD 15).
- (iii) Where the sum exceeds N100, 000 (USD 1,000) but not above N1, 000,000 (USD 10,000), the fee payable is N2, 500 (USD 25).
- (iv) Thereafter for each additional N1, 000,000 (USD 10,000) or part thereof, the sum of N1, 500 (USD 15) is payable.

Please note that the maximum court filing fee payable in respect of any claim is N50, 000 (USD 500). Where a claim is in a foreign currency, it shall be converted to the Nigerian currency and assessed in the manner set out above.

Disbursements arising in the course of effecting a simple arrest usually range between N50,000 to N75,000(USD 500 to USD 750). Professional fees are charged on an hourly basis.

Reparation for needless arrest

An applicant for an arrest order is liable to the ship owner for damages arising from a wrongful arrest. A ship owner has three options to wit:

1. He may apply to court within three months from the termination of the suit for general damage not exceeding twenty thousand naira; or
2. He may make an oral application for damages immediately after judgment. The court in this instance is entitled to summarily assess the damages due to the ship owner; or
3. He may also bring an action for wrongful arrest claiming all the damages arising from the arrest, which he can establish.

Schedule

Definition of maritime claim

Section 2 of the Admiralty Jurisdiction Act 1991 defines a maritime claim as follows:

- (1) A reference in this Decree to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.
- (2) A reference in this Decree to a proprietary maritime claim is a reference to
 - (a) a claim relating to -
 - (i) the possession of a ship; or
 - (ii) title to or ownership of a ship or a share in a ship; or
 - (iii) a mortgage of a ship or of a share in a ship; or
 - (iv) a mortgage of a ships freight;
 - (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship.
 - (c) a claim for the satisfaction or enforcement of a judgment given by the Court or any court (including a court of a foreign country) against a ship or other property in an admiralty proceeding in rem;

(d) A claim for interest in respect of a claim referred to in paragraphs (a), (b) or (c) of this subsection.

(3) A reference in this Decree to a general maritime claim is a reference to –

(a) a claim for damage done by a ship (whether by collision or otherwise);

(b) a claim for damage received by a ship;

(c) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;

(d) subject to subsection (4) of this section, a claim, including a claim for loss of life or personal injury arising out of an act or omission of –

(i) the owners or charterers of a ship;

(ii) a person in possession or control of a ship;

(iii) a person for whose wrongful act or omission the owner, charterer or person in possession of the ship is liable.

(e) a claim for loss of, or damage to goods carried by a ship;

(f) a claim arising out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;

(g) a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land);

(h) a claim in respect of general average;

(i) a claim in respect of pilotage of a ship;

(j) a claim in respect of towage of a ship or an aircraft when it is waterbourne;

(k) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance;

(l) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);

(m) a claim in respect of the alteration, repair or equipping of a ship or dock charges or dues;

(n) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship;

(o) a claim arising out of bottomry;

(p) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;

(q) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship; or goods or cargoes carried by a ship;

(r) a claim by a master, or a member of the crew, of a ship for –

(i) wages; or

(ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country;

(s) a 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;

(t) a claim for the enforcement of or a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration and Conciliation Act) made in respect of a proprietary maritime claim or a claim referred to in any of the preceding paragraphs;

(u) a claim for interest in respect of a claim referred to in any of the paragraphs (a) to (t) of this subsection.

ARREST OF VESSELS IN PANAMA

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- The Maritime Court of Panama, has been established since 1982, and is our first forum with special jurisdiction for local and international maritime claims. A second Tribunal was been created pursuant to Law 23 of 2001 and formally designated by the Judiciary to receive its first maritime claims starting the second week of March 2002.

- Maritime Judges are appointed by Assembly of Justices of the Supreme Court.

- By statute, the Maritime Courts are available carry out arrests of vessels, receive complaints and carry out summons 24 hours a day. The notice board of the Maritime Court has a daily listing of officials assigned to this special 24-hour service.

- The most common litigants are members of the Panama Maritime Law Association, a respected group within the practice.

- The Maritime Courts of Panama have jurisdiction over all matters involving maritime causes of action, except for port matters, which pertain to the Panama Maritime Authority. Local labour claims are also excluded, but attachments on vessels as a result of such actions must still be carried out by the Maritime Courts.

- Accordingly, the Maritime Courts are available to try maritime claims originated outside of Panama, where one of the following requirements is met:

1. the proceedings are against a vessel or her owner and the vessel is arrested in Panama.
2. other property of the defendant is attached when the defendant is not domiciled in Panama.
3. the defendant is physically in Panama and has been served in Panama on the particular proceedings.
4. one of the parties is a Panama flag vessel or Panamanian law applies by contractual provision or pursuant to conflict of law rules of Panama or by submission of forum, which may be expressed (in contract or in any petition submitted

during the proceeding) implicit (by acting in the proceedings without opposing want jurisdiction.)

- Generally speaking, a vessel may be attached in Panama for the following purposes:

1. To protect the interest of parties and prevent the disposition of assets that would otherwise serve the claims involving the proceedings.
2. To give subject matter jurisdiction to the Maritime Courts when the defendant is not present in the Panamanian jurisdiction.
3. To enforce maritime liens against it.

- Also in order to proceed with a petition for attachment the following minimum requirements must be taken in consideration:

1. Submit evidence of the existence of the plaintiff and power of attorney. However, with payment of bonds, in case the documents same are not readily available at the time of filing the complaint, it is possible to initiate proceeding and effect the arrest without these documents. In this respect we note that these documents must be submitted in originals and duly certified by notary public and legalised by Panamanian consul or apostilled in accordance with the 1961 Hague Convention.
2. Payment of initial custodial charges and thereafter, whenever the Marshall requires, additional contributions for such purpose. Failure to fund vessels maintenance costs would result in the release of the attachment.
3. Documentary evidence of the claim and, in case of in-rem claims, that the same constitutes a maritime lien against the vessel.

In case of maritime liens, the criteria of how to determine if a vessel is subject to enforcement in-rem of a particular claim has been changing over the last decade, based on the interpretation of the conflict of law rules contained in our Code of Maritime procedure.

Strictly abiding to the law, a vessel would only be subject to an in-rem claim for the enforcement of liens which are expressly contemplated in the applicable statute contained in the laws of the place of registration of the vessel.

In this respect, numeral 2 of Article 507 of Law 8 of 1982, states the following:

"Article 557: Except as otherwise provided by international treaties ratified by the Republic of Panama, the rights and

obligations of the parties to an action filed in the Panamanian Maritime Courts shall be determined in accordance with the following special principles of private international law and, in the cases not expressly covered by this Chapter, in accordance with that established by the civil law:

2. With respect to the real rights and liens that affect the vessel, the laws of the country of registry."

However, a more flexible approach from our Maritime Court and confirmed in various occasions by our Supreme Court is that if the laws which apply to a particular contract or relationship regarding the operation of the vessel contemplate that the particular claim constitutes also a lien against the vessel, then proceedings for the enforcement of maritime liens against the vessel would be heard in light of such laws, regardless of what is stated in the laws of registry of the vessel.

For example numeral 7 of Article 557 of Law 8 of 1982, provides as follows:

"7. With respect to the claims of stevedores, dock workers, other port workers, third persons rendering services to the vessel related to maritime commerce or others who are found temporarily aboard while the same is in port, unless there is an agreement to the contrary in cases of contractual liability, the laws of the country where the event or events that gave rise to the complaint occurred even though these occurred aboard the vessel."

Therefore, if a stevedoring company provides stevedoring services in country "X" to a vessel registered in country "Y" and the vessel is attached in Panama for the enforcement of maritime liens and provided that there is no governing rule clause, the plaintiff may present the case under laws of "X". This would involve all substantial rights and defences available under such laws.

However, matters may complicate when there are other issues in dispute which may depend also on the laws applicable based our conflict of law rules. For instance, the statute of limitations to be applied under numeral 14 of Article 557 would be the one "stated in the laws which shall determine the rights and obligations according to this Article".

We ask then, who should the Court "favour" with this interpretation, when confronted with a statute of limitation problem?

On the other hand, in case of charter-parties, when similar principles of applicable law apply, the matter may compli-

cate further when the dispute originates on the existence or not of such contract, when there are issues as to the capacity of the parties and where there are agents signing by electronic means or fax in various parts of the world, where even conflict of law rules contained in our Code of Commerce, may need to supply Article 557.

- The Maritime Courts would not dismiss a claim on the base of forum non-convenience unless a party so requests, based on the following grounds:

1. When there are material discovery motions and witnesses, which must be carried out in a foreign jurisdiction.
2. When a judicial inspection is essential to ascertain the facts and the same needs to be carried outside of Panama.
3. When the parties have submitted in contract to the jurisdiction of a foreign court or to arbitration.
4. When the same claim is pending before a foreign court or arbitration tribunal. Nonetheless, this does not preclude that the Maritime Courts may accept to arrest vessels, for instance, to secure the results of a foreign proceeding, leaving the execution of the attachment to the order of such foreign Court or arbitration tribunal.

- Our Maritime law rules provide for pre-trial conference and oral hearing, this added to ample discovery proceedings and prevailing "summary procedure", assist in the simplifying the resolution of maritime disputes in Panama.

In essence, the arrest of vessels in Panama, which also benefits from the passage of vessels of different registries due to existence of the Panama Canal, may be complemented by an interesting site for disputes involving various different points of contact in international claims.

ARREST OF VESSELS IN SLOVENIA

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The arrest of maritime vessels in Slovenia is governed by the Maritime Code and the International Convention on Arrest of Maritime Vessels (Brussels 1952). The implementation of the rules and regulations by the courts are quite strict so it is possible to obtain an arrest only if the case be prepared well.

First of all there must be reciprocity, that is the ships must be from a state where the said convention is in force, or actual reciprocity must be proven, which is rather lengthy and in such cases a statement of law of the flag state should be obtained.

The next practical obstacles are translations. All documents proving the probable existence of a claim must be translated into the Slovene language, as well as a power of attorney in original added. In practice this means that an arrest shall have to be planned at least some days ahead, and DHL shipments made. Usually all solicitors who handle such cases have bilingual powers of attorney prepared and this may be in the hand of the client in a day or two and returned with documents in the same period. If we add a day or two for translations we may safely say that a week of preparations will give us a good grounding.

The courts are, as a rule quite expedite, that is if a petition is presented without flaws we may receive a decree the same day or the next. The release is simpler but lasts equally a day or two.

The basis for a probable claim is not so strict. Invoice are a good basis, a document or statement of experts will mostly be satisfactory. The plaintiffs claim must be plausible and some evidence of basic facts presented. There is no hearing. Once a vessel is arrested it is most difficult to get it free without depositing a guarantee. A P&I letter of guarantee will do only if the plaintiff accepts it, otherwise it is not an automatic ground for release.

In the past days we have also had a case of braking of the arrest, the vessel Atlantic Start simply ignored the decree and left. As the territorial waters are quite small the vessel gained foreign waters before the authorities could intervene.

SHIP ARRESTS IN SOUTH AFRICA

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There are essentially three ways one can arrest or attach a ship (or other asset) in South Africa, namely by:

1. an attachment in personam;
2. an arrest in rem;
3. a security arrest.

Arrests in rem and security arrests are by far the more common methods and are therefore dealt with first.

1. Actions in rem

A maritime claim (which is very broadly defined by the Admiralty Jurisdiction Regulation Act of 1983 – "the Admiralty Act") may be enforced by an action in rem :

- if the claimant has a maritime lien over the property to be arrested (the claims that will give rise to a maritime lien are those arising from salvage, damage caused by a ship, seamen's wages, master's wages, master's disbursements and bottomry and respondentia - as the law stands at present, foreign maritime liens not falling within the above categories are not recognised); or
- if the owner of the property to be arrested (the res) would be liable to the claimant in an action in personam in respect of the cause of action concerned (in other words that party would be personally liable in a direct action against it).

An action in rem is instituted by the arrest within the area of jurisdiction of the court concerned of a vessel (or other asset, including cargo, freight, bunkers, containers) in respect of which the claim lies.

The procedure for instituting an action in rem is the issue of a summons and writ of arrest and the subsequent arrest of the res. However, the action is commenced (and any time bar interrupted) with the issue of the process at Court (i.e. the summons and writ of arrest), provided that the action in rem is subsequently served on the vessel (or res) within a further 12 months (failing which the proceedings will lapse if not extended by the court prior to expiry).

In practical terms, the issue of proceedings in rem is a simple and speedy process which requires simple allegations to support a prima facie cause of action without any need for substantiation on the papers although, of course, it is necessary to be able to substantiate any allegations made if the owner seeks subsequently to set the arrest aside or to attack it as being wrongful.

It is also possible to arrest a vessel **associated** with the ship concerned for security (see the requirements for association under the Admiralty Act below).

2. Security Arrests

Where claimants already have proceedings underway in South Africa or other jurisdictions (e.g. London arbitration) or intend proceeding here or elsewhere, it is open to them to arrest in South Africa any property belonging to their adversaries in order to obtain security for the claim, whether or not the substantive proceedings are subject to the law of South Africa.

The person seeking security must have a "maritime claim" enforceable by an action in

personam against the owner of the property or an action in rem against the property, or one which would be so enforceable but for the arbitration or other substantive proceedings.

As with arrests in rem, it is also possible to arrest a vessel associated with the ship concerned for security (see below).

A point to note is that, by bringing a security arrest, the claimant does not thereby submit to South African jurisdiction for the merits of the claim in respect of which security is sought. However, the court will have jurisdiction over all matters pertaining to the arrest itself and any security furnished in relation to it. In particular, the Admiralty Act vests the Court with wide power, in its discretion, to order that security or counter-security be furnished for claims and counterclaims, and this discretion should not be unduly circumscribed.

The procedure when bringing a security arrest is to bring a substantive application before a judge in which the claimant must establish :

- that he has a prima facie case with reasonable prospects of success in the substantive proceedings;
- that the property to be arrested on a balance of probabilities is owned by the defendant in the other proceedings;

- why the claimant requires the assistance of the South African court; and

- that the claimant has a genuine and reasonable need for security. In this regard, he would need to establish that he does not already have any or sufficient security and that he is unable to obtain security in the other pending or contemplated arbitration or proceedings. Case law provides that the fact that the owner of arrested property has significant fixed assets in another jurisdiction, does not mean that there can be no genuine and reasonable need for security.

3. Actions in personam

Any maritime claim may be enforced by an action in personam, provided the Defendant (natural or juristic) is:

- a person resident or carrying on business at any place in South Africa;
- a person whose property within the court's area of jurisdiction has been attached by the claimant to found or to confirm jurisdiction;
- a person who has consented or submitted to the jurisdiction of the court;
- a company, if the company has a registered office in South Africa.

If the prospective defendant is resident or carrying on business in South Africa, it is generally not necessary (and usually not possible) to attach his/her property in order to found or confirm jurisdiction, the court having inherent jurisdiction over that person. In those circumstances, all that is needed is to issue and serve a summons.

If the prospective defendant is a foreigner and he has not consented or submitted to the jurisdiction of the court, it is necessary to **attach property** owned by that defendant which is within the area of jurisdiction of the court in order to found or confirm jurisdiction. The value of the property attached need bear no relation to the quantum of the claim. Proceedings are deemed to commence with the making of the application for attachment.

In order to make an attachment to found or confirm jurisdiction, it is necessary to bring a substantive application before a judge alleging both a prima facie case on the merits and, on a balance of probabilities, that the property to be attached belongs to the prospective defendant.

Following service of the attachment order (which is the act that confers jurisdiction on the court), a summons may be served on the prospective defendant. It should be noted, however, that if the defendant is not in South Africa, summons may only be served outside the jurisdiction with the leave of the court.

Associated Ship arrests

Special mention should be made of "associated ship" arrests. Where the maritime claim arises in respect of a ship, it is possible to bring an action in rem (or a security arrest) by arresting an "associated ship" instead of the ship in respect of which the maritime claim arose. In the Admiralty Act the term "associated ship" includes the concepts of a "sister" ship but goes considerably further.

There is precedent to the effect that it is not possible to arrest an associated ship as well as the ship concerned e.g. if a judgement is not satisfied against the ship concerned in proceedings elsewhere, but this decision is in our view wrong and should be capable of challenge.

An associated ship is a ship, other than the ship in respect of which the maritime claim arose ("the ship concerned") which is :

- owned, at the time when the action is commenced, by the person who owned the ship concerned at the time when the maritime claim arose (a "sister" ship);
- owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or
- owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

Ownership is deemed when a majority of shares (either in number or of voting rights or value) in the ships is owned by the same person(s).

Furthermore, a person is deemed to control the company if he has **power, directly or indirectly, to control the company**. This latter provision has not been fully judicially tested and so there is still considerable speculation as to what control actually means. In its narrower sense it would be restricted to beneficial ownership of the vessel, but in a broad sense it could extend to directors of companies or

possibly even managers. Until we have some further judicial guidance, our attitude is that the narrower view is the correct one.

However, in a recent divided Supreme Court of Appeal decision the majority held that the Admiralty Act distinguishes between direct and indirect power (de jure or de facto control) and that either form of control can bring the relevant subsection into operation. This decision will undoubtedly be subjected to further judicial testing as it has far-reaching consequences for the associate ship provisions. In effect this means that vessels can be caught up under the associate ship net even where there is no direct connection with a guilty ship, e.g. where a third party appointed the same person as nominee of his company as the company which owns the guilty ship.

In order to establish an association between vessels, it is often not possible to obtain direct evidence of share-holdings of holding and owning companies. In those cases, a picture must be created of the association to satisfy the Court on a **balance of probabilities** that the guilty ship and vessel to be arrested are associated. Some typical evidence other than common share-holders which can assist to create such a picture would include:

- Cross-collateralisation of vessels
- Common signatories to financing or security documentation
- Common signatories to important agreements (e.g. M.O.A.'s)
- Common attorneys-in-fact
- Similar or related ship names
- Common guarantors of mortgage finance obligations
- Fleet entries with P&I Clubs
- Common managers
- Common operators
- Common directors and officers
- Common funnel or fleet markings
- Public statements about ownership or group financial results
- Common nominee share-holders
- Shared street business addresses and telephone numbers
- Public data-base information
- Investigators' evidence (e.g. MRC reports)
- State-owned enterprises
- Same-fleet vessels substituted in charter-parties

None of these on its own would necessarily be sufficient to discharge the onus of proof, but the more that are available the greater the probabilities of association. There is no hard

and fast rule about what is sufficient and each case will depend on its own facts.

It is not sufficient in order to obtain an associated ship arrest to show that the managing agents handle the day to day management and administration of the various one-ship companies. The term "control" envisaged by the Admiralty Act relates to overall control of the assets and destiny of the companies.

Typical maritime investigation agencies such as Lloyds, IMB, MRC and the like are often able to provide valuable information to prove an association. Mortgage registers of those flag states which retain documentation on file (such as Cyprus) can be the source of useful evidence like a declaration of beneficial ownership of a fleet of vessels legally owned by one-ship companies.

Finally where a ship was at any time the subject of a charter party, the charterer or sub-charterer is deemed to have been the owner of the ship concerned in respect of any maritime claim for which he is alleged to be liable. The effect of this is that a ship owned by a company which in turn is controlled by the same person who also controls the company which was the **charterer** or sub-charterer of the ship concerned may be arrested in an action in rem.

Security

It is not a requirement under South African law for an arresting party to lodge advance security with the court to cover either the costs of the arrested party or a potential wrongful arrest claim. However, the court does have wide powers to attach conditions to any arrest order and may be asked by the ship owner in subsequent proceedings to make the continued arrest (or continued security) conditional upon counter security being given for the owners' costs or counter-claims in the same proceedings.

The usual form of security furnished by the ship owners in order to obtain release of the vessel is a first class South African bank guarantee or a P&I Club Letter of Undertaking. The latter may only be provided by agreement between the parties (which is of course frequently the case) but the arresting party may not be compelled to accept anything other than a first class South African bank guarantee (or cash lodged with the Registrar).

In the case of an arrest in rem or a security arrest, the amount of security required (including any claim for interest and costs) is limited to the value of the property arrested. In the case of an attachment (in personam proceedings), however, security may be demanded for the full value of the claim, irrespective of the value of the property attached.

There is deemed to be an arrest still in place where the ves-

sel has been released from arrest against the provision of security.

In terms of a recent decision of the Supreme Court of Appeal, the bank guarantee or LOU need not be given to the Registrar of the court (as has been the practice recently) but may be exchanged between the parties, with the South African court retaining jurisdiction over matters relating to the arrest (or the deemed arrest once security is furnished) or to the security itself (e.g. the reduction or increase of the level of security or the return of the security).

Wrongful Arrest

The Admiralty Act provides that an arrest will be wrongful (and damages may be awarded) if it is obtained without reasonable and probable cause or if the arresting party has made an excessive claim or sought excessive security. The courts have indicated that an arrest will be wrongful unless the arresting party believed on reasonable grounds that the arrest was justified, and where it relied on legal advice, a reasonable person would have believed that such advice was probably correct.

ARRESTING A SHIP IN SPAIN

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The applicable law:

A ship arrest in Spain might be applied for under two different legal regimes; the 1952 Brussels Convention of 1952 on unification of certain rules on arrests of sea-going vessels, which has to be interpreted in connection with the 2/1967 Spanish law on ship arrest, or under the Procedural Law Act 1/2000, arts 721...

Whereas under the former legal regime the party pursuing arrest needs only to allege one of the credits listed under article 1 of the said Convention, under the latter the claimant needs to provide the Court with a "fumus boni iuris" and a "periculum in mora". On the other hand the credits that can be secured by this second via are not "numerus clausus".

Fumus boni iuris: Evidence of good law, evidence of having a claim against the owner of the ship.

Periculum in mora: Evidence of the existence of a situation, whereby if action is not taken, there is a solid risk of the payment obligations not being honoured.

Power of Attorney

The arrestor needs to provide the Court with a duly issued POA, a faxed copy shall at first suffice.

Security:

The Courts will request from the arrestors security for the possible damages that might be accrued should the arrest be declared unlawful. Security is usually to be provided by means of bank guarantee issued by a first class bank.

The judge has a discretionary power to fix the amount that needs to be secured. This amount varies in accordance to each court and mostly to its geographical location, subject to certain minimum that needs to be complied with.

Whilst an arrest can be performed in few hours since the clients' first call. The security to be provided stands as the

greatest time-impediment to perform a ship arrest. Thus it is advisable, where possible, for the claimants to arrange the security in advance, either by preparing a standby bank guarantee, or by a quick bank transfer. Cash will not usually be accepted, though sometimes in cases of urgent need the undersigned has witnessed its acceptance.

The ratification of the arrest:

The arrest has to be ratified by pursuing an action for the claimed amount, all in all in accordance with the 1952 Brussels Convention rules, the Brussels Convention of 1926 on maritime mortgages and maritime liens (in force in Spain), or under the general principles of legitimation within Spanish law, as the case may be.

The usual period for the presentation of the lawsuit consist of 20 judicial days. The claim can be ratified in another jurisdiction in accordance to the forum chosen within the contract under which the claim is brought, including arbitration .

The release of the vessel

The arrested party may release the ship by providing the court with enough security covering the claimed amount, which may include the legal fees of the attorneys.

Sister ships:

In lieu of article 3 of the 1952 Brussels Convention of 1952 on unification of certain rules on arrests of sea-going vessels, a sister ship can be arrested under Spanish law provided she is the property of the debtor at the time the claim arose. This so being whether the debtor is the registered owner or the charterer by demise.

Furthermore, and in view of the large number of owners operating single ship companies, the claimants may produce evidence to lift the veil of the corporate structure and arrest a sister ship breaking the definition contained within article 3.

Costs of a ship arrest in Spain.

Attorneys and procurator fees are regulated by the Professional Associations Rules. The same are accrued according to a percentage of the claimed amount, percentage that is scaled down as the claimed amount is higher. Both fees are in principle recoverable from the defendants, though not always monetary secured under the arrest.

ARRESTING VESSELS ON THE TEXAS GULF COAST

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Maritime arrest or attachment of vessels pursuant to Rule B or Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims is a remedy often employed by maritimen and/or suppliers of necessities to vessels to obtain security for their payment. In this regard, the only way to obtain service and jurisdiction over a vessel is to arrest it and there is no other action which will get the immediate attention of a vessel owner quicker than having a United States Marshal arrest its vessel.

Arresting vessels in Texas is not a difficult procedure to accomplish assuming the firm retained to arrest the vessel has expertise in doing so and is familiar with the local rules and quirks of the District in which the arrest is being effected. The typical documents and pleadings used to effect the arrest are as follows:

1. Civil Cover Sheet;
2. Summons in a Civil Case;
3. Verified Original Complaint;
4. Plaintiffs Motion for Issuance of Summons and Warrant of Arrest;
5. Memorandum in Support of Motion of Order Issuing Warrant for Arrest;
6. Order to Arrest a Vessel;
7. Warrant to Arrest Vessel;
8. U. S. Marshals Services Process Receipt and Return Form USM-285;
9. Check in the amount of \$150.00 payable to the United States District Clerk; and
10. Check in the amount of 10,000.00 payable to the United States Marshal.

To arrest a vessel, she must be at dock and her exact location must be known. Its generally a good idea, and a matter of courtesy, to give the Marshal advance notice that a vessel arrest will be filed shortly. Our firm tries to give 24 hours' advance notice, which the Marshal greatly appreciates.

To effect the arrest, a Verified Original Complaint in rem must be filed against the vessel and a \$150.00 filing fee paid. The Civil Intake person filing the complaint will recognize that it is a vessel arrest and will arrange for an immediate ex parte conference with the Magistrate Judge for the District Judge in whose court the complaint is filed. The purpose of the meeting with the Magistrate Judge is to get the Order to Arrest Vessel signed which is required by the Marshal. In this regard, it is a good idea for the attorney who prepared the complaint to walk it through Civil Intake and to attend the meeting with the Magistrate Judge. The Magistrate Judges vary greatly in their knowledge of the supplemental rules and, more times than not, he/she will have questions about the supplemental rules, the case, or the facts giving rise to the claim which only the attorney familiar with the case or his client can answer. The question(s) must be answered before the Magistrate Judge will sign the arrest order.

Once the Order to Arrest Vessel has been signed, the original Order goes back to Civil Intake where the District Clerk will make certified copies of the necessary pleadings required by the Marshal. The next step is to deliver the documents necessary to effect the arrest to the Marshal, together with the check for \$10,000.00, which is the arrest bond. After a review of the pleadings to ensure everything is in order and that the correct number of copies are provided, and after payment of the \$10,000.00 bond, the Marshal will travel to the location of the vessel specified in the Process Receipt and Return and will arrest the vessel. A copy of the complaint will be served upon the vessel Captain or other person in possession of the vessel. The Marshal will then post a sign in a conspicuous place, on the vessel, usually in the wheelhouse, visible to all stating that the vessel is under arrest. The arrest has now been accomplished and efforts to secure her release usually follow immediately.

SHIP ARREST IN TURKEY

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Introduction

Set out below is an overview of ship arrest issues and procedures in Turkey grouped under the subject headings most frequently queried by our clients.

General

A ship may be arrested at a Turkish port by an ex parte application to the court pleading for the issuance of a precautionary judgement.

By depositing a determined amount of counter-security the precautionary judgement may then be enforced over the vessel to detain it from sailing. Since the purpose of the arrest is to obtain security, the vessels owners are free to substitute adequate security in place of the vessel to secure its release. The precautionary judgement then continues in force over the security.

• Claims permitting arrest

There is no closed category of claims which may give rise a vessels arrest in Turkey. Any debt of the vessels owner, whether arising out of contract or tort, may support an arrest application.

• Documentation

All documentation evidencing the claim (e.g. charterparties, invoices, contracts etc.) are required and these must be officially translated into Turkish prior to submission to the court. It is generally the case that sworn translations of documents are acceptable without the need for notarisation (although if objected to notarised translations are necessary).

A power of attorney is also required to make the court application. The power of attorney should be notarised in the country of the grantor (and apostilled where appropriate) and this too requires sworn translation and notarisation for submission to the court. In urgent cases a faxed power of attorney from overseas can be accepted provided the original is duly presented thereafter.

• Counter-Security

When issuing a precautionary judgement, the court will require an amount of counter-security to be deposited to

allow enforcement of the judgement. The amount of counter-security is at the discretion of the court and is usually a figure between 15% and 40% of the claim amount (although it may be higher depending on the circumstances).

The courts in Turkey require that the counter-security take the form of either cash or a bank guarantee issued by a first-class Turkish bank.

• Action on the Merits

Upon obtaining a precautionary judgement, this judgement is only valid for an initial period of ten days and the judgement will fall unless the claimant commences an action on the merits before a competent tribunal within this period. To protect the precautionary judgement, the court requires that written evidence be submitted to the file demonstrating that an action on the merits has been commenced.

• Sister Ships

Sister ship arrest in the international sense is not permitted in Turkey. Only vessels in the ownership of the debtor company may be arrested and Turkish law does not enquire into the shareholding interests of affiliated companies of the debtor (even where such companies are owned and controlled in exactly the same way as the principal debtor).

• Release of Arrest

The owner may arrange release of the vessel by either settling the claim or depositing cash or a Turkish bank letter of guarantee in acceptable wording to the court file. Club letters of undertaking are not accepted by the courts in Turkey.

• Wrongful Arrest

The claimant may be held liable for the losses and damages incurred by the defendant as a result of a wrongful arrest.

The counter-security submitted by the claimant when implementing the arrest forms a security for any counter-claim by the defendant for wrongful arrest.



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