

SHIP ARREST IN PORTUGAL (QUESTIONS 1 TO 9)

By Mafalda Rodrigues Fonseca*
CSBA, RL
csba@csba-advogados.pt
www.csba-advogados.pt
Rua Castilho, no. 44, 8th Floor,
1250-071 Lisboa
Tel: 00 351 21 384 62 00
Fax: 00 351 21 386 17 35



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

Ship arrests are common in Portugal and such a fact is not surprising taking into account its extensive coast, strategic location and key importance of navigation throughout its history. Ship arrests are a provisional remedy envisaging a court decision pertaining to the collection of a debt through the seizure of assets. Indeed, according to Portuguese Law, the arrest petitioner must provide the court with the facts that show a serious probability that the claimed credit does exist and in addition demonstrate the risk of losing the guarantee ("fumus boni iuris" and "periculum in mora"). Ship arrest under applicable international Law does not require evidence of "periculum in mora", but the creditor must still evidence the apparent existence of the claimed credit. In the aforementioned cases it is not required evidence of the credit's existence, it is necessary to demonstrate that there is a serious probability that the credit indeed exists. Considering the provisional nature of this "legal instrument" it is also important to emphasize the relevance of its link to the declaratory procedure, since, it has to be filed by the petitioner within 30 days after the notification of the arrest decision or in another deadline if requested by the petitioner and ordered by the maritime court. If the petitioner does not act accordingly the arrest provisional remedy it is extinguished and the petitioner may be held liable for the unjustified arrest.

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

The International Convention for the Unification of Certain Rules relating to the Arrest of seagoing Ships of 1952 (below simply referred to as 1952 Convention) is applicable in Portugal to the arrest of foreign ships. An additional number of particularities arise from Portuguese law, namely from articles 391 and 394 of the Civil Procedure Code and article 619 of the Civil Code. It is in accordance with the aforementioned laws that the competent entity, i.e., the Maritime Court orders the arrest of ships.

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

No. In Portuguese territory the only way to arrest a ship is through the aforementioned legal instrument. The entire legal basis mentioned is specifically referred to ship arrest and therefore these legal issues do not find solution in any other law. The arrest of ships in Portugal must be requested before the Maritime Court through the initial petition.

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

In Portugal the debtor can only stop a ship from leaving the country through a *saisie conservatoire* since the national legal system has specific laws for this kind of situations. This legal instrument will allow the creditor to secure his credit's payment keeping an asset (ship) well located.

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

In accordance with the 1952 Convention, namely article 2, ships can only be arrested in the jurisdiction of another State in respect of a maritime claim. However the Convention does not overlap or restrict internal laws and any national regulation of the State concerning ship's arrest.

Regarding the above mentioned we can conclude that the Maritime Court is competent to arrest ships, whether Portuguese or not, in accordance with both Portuguese and International Law, namely the aforementioned 1952 Convention. It is important to emphasize that although in some cases Portuguese Courts may not have jurisdiction to decide on the merits of the claim, the arrest of ships in Portuguese waterways is possible, under the 1952 Convention. Should this be the case, the prerequisite of the maritime nature of 243 the underlying claim must be in place in order for the Convention to be applied, although it is not required demonstration of the "periculum in mora", as it is presumed to exist.

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

Yes. Since the Portuguese and International Law do not forbid the arrest of a vessel concerning its flag, through a reverse interpretation we can conclude that a ship can be arrested irrespective of its flag.

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

Yes, it is possible in some situations to arrest a ship irrespective of the debtor. For example, paragraph 1 of the 3rd article of the 1952 Convention allows, a Claimant to request the arrest of either (i) the ship in respect of which the maritime claim arose, or (ii) any other ship owned by the person who was, at the time when the maritime claim arose, the owner of the ship (responsible for the maritime claim). This situation is possible even though the ship arrested is ready to sail. However no ship, other than the particular ship in respect of which the claim arose, can be arrested in respect of any of the maritime claims enumerated in Article 1 (1) (0), (p) or (q) of the 1952 Convention. Another example, is stated in paragraph 4 of the 3rd article of the 1952 Convention, referred to situations of ship freight with nautical management transfer, which allows, (when the only responsible for the maritime claim against that vessel is the charterer), the arrest of that specific ship or any other owned by the charterer.

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

Regarding sister ships, paragraph 1 of the 3rd article of the 1952 Convention allows the arrest of ships in respect of which the maritime claim arose and also of any other vessel owned by the same person / company. Regarding ships in associated ownership, the Portuguese legal system allows the arrest of ships in associated ownership, there is not a law forbidding it.

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

There is a difference between these two types of charter contract. In a Time-chartered vessel the petitioner can request the arrest of the vessel from which the maritime claim arose or of any other vessel owned by the charterer. In a Bareboat Chartered vessels the only asset/ship that can be arrested is the vessel from which the maritime claim arose.

**Born on 4 September 1978*

Portuguese

Graduate and postgraduate by Portuguese Catholic University;

Member of the Portuguese Bar Association since 2004;

Ship Arrest and in general Maritime Law is a very active area of work in which she has a great deal of experience.

SHIP ARREST IN PORTUGAL (QUESTIONS 10 TO 26)

By Ana Cristina Pimentel*
ANA CRISTINA PIMENTEL & ASSOCIADOS
SOCIEDADE DE ADVOGADOS, SP, RL
acp-11305L@adv.oo.pt
Av. Elias Garcia, 176 – 2º Esq.
1050-103 Lisboa - Portugal
Tel: 351 21 781 99 90
Fax: 351 21 793 06 15



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

Although it is established on article 374 nr. 2 of the Portuguese Code of Civil Procedure that the judge may request the arrestor to put up an adequate security, considering the circumstances of the case, to our knowledge never did a Maritime Court Judge request for such counter-security to be given by the arrestor as a requisite for the arrest.

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

There is no difference in respect of arresting a ship for a maritime credit or maritime lien; the same rules apply on both situations. However, when the arrest is requested on the basis of national law only, the arrestor will have to produce evidence on the probability of the existence of his credit, as well as on the financial situation of the arrestee, to justify that the arrest of the ship will be the only measure that will allow the arrestor to be able to receive payment considering the overall situation of the arrestee and his assets.

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

Since 13th May 2012 Portugal is no longer be a party to the 1926 Brussels Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages. The issue of maritime liens is now ruled by the Commercial Code, namely article 578, listing as maritime liens the “hypothèque” in the third place, after court costs and expenses incurred in the common interest of the creditors and salvage, and before other liens such as pilotage and tug costs; light, harbour and port dues; crew wages; supplies and repairs to the vessel; insurance premiums; unpaid last sale price of the vessel; unpaid amounts arising from shipbuilding contracts and indemnities due to cargo owners.

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

Once the file is analysed by the Lawyers, it will be necessary to prepare and draft the arrest application stating clearly all the relevant facts of the case, the reasons for the arrest to be granted and the amount claimed, all dully supported by the relevant documentary evidence (contracts, invoices, exchange of correspondence, etc.), translated into Portuguese (at least the most relevant documents). A list of witnesses to be heard has also to be included. The judge will have a period of 24 hours to analyse the file and give the first detention order preventing the vessel from sailing. This order is immediately sent by the Court to the Harbour Master office of the port where the vessel is staying. The hearing of the witnesses appointed, if necessary, will take place a few days later.

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

When submitting the arrest application, it will be necessary to attach a power of attorney, as well as all the supporting documents evidencing the facts of the case and the amount of the claim for the judge to be able to analyse the merits of the arrest application.

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

All documents are filed electronically, and the originals kept by the Lawyers. The original POA is kept by the Lawyers; the supporting documents may be kept only in copies. The POA has to be legalized with apostille or alternatively documents evidencing the identity and powers of the person signing the power of attorney should be presented to the Lawyer and considered as sufficient evidence.

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

Portuguese Courts will accept jurisdiction over the substantive claim on the situations listed on article 7 no. 1 of the 1952 Brussels Arrest Convention.

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

The arrestee will have to discuss settlement with the arrestor or alternatively put up security, directly within the court or in the hands of the arrestor. The ship will be released as soon as requested by the arrestor or when the judge considers the security provided is adequate.

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

Any kind of security will be accepted provided it receives the agreement of the arrestor. If security is placed directly with the court only cash deposit or bank guarantee will be acceptable.

19. Does security need to cover interest and costs?

Not necessarily, security will have to be sufficient to replace the amount of the claim guaranteed by the ship as established on the arrest decision.

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

P&I LOUs are only accepted if they receive the agreement of the arrestor. The judge alone will not consider P&I LOU as adequate security.

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

As soon as payment is made, or the security provided is considered adequate, the release request is sent to the court by the arrestor ; the release order will follow immediately after. However, the release request will have to be submitted within the courts' working hours (week-ends and holidays are excluded).

22. Is there a procedure to contest the arrest?

The arrestee may oppose to the arrest decision within 10 days from service of the arrest documents or alternatively appeal from the arrest decision. In case of opposition, the arrestee may submit documents and list witnesses to be heard by the court. A new arrest decision will be given after the judge has considered the arguments of the arrestee. The arrest may thereafter be lifted, maintained or the amount granted reduced.

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

The time limit for the claimant to take legal action on the merits is thirty days counting from the date the arrestor is notified by the Court that the arrest application has been served on the arrestee.

24. Do the Courts in your Country acknowledge wrongful arrest?

Yes. Article 374 of the Code of Civil Procedure determines that if the arrest is considered unjustified or will become void because of the arrestor, the arrestor is responsible for the damages caused to the arrestee if the arrestor did not act as a normal and prudent man should have done. Civil liability rules will apply.

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

No. In principle only the debtor / arrestee and his registered assets are liable for the payment of the debts claimed against such debtor, an individual or a company. The Court will not look into the links between different companies and their shareholders.

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

It will be possible to request for the anticipated sale of the ship, providing one can justify the need for such measure because of, for instance, the depreciation of the value of the ship and the consequences thereof for the owner and claimants. The circumstances of each particular case are analysed by the Court and the sale is normally only allowed when the ship is abandoned by the owner/arrestee, remains arrested for a long period of time and her situation is uncertain. The sale procedure will take several months considering the need to obtain the judge's order, the service on the owner of the ship and the sale procedure that will follow thereafter.

**Ana Cristina Pimentel obtained her degree in Law in 1991, at the Université Catholique de Louvain-la-Neuve in Belgium and in 2003 a post graduate diploma on Maritime Law at the London Metropolitan University in the UK. She is a Lawyer and a member of the Portuguese Bar Association since 1994, working actively in Shipping, as well as in road and air transport and insurance. She has also been an invited teacher at the Escola Superior Náutica Infante D. Henrique, the Portuguese Maritime College, since 2004, giving lectures on different subjects on Maritime Law and Transport Law.*