

SHIP ARREST IN SPAIN



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

Arresting a ship in Spain is a good tool to enforce claims against ship owners and other operators. The recent implementation of specialized mercantile Courts in Spain has improved the swiftness of the procedure and reaction of the Court where an arrest application is presented. Likewise, the perception of a ship arrest as a tool to obtain security rather than as a way to proceed to the ship's auction has increased. 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.

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

As from 14 September 2011 the 1999 Geneva Arrest Convention applies in Spain due to its signature by Albania last 14 March 2010 and the amendment of the Procedural Law Act, the scope of maritime claims is now wider than under the 1952 Convention (1). Indeed until very recent times in Spain the 1952 Brussels Arrest Convention was the main tool to arrest a ship in Spain, offered a high degree of certainty gained over many years of application.

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

Under general principles of Spanish law, any property, and so a ship arrest may be applied for by a creditor, before, at the time, or after, bringing an action on the merits for the main proceedings.

For those ships uncovered by the 1999 Arrest Convention a creditor might apply to under general principles of Spanish procedural law. To be able to succeed in his application, he needs to aver before the Court the existence of a "fumus boni iuris" and a "periculum in mora". The plea under the general principles of Spanish procedural law has the benefit of comprehending any type of claim based on debts or damages whatsoever been caused, not therefore limited to the scope of maritime claims listed under Art. 1 of the 1999 Arrest Convention.

Fumus boni iuris is defined by the Spanish Courts (2) as the sort of evidence provided by the creditor, normally by means of documentary evidence, from which an obligation from the debtor is showed for the alleged credit. The creditor does not need to present a sole document stating the existence of the credit but merely that on the whole of various documents the obligation of the debtor is evidenced. Periculum in mora is held by the Spanish jurisprudence as the situation, proven on evidence, of the existence of peril for the enforcement of a given credit, i.e., the well-known suspectio debitoris.

(1) Nestor gives fighting power to P&I, Lloyds' List 2003 by Felipe Arizon

(2) Spanish Constitutional Court ruling, 14/1992, and Ciudad Real Court of Appeal ruling 49/1999

4. Are these 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 will depend on the basis the application is made:

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(2) Spanish Constitutional Court ruling 14/1992, and Ciudad Real Court of Appeal ruling 49/1999

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 irrespectively of her flag?

In Spain the 1999 Arrest Convention applies irrespectively of the ship's flag.

7. Can you arrest a ship irrespectively 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 Article 586 of the Spanish Commercial Code, which reads "The shipowner and the ship operator, "navier" shall be civilly liable of the acts of the Master and of the obligations undertaken by the latter to repair, habilitate, and supply the ship, provided that the creditor proves that the amount claimed was invested in benefit of the ship". This article provides creditors with a generous safety net to collect their claims arising from time charterer, voyage charterer, or even a ship manager. The ship owners will be held under this article responsible for the claims against the other parties.

Moreover, 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.

Therefore, to undertake the arrest itself, the claimant by pleading the aforesaid provision, will be entitled to obtain from the Court the arrest order. However, in order to enforce his claim on the arrested ship, the claimant will need to bring an action against the current ship owners in personam, either based on the aforesaid art. 586 CCo, or in a lien. As an alternative in some cases the claimant may bring an action against the actual debtor by enforcing the bank guarantee placed in substitution for the arrested ship.

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 is accepted whereby Courts admit as sufficient counter-security an amount of circa 10% of the claimed amount, but the Court may establish otherwise.

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?

Yes, in two different scenarios, as the case may trigger. Firstly, under the International Convention on Maritime Liens and Mortgages 1993 that has recently entered into force in Spain. Likewise, article 580 of the Spanish Commercial Code recognizes the existence of a list of liens that hold priority among them and above other common claims in case a ship is auctioned.

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

Provided all the necessary items are fulfilled, namely a copy of the POA is advanced by fax, and supporting documents are likewise delivered, the arrest 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 is indeed needed, a faxed copy may suffice, but originals duly legalized shall follow. In some recent arrest applications some Commercial Court Magistrate are requesting original POAs to proceed with the arrest. Moreover, while the documents of the claim are not necessary in the arrest application 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 agreement to fix a low amount of countersecurity.

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

Initially most commercial Courts will accept copies of any documents. The only document which production is mandatory is the power of attorney. Other documents related to the claim should be provided to the Court in order to ensure the best understanding of the case by the Magistrate, which in turn may assist in getting his agreement to a low countersecurity.

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.(...).

17. Which 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 20 working days for presentation of the action on the merits.

18. 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.

19. 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.

20. 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 as an enforcement of an action, hence at the end of the proceedings. Unless all parties agree to have the ship sold at an earlier stage, the action will take place at the very end of the process. Alternatively, in some cases the parties have reached an agreement to bring the ship to Gibraltar for an urgent auction.



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Dr. Arizon acts before many international and domestic arbitration forums including ICC, Gafta, Fosfa, CAP and RSA. He is a well-know barrister before Spanish Courts, including High Courts, Appeal Courts and Supreme Courts. According to The Legal 500 Felipe "is well liked and supported by the main players of the Spanish market".

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: England (Newcastle University; Lloyd's Maritime Academy), Russia, Ukraine, Netherlands, France, and Turkey. He has been engaged on seminars at the Nautical Institute (England). Felipe is member to the International Bar Association and supporting member of the LMAA.