

SHIP ARREST IN BRAZIL (Questions 1 to 9)

By Marcus Alexandre Matteucci Gomes*

FELSBERG ADVOGADOS

marcusgomes@felsberg.com.br

www.felsberg.com.br

Avenida Cidade Jardim, 803, 5th Floor

Sao Paulo - SP 01453-000 - Brazil

Tel: (55 11) 3141 9145 - Fax: (5511) 3141-9150



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

Under Brazilian law, the arrest of assets is a provisional or interim remedy that may be granted by a court so as to ensure satisfaction of a judgment in a present or future action of law brought to enforce the collection of a debt. It results in a preventive and provisional seizure of assets of a value deemed to be sufficient for providing security to the debt. The circumstances in general in which such provisional remedy may be granted are listed in Articles 813 and 814 of the Brazilian Code of Civil Procedure. The granting of the arrest also requires evidence of an indisputable and strongly grounded credit. Specifically in relation to the arrest of ships, pursuant to Article 479 of Brazilian Commercial Code, the arrest may be granted with grounds upon one of the credits that are qualified as “privileged” by Brazilian law. Under the same legal provision, said “privileged” credits have in rem effects, constituting a maritime lien on the vessel. Thus, the arrest of a ship essentially takes into account whether the claim is grounded on one of the credits that give rise to a maritime lien on the vessel.

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

Brazil is only part to the “International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages”, signed in Brussels, on April 10, 1926. Such Convention is in force in Brazil by virtue of Decree No. 351, dated October 10, 1935, and, as a matter of Brazilian law, has the same status of any other Brazilian federal law.

Although the Brussels Convention of 1926 does not dispose about the arrest of ships, its enactment in Brazil not only confirmed but also complemented the list of credits that, under Brazilian Law, are considered to result in a maritime lien on a vessel.

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

Brazilian law provides for the arrest of ships as a provisional or interim remedy for the obtaining of security. As a general rule, there are no other ways of arresting a ship under Brazilian law.

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

Based on Article 804 of the Brazilian Code of Civil Procedure, the arrest may be ordered by court as an injunctive relief, even before Defendant is served with process and has the opportunity of filing its defense. For such, there must be strong evidence of the satisfaction of the legal requirements for the arrest, as well as reasonable arguments supporting that the granting of the arrest is a matter of utmost urgency. As a condition for granting said injunctive relief the court may, however, order the posting of counter-security. The requirement or not of said counter-security relies on court’s discretion.

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

The list of credits that gives rise to a maritime lien on the vessel is provided by Articles 470 and 471 of the Brazilian Commercial Code, as amended and complemented by Article 2 of the Brussels Convention of 1926.

Amongst others, the following credits are considered to have in rem effects in relation to a ship, making it possible for the arrest to be required irrespectively of the debtor:

- i. Taxes due to the State;
- ii. Salaries or payments due for services rendered aboard ship or in the benefit of the ship;
- iii. Expenses incurred with the ship’s costs and maintenance;
- iv. Expenses with depositaries, as well as storage costs relating to the ship’s instruments;
- v. Shortages on delivery of cargo and damage thereto;
- vi. Debts deriving from the contracts for construction and purchase of the ship;
- vii. Debts deriving from costs incurred in the repair of the ship and its installations and equipment;
- viii. Salvage indemnity claims;

- ix. Obligations assumed by the master while exercising the powers conferred upon him bylaw,
- x. Claims for general average;
- xi. Claims for marine accidents;
- xii. Credits secured by marine mortgage;
- xiii. State or private port operators' credits;

Even credits that do not constitute a maritime lien may give rise to the arrest of a ship, however, not irrespectively of the debtor. Additionally, 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 collection action.

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

Pursuant to the Article 482 of the Brazilian Commercial Code, a foreign flag vessel should not be arrested in Brazil unless it is due to: (i) a maritime lien originating in Brazil; or (ii) even if originating abroad, a maritime lien that is grounded in a title that may be considered enforceable in Brazil. Nevertheless, it has long been a controversial matter whether such Article is still in full force, there being grounds to sustain that it was barred by the Federal Constitutions that superseded the Brazilian Commercial Code.

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

Provided that there is a valid maritime lien, the ship may be arrested irrespectively of the debtor.

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

Such arrest is only admitted when the credit is opposable upon owners and not solely upon the ship. As a consequence thereof, for said purpose it is only admitted the arrest in personam (unless there are grounds for claiming the lifting of the corporate veil of the companies or individuals involved, pursuant to Article 50 of Brazilian Civil Code).

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

As mentioned above, a ship may be arrested irrespectively of the debtor. Thus, subject to the qualifications contained herein, bareboat and time-chartered vessels may be arrested.

*Marcus Alexandre Matteucci Gomes is Partner of Felsberg and Predretti Advogados e Consultores Legais. Admitted to Bar, 1999, Brazil. Member of the Monitoring and Research Group of the Department of Roman Law at the Law School of the University of São Paulo (1995-2002). Member of the Teaching Assistance Plan of the University of São Paulo (2000-2002). Visiting researcher at "Istituto di Diritto Romano" of the School of Law of the University of Rome I – "La Sapienza" (2003). Professor of Civil Law at UNICID (1999-2003) and FAENAC (2004-2006). Member of the Legislation, Legal Writings and Case Law Committee ("Comissão de Legislação Doutrina e Jurisprudência") of the Brazilian Bar Association, São Paulo Chapter (2001-2003). Member of São Paulo Lawyers Association. Background: São Paulo University, School of Law (LL.B. 1998). São Paulo University, School of Law (PhD 2004). Practice Areas: Civil and Commercial Law, including Shipping and Maritime Law, National and International Litigation, Mediation and Arbitration.

SHIP ARREST IN BRAZIL (QUESTIONS 10 to 26)

By Arthur Rocha Baptista*
ADVOCACIA ROCHA BAPTISTA
arthur@arb.legal
www.rochabaptista.adv.br
Largo Silveira Martins, 23 – B4 96200-395
Rio Grande, Brazil
Tel: +55 53 3232 0232
Fax: +55 53 3231 7787



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

Brazilian Courts may require counter-security in order to arrest a ship in cases where the plea of arrest is lodged as a preliminary or precautionary measure to guarantee a future action of collection or indemnity. Pursuant to article 804 of the Brazilian Code of Civil Procedures, it falls within the discretion of the Judge to require counter-security either to issue an in limine arrest order, i.e. without prior hearing of the defendant party, or to secure an eventual claim for wrongful arrest. In accordance with article 816, II, the Judge shall grant the arrest order without prior justification when the party offers counter-security. Usual means of counter-security are cash deposit or bank guarantees. Brazilian Courts may also require a security from foreign claimants who do not have assets or branch companies in Brazil, in order to guarantee the satisfaction of judicial costs and legal fees, usually up to 30% of the value of the claim.

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

Yes. The arrest for a maritime lien is an action in rem, and to this effect it can be exercised against a specific vessel regardless of the fact that the debt was incurred by the owners, charterers or operators of the vessel. Claimant needs only to prove that it holds a valid maritime lien against the vessel. The arrest for a maritime claim is an action in personam. It is subject to proof of the claim (*fumus boni iuris*) and evidence that the debtor does not have other assets in Brazil to satisfy the claim (*periculum in mora*). The arrest for a maritime claim – or for claims of any other nature – is filed against the owner of the vessel for owner's debts only, and it may be addressed against a sister ship.

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

Yes. Brazil is signatory to the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, 1926, which is in force by Decree nr. 351/35.

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

From 24 hours to 48 hours, depending on the location of the ship.

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

Yes. A POA is required, together with the company's articles of incorporation, written evidence of the claim and ownership of the vessel.

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

Some Brazilian Courts accept electronic based lawsuits, and digital documents can be filed on these Courts. Other Courts will only accept paper-based claims. A written evidence of the claim and ownership of the vessel must be presented at lodging of the plea of arrest. The POA needs to be notarised and it can be presented up to fifteen days after the filing of the arrest. Every document that is not written in Portuguese must be translated by a sworn translator.

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

The arrest of ships in Brazil is only possible in cases where Brazilian Courts have jurisdiction over the substantive claim, in one of the following cases:

- (i) Defendants are Brazilians or have subsidiaries in Brazil;
- (ii) The obligation has to be fulfilled in Brazil;
- (iii) The claim originates from facts or acts occurred in Brazil.

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

The shipowner has to plea in court and offer a proper security as replacement for the arrest usually in the value of the claim plus 20 to 30% to cover fees and costs.

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

Usually a money deposit, but a real estate, and bank guarantees are also commonly accepted.

19. Does security need to cover interest and costs?

Yes, as a rule between 20 and 30% but may be reduced or enlarged at Judge's discretion.

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

May be accepted at Judge's discretion; however, experience tells that P&I LOUs are frequently not accepted in Brazil.

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

Depends on the kind of security offered; for instance, less than one day for money security.

22. Is there a procedure to contest the arrest?

Yes, the arrest and the substantive claim can be contested in court by means of a written defence subscribed by a Brazilian lawyer; all legal and factual defences are available to defendants.

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

Claimants must file a substantive claim within thirty (30) days of the issuance of the arrest order. Claimants may file the substantive claim and plea the arrest at the same time.

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

Yes. As a general rule, a wrongful arrest will be acknowledged in cases where the substantive claim is ruled against claimants.

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

As a matter of law, Brazil acknowledges the piercing and lifting of a company's corporate veil. However it is unlikely that a Brazilian Court would investigate a foreign company and lift the corporate veil to the effect of granting an arrest order.

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

Yes, in cases where the ship is damaged or abandoned, or it is too onerous to maintain the ship afloat. A judicial sale of a ship may take from two to three months.

*Arthur Rocha Baptista is a registered lawyer in Brazil since 2001 and the managing partner of shipping law firm Advocacia Rocha Baptista since 2007. Arthur acted as observer for the Brazilian Delegation before the Legal Committee of the IMO in London (2003) and holds a Masters degree in Maritime Law at the University of Southampton, UK (2004).

Arthur is a regular speaker for the Lloyd's Maritime Academy's Latin America programmes (2013-2014) and other shipping courses. He was recently listed as a "Transport & Shipping Recommended Lawyer" by the Legal 500 Latin America 2013.

Specialties: wet & dry shipping; international trade; environmental law; shipbuilding contracts; corporate law; arbitration & litigation. Memberships: International Bar Association; Brazilian Bar Association; Brazilian Association of Maritime Law; Iberoamerican Institute of Maritime Law.

Chambers 2015: "Well-regarded practice with extensive experience of representing P&I clubs, most notably in shipping, commerce, customs, corporate and environmental issues. Arthur Rocha Baptista is highly recommended by peers and clients alike for his extensive knowledge and experience."