

# SHIP ARREST IN BRAZIL



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

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

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 legislature, 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.

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

Only the International Brussels Convention of 1926, has been signed and ratified by Brazil and is promulgated in Brazilian territory by virtue of Decree No. 351 of 10.01.1935. Brazil has not ratified any international convention regarding the arrest of ships (neither the International Convention to the Arrest of Sea-Going Ships 1952 nor the International Convention on Arrest of Ships 1999 has been ratified and promulgated).

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

As was mentioned in item 1, our legislation makes arrangements for arrests where the subject is a shipping vessel (articles 813 to 821 of the Code of Civil Procedure).

However, where this concerns a foreign creditor, a situation involving the obtaining of a preliminary measure would be difficult considering the conditions included in the law.

## 4. Are these alternatives e.g. *saisie conservatoire* or freezing order?

If the debtor: (i) pays the debt and the process expenses which the creditor has had; (ii) has a reliable guarantor or pledges to guarantee the debt, the arrest order shall be suspended. Should the parties renew or reschedule the debt, this shall also be considered a situation in which the arrest will be suspended.

Another hypothesis in which the arrest may be suspended would involve the presentation to the

Court of an appeal demonstrating that the preliminary measure conceded by the Judge was made in a manner contrary to the law.

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

The applicability of a measure resulting in the arrest of a vessel, whether Brazilian or foreign, under Brazilian commercial law 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” (the arrest is in rem); and b) the arrest is grounded on credits qualified by the Commercial Code as “not privileged” (the arrest is in personam).

Below is a brief analysis of such events:

#### 1) 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, are binding upon the ship wherever it may be, namely:

- i. Taxes due to the State and court costs and expenses;
- ii. Salaries due for services rendered aboard ship;
- iii. Salvage indemnity claims;
- iv. 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;
- v. Indemnification for general average;
- vi. Indemnification for marine accidents;
- vii. Credits secured by marine mortgage;
- viii. Debts owed to private port operators;
- ix. Expenses with depositaries, as well as storage costs relating to the ship’s instruments;
- x. Expenses incurred with the ship’s costs and maintenance;
- xi. Shortages on delivery of cargo and damage thereto;
- xii. Debts deriving from the contracts for construction and purchase of the ship; and
- xiii. Debts deriving from costs incurred in the repair of the ship and its installations and equipment.

#### 2) 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 vessel wherever it may be. Therefore, the arrest based on such type of credit is enforceable only at the port where the vessel 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.

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

If the above listed requirements are contemplated, as a general rule a ship may be arrested irrespective of her flag.

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

If the above listed requirements are contemplated, the credits have in rem effects and follow the vessel, not the debtor, being possible to arrest the vessel, whether Brazilian or foreign, in a Brazilian court.

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

Within our legal system, the arrest of sister ships and ships in associated ownership is only admitted when the credit arising from a judicial or extrajudicial security (and recognized as such by Brazilian law) was against the ship owner and not the ship, i. e., if the arrest is in personam, it may be possible to file a precautionary lawsuit against the shipowner, in order to detain a sister ship and request security, even if the debt is not directly related to such vessel.

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

Should the debt be contracted by the vessel (for example: loading of the ship, services provided to the ship), Brazilian law states that it is the vessel which is responsible for the debt, and thus, an arrest would be possible, it being of little matter who owns such vessel or is in possession of such.

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

The Court may impose, at its discretion, a counter-security. Additionally, in the event of a foreign plaintiff who does not own real estate in Brazil, the plaintiff may be ordered to provide security for costs and legal fees incurred by the defendant's lawyer, corresponding to 10% to 20% of the total claimed amount. A letter of credit issued by a first-line bank headquartered in Brazil may alternatively be offered instead of depositing such amount.

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

As a general rule, there is no difference.

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

As previously informed, only the International Brussels Convention of 1926, has been signed and ratified by Brazil. Any maritime lien that is not contrary to Brazilian public order may be recognized.

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

If all the documents are available, it can be done in a couple of days.

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

To file this kind of lawsuit it is necessary to provide the court with: i) all available documents that evidence the existence of the credit and its amount (for instance, invoices, delivery notes and receipts executed by the master, and any other related documents that may be supportive of the claimed credit); ii) a Power of Attorney for the Plaintiff's lawyers; and iii) evidence that the pertaining court costs have been duly paid.

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

All documents (mentioned in item 14) should be presented in the form of certified copies which have been ratified by a Judge. There is no method other than this existing in Brazil.

Documents in a language other than Portuguese must be translated in Brazil by a sworn public translator. Regarding the Power of Attorney, the signatures must be duly notarized and afterwards consularized at the nearest Brazilian Consulate. If the Notary Public is not able to certify that the undersigned are authorized to execute the Power of Attorney on behalf of the grantor, it will be necessary to provide the court with a notarized and consularized copy of the by-laws or any other official document to the same extent. Anyway, if, for any reason, there is not enough time to obtain the notarizations, consularizations and translations before the arrest is filed, it is possible to provide the court with scanned copies of the documents and ask for additional time to submit the notarized and consularized originals and its translations.

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

Our Courts acknowledge jurisdiction based our Code of Civil Procedure. Pursuant to article 88 of the BCCP, Brazilian courts may accept jurisdiction when: (i) the defendant, regardless of his/her nationality, is domiciled in Brazil; and/or (ii) the obligation is to be performed in Brazil; and/or (iii) the proceedings originate from events occurred or actions performed in Brazil. Further, pursuant to article 89 of the BCCP, Brazilian courts have exclusive jurisdiction for: (i) hearing legal proceedings relating to real estate located in Brazil; and (ii) conducting probate and distributing estates, even if the deceased is a foreigner and lived outside of Brazil.

**17. Which period of time will be granted by the Courts in order for the claimants to take legal actions on the merits?**

As a general rule, thirty (30) days.

**18. Do the Courts of your country acknowledge wrongful arrest?**

Yes, our Courts do acknowledge wrongful arrest in cases which the plaintiff did not properly prove that its credit gave rise to the remedy of arrest, i. e., if it is ruled that the debt does not exist.

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

Not only will our courts pierce and lift the corporate veil when appropriate, but our Civil Code specifically provides for such remedy (article 50).

As per article 50, the application of the disregard of the legal entity doctrine is allowed only upon evidence and verification by the court that the legal entity has been involved in a so-called “abuse of corporate personality”.

The abuse of corporate personality, according to this provision, can be characterized when at least one of two requirements is present:

- a) The legal entity is not used for the purposes for which it was set up by the legal system (the so-called “deviation of purposes”); and/or
- b) There is confusion between the partner’s or subsidiaries’ or associated companies’ assets and those of the company whose veil is expected to be pierced (the so-called “confusion of patrimony”).

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

As long as it has judicial authorization, the company may suspend the arrest. This judicial authorization may only be given if the company provides another guarantee in the place of the vessel (for instance: a letter of credit issued by a first-line bank headquartered in Brazil). It can be done in a couple of days.



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