

## SHIP ARREST IN PORTUGAL (Questions 1 to 9)



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### 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 emphasise 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.

### 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 406 and 409 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 legal instrument aforementioned. The entire legal basis mentioned are 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 these 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 emphasise 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 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 irrespectively of her flag?

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

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

Yes, it is possible in some situations to arrest a ship irrespectively 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.



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## SHIP ARREST IN PORTUGAL (Questions 10 to 20)



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

Although it is established on article 390 nr. 2 of the Portuguese Code of Civil Procedure that the judge may request the arrestor to put up an adequate security, considering the particular circumstances of the case under analysis, 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 to be granted.

### 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 before the Court on the probability of the existence of his credit, as well as on the financial situation of the arrestee, to justify the urgency of the proceedings and 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 recognize maritime liens? Under which International Convention, if any?

Portugal has been a party to the 1926 Brussels Convention for the Unification of certain rules relating to maritime liens and mortgages; however, this Convention has been denounced on basis of its article 21 and will no longer be applicable in Portugal from 13th May 2012 onwards. Article 578 of the Portuguese Commercial Code lists 15 situations giving rise to a maritime lien on the vessel, mortgages being ranked on the third place after judicial expenses and salvage.

### 13. What lapse of time is required in order to arrest a ship since the moment the files 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 should be translated. A list of witnesses to be heard should also be included on the arrest application. From the moment the arrest application is submitted to Court, the judge will have a period of 24 hours to analyse the file and give the first detention order preventing the vessel from sailing. (Courts are opened to the public on working days only from 9.00 to 16.00 hours, with lunch time break from 12.30 to 13.30 hours, although documents may be filed electronically at any time). This first detention order is immediately sent by fax by the Court to the Harbour Master office of the port where the vessel is staying. Normally, as far as the Maritime Court is concerned, the first detention order is given within a few hours after the application is submitted to Court. The hearing of the witnesses appointed will take place a few days later depending on the judge's agenda and whether the judge considers such inquiry necessary. The arrest of ships calling the ports of Madeira and Azores Islands may take longer as the matter is brought before the Civil Courts and not before a specialized Maritime Court as it happens for the rest of the country.

### 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. At least a copy of the power of attorney should be attached to the arrest application, providing the original

is attached as soon as received. If the papers are filed electronically, the originals are kept by the Lawyers.

All the supporting documents evidencing the facts of the case and the amount of the claim should also be attached to the arrest application for the judge to be able to analyse the merits of the arrest application and consider whether there is sufficient evidence to justify the need for the arrest procedure as guarantee for the payment of the amount claimed in debt.

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 may be filed electronically, in such case, the originals are kept by the Lawyers. The original power of attorney should always be kept by the Lawyers; the supporting documents may be kept only in copies. The power of attorney should be legalized with apostille or at least 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. The originals of the supporting documents may eventually be requested by the Court to be confronted with the copies on the file, in case of any doubt or controversy regarding the validity or evidence value of the documents filed.

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 nr 1 of the 1952 Brussels Arrest Convention.

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

The normal time limit for the claimant to take legal action on the merits is ten days counting from the date the arrestor is notified by the Court that the arrest application has been served on the arrestee. Such period of time may be longer at the request of the applicant on the basis of article 7 nr 2 of the 1952 Brussels Arrest Convention providing the arrestor justifies the need for such a longer delay, namely when the proceedings will have to be engaged on a different jurisdiction.

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

Yes. Article 390 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 to this situation and to the evaluation of the damages caused.

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

No. Only the debtor / arrestee and his registered assets are liable for the payment of the debts claimed against such debtor, an individual person or a company. The Court will not look into the links between different companies and their shareholders or allow the arrest of assets belonging to other entities other than the debtor/arrestee.

20. 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 this measure 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 thereof.

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