

SHIP ARREST IN SPAIN

By Dr. Felipe Arizon*
ARIZON ABOGADOS SLP
felipearizon@arizon.es
www.arizon.es
Paseo de Reding 43, groundfloor
29016, Malaga, Spain
Tel: +34 952 211774
Fax: +34 952 226676



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

Arresting a ship in Spain is very common as it provides a very fast and effective tool to enforce claims against ship owners and other operators. The implementation of specialized mercantile Courts in Spain has improved the swiftness of the procedure and reaction of the Court where an *ex parte* arrest application is presented, becoming one of the fastest jurisdictions to carry out an arrest. If a team of skilled and well learned lawyers is employed, a ship arrest can be carried out in 3 or 4 hours from the client's first call. A power of attorney is required in order to aver the representation of the plaintiff. A lawyer and a bailiff need to be employed before the Court. Registration of a lawyer before any Spanish province entitles him to act before all Spanish ports for a ship arrest, including the Canaries and Balearics islands, Ceuta and Melilla. After the entry into force of the 2014 Navigation Act, the application of the arrest can be presented before the ship arrives to the port, which has increased the chances to enforce an arrest even over the weekend as all the necessary arrangements can be ready before the ship enters the port. Moreover, ships can be arrested under the 1999 Convention up to the date a judgment or an arbitration award is issued or obtained.

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

On the 25 of September 2014 a new Navigation Act has entered in force into Spain, changing some aspects of the law related to arrest of ships. Nevertheless the 1999 Geneva Arrest Convention remains the main law that applies when arresting a ship in Spain.

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

Ships flying a 1999 Arrest Convention State flag can be arrested in Spain for the claims listed in the 1999 Arrest Convention only. Ships flying the Spanish flag can be arrested for any other claim in addition to those set out within Art. 1 of the 1999 Arrest Convention provided the creditor has its usual residence in Spain, its principal place of business in Spain, or has obtained the credit via subrogation, or assignment. Ships not flying a flag of a 1999 Convention signatory State, the great majority, can be arrested in Spain for maritime claims as well as for any other claims.

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

No, they are not. In practice the stoppage of a ship can only made by an arrest of the ship. A different scenario may come up where the ship is detained by her involvement in a criminal matter, or for having breach Administrative Laws.

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

It depends on the flag of the ship, see response to question number 3 above.

Under the 1999 Brussels Convention you may arrest a ship for the following claims:

1. "Maritime Claim" means a claim arising out of one or more of the following:

- (a) loss or damage caused by the operation of the ship;
- (b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- (c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- (d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);

- (e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- (f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
- (g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- (h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;
- (i) general average;
- (j) towage;
- (k) pilotage;
- (l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- (m) construction, reconstruction, repair, converting or equipping of the ship;
- (n) port, canal, dock, harbour and other waterway dues and charges;
- (o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance, contributions payable on their behalf;
- (p) disbursements incurred on behalf of the ship or its owners;
- (q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- (r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- (s) any dispute as to ownership or possession of the ship;
- (t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
- (u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;
- (v) any dispute arising out of a contract for the sale of the ship.

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

In Spain, the 1999 Arrest Convention applies irrespectively of the ship's flag but the list of claims is restricted where the ship flies a 1999 Arrest Convention flag. Otherwise the ship can be arrested for any claim.

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

Not in all cases, but in some, depends on the facts of the case. This question needs to be paid careful attention. The response is to be positive where the claim is based upon a maritime lien. Equally, the same result can be reached by application of the new article 149 of the Spanish Navigation Act which states "Responsibility of the armatour: The armatour is responsible before third parties for the acts and omissions of the Masters, the crew, and the obligations assumed by the Master in accordance to Art. 185".

Moreover, the new article 316 of the Spanish Navigation Act further states: "In its relationships with third parties the Manager shall manifest his condition as agent, identifying the armatour and his domicile in the contracts. Should the manager fail to do so, he shall be liable with the armatour of the obligations assume on behalf of him."

Where the ship is under a time charter or a voyage charter, or operated under the management of a third Company the 1999 Geneva Convention establishes the possibility of arresting a ship for those cases in which a person different to the owners shall respond of the maritime claim, for such cases see the 1999 Convention text.

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

Sister ships can be arrested in accordance to the provisions of the 1999 Arrest Convention. For cases of associated ownership see below "lift of the corporate veil".

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

There is no case law setting out the position on these cases. However, as far as bareboat chartered ships are concerned, the 1999 Arrest Convention sets it clear that the ship can be arrested. Time and voyage charterers ships can also be arrested if the claim amounts to a maritime lien, or where the ship owner is legally liable for the claim.

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

Yes, the amount varies according to the criterion of the Judge. A certain practice has been accepted whereby Courts admitted as sufficient counter-security an amount of circa 10% of the claimed amount. However, the 2014 Spanish Shipping Act sets out that security shall be fixed in a minimum of 15% of the amount of the alleged maritime claim.

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

There is no procedural difference.

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

The International Convention on Maritime Liens and Mortgages 1993 applies in Spain, setting out the regime of maritime liens applicable in Spain. Other liens recognized under Spanish or foreign laws will rank after the list provided by this international Convention.

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

Provided all the necessary arrangements are made, namely a copy of the POA is advanced by fax, and supporting documents are likewise delivered, the arrest by a skillful and learned team of lawyers can be carried out in less than 3 or 4 hours. The concrete timing will depend on the reaction of the Court's officials and Judges towards the writ.

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

A POA issued before a Notary, and ideally apostilled, is indeed needed. A faxed copy may suffice, but originals duly legalized shall be ready for submission in case the Court or the opponents request their production. Moreover, while the documentary evidence of the claim is not necessary in the arrest application, a mere allegation suffices, it is very advisable to provide the Court with some of them enabling the Judge to foresee a good claim, which also may play a role in the Magistrate's agreement to fix a low amount of counter-security.

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

The recent 1065/2015 Royal Decree has implemented an electronic service of communications before the Court. So originals are no longer initially required by the Court.

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

Under the 1999 Convention, article 5 sets out the following:

Article 7. Jurisdiction on the merits of the case:

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.
2. Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.
3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:
 - (a) does not have jurisdiction to determine the case upon its merits; or
 - (b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.(...). In accordance to article 479 of the 2014 Spanish Shipping Act the Court, for those cases where Spain is not competent will fixed a time period from 30 to 90 days for the claimants to commence proceedings on the merits.

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

It is necessary to appear before the Court and place the security requested by the arrest order. In the

alternative, the arrest can be challenged, following the presentation of the challenge writ, the Court will fix a hearing to hear both parties, and this will be followed by a new judgment on the arrest.

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

A Bank guarantee or cash is most common.

19. Does security need to cover interest and costs?

It depends on what the Court has ruled in the arrest order.

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

If the claimant agrees, yes. If no agreement is reached, the position has been that they are not.

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

The time to appear before the Court (few hours), normally with the Master of the ship, and put the security.

22. Is there a procedure to contest the arrest?

Yes, within a period of 20 days from service of the arrest order the arrest can be challenged.

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

Normally, the Court grants between 30 to 90 days for presentation of the action on the merits if in the case the Spanish Courts are competent.

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

Yes. Where the claimant fails in his action on the merits or in the arrest procedure per se, the Court will normally hold the plaintiff to pay for the legal costs of the defendants and the damages flowing from the arrest.

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

Yes, in fact it is an up-rising tendency. Spanish jurisprudence accepts both, the lifting and the piercing of the veil. The former aimed at discovering the reality behind the corporation, while the latter goes a step further, by unmaking the illegality sought under the corporation. In Spain, for it to be able to pierce the corporate veil, the claimant needs to establish the following; enough evidence to prove the unity of assets, interest, management, and actions between the Companies; the existence of an aim to defraud or prevent the application of the law, damaging the creditors rights; no other possibility to obtain satisfaction of his credit.

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

A ship's auction will normally take place at the end of the enforcement of an action, hence at the end of the proceedings. However, a recent practice has been observed where the ship has been auctioned at the request of the Port Authority. This has resulted after an administrative procedure was initiated by the Port Authority for the abandonment of the ship. Port Authorities are pressed in the Spanish ports to impede that a non operational ship occupies space in the port area. In these cases the proceeds of the public sale will be distributed in accordance to the ranking and amounts of the credits.

***Felipe Arizon** is the managing partner of Arizon Abogados S.L.P. He holds a Ph.D in English Law from Newcastle University, a LL.M from Southampton University, and has been a "Visiting Scholar" at the University of Tulane-New Orleans. Dr. Arizon acts before many international and domestic arbitration forums including ICC, Gafta, Fosfa, CAP and RSA. He is a well-known barrister before Spanish Courts, including High Courts, Appeal Courts, and Supreme Courts. Felipe is an author of the world leading maritime law book series, The Lloyd's Shipping Law Library (co-author of the volume Maritime Letters of Indemnity). He is regular contributor to international and Spanish publications in commercial law, carriage of goods, insurance and arrest of ships and is The founder of www.shiparrested.com. Felipe is lecturer at the Spanish State Institute for International Trade and has lectured widely in Spain and abroad, including: England (Newcastle University; Lloyd's Maritime Academy), Russia, Ukraine, Netherlands, France, and Turkey. Felipe is a supporting member of the LMAA.