

SHIP ARREST IN CANADA



By Shelley Chapelski & Jason Kostyniuk*
BULL, HOUSSEY & TUPPER LLP
sac@bht.com & jrk@bht.com
www.bht.com
900 - 900 Howe Street
Vancouver, BC, Canada V6Z 2M4
Tel: 604.687.6575
Fax: 604.641.4949



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

Ship arrest in Canada is usually simple and relatively inexpensive. Three documents are required:

- a. Statement of Claim to commence the action briefly setting out the relevant facts to establish in rem jurisdiction.
- b. Affidavit to Lead Warrant, which can be sworn by the solicitor upon information and belief; and
- c. Warrant for Arrest issued by the Court to the Sheriff.

In Canada, it is not required that the Sheriff go into possession of the ship following arrest, unless specifically ordered by the Court. Therefore, the only costs to arrest are disbursements to the Court and Sheriff and the legal costs to prepare the documentation. If a straightforward matter, it can be done for as little as Cdn.\$2000 to \$3000 in all.

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

Canada has not acceded to the Arrest Conventions. The grounds for arrest are found in domestic legislation.

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

There is no other way to arrest a ship but it may be seized through other processes described in the next answer.

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

In appropriate circumstances, Canadian Courts may grant Mareva Injunctions with respect to seizure of a defendant's assets within the jurisdiction. A vessel may also be seized and sold as an asset of a judgment debtor to satisfy a debt.

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

S. 22(2) of the Federal Courts Act provides for in rem jurisdiction for:

- (a) any claim as to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;
- (b) any question arising between co-owners of a ship as to possession, employment or earnings of a ship;
- (c) any claim in respect of a mortgage or hypothecation of, or charge on a ship or any part interest therein or any change in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;
- (d) any claim for damage sustained by, or for loss of a ship including, without restricting the

generality of the foregoing damage to or loss of the cargo or equipment of or any property in or on being loaded on or off a ship;

(e) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

(f) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or the master or crew thereof for of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in embarkation, carriage or disembarkation or persons on, in or from the ship;

(g) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers, baggage or personal effects;

(h) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

(i) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if such aircraft were a ship;

(j) any claim for towage in respect of a ship or of an aircraft while such aircraft is waterborne;

(k) any claim for pilotage in respect of a ship or of an aircraft while such aircraft is waterborne;

(l) any claim in respect of goods, materials or services wherever supplied to a ship for her operation or maintenance including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

(m) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

(n) any claim by a master, officer or member of the crew or a ship for wages, money, property or other remuneration or benefits arising out of his employment;

(o) any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements or by a shipper in respect of advances, made on account of a ship;

(p) any claim in respect of general average contribution;

(q) any claim arising out of or in connection with a contract of marine insurance; and

(r) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.

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

Yes, although the Canadian Courts will recognize sovereign immunity but not for government-owned commercial ships.

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

As a general principle, other than for maritime liens and certain statutory rights in rem, the ship owner itself must be liable for the debt in order to arrest. One exception is if it can positively be shown that the charterer was acting as the ship owner's agent when incurring the debt. Additionally, if the law of the contract governing the supply of ship's necessities grants a maritime lien to the supplier, then the supplier can arrest in Canada to enforce the lien even if that same claim would not otherwise constitute a maritime lien under Canadian law. Finally, pursuant to a recent amendment to Canadian law, Canadian suppliers of goods, materials or services (other than stevedoring and lighterage) to foreign ships now may also claim a maritime lien even if the debt was incurred by the charterer of the ship. See also the answer to Question 9 below.

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

Section 43(8) of the Federal Courts Act permits sister ship arrest. However, absent fraud, the ownership interests of the two ships must virtually be identical to establish the right to claim against a sister ship.

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

Subject to the exceptions described in 8, above, in the instance of both bareboat and time chartered vessels, and claims for necessities, the claimant bears the onus to prove that the charterer was

acting as agent of the owner in order to advance a claim in rem. This is easier to establish with bareboat chartered vessels. As well, with respect to stevedoring services, it is deemed by domestic legislation that the creditor may arrest the ship for unpaid services incurred by a bareboat charterer, so long as the ship remains under charter to the bareboat charterer.

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

Countersecurity is not required for the arrest. However, if the plaintiff is a foreign entity without any assets in the jurisdiction, security for costs of the litigation, should that party lose the case and be ordered to pay costs to the defendant, is often ordered (if such an order is sought by the defendant).

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

The procedure is the same. However, if ownership of the ship has changed subsequent to the action in rem arising but before being arrested, the in rem liability of the ship is extinguished (subject to certain statutory exceptions).

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

Canada recognizes the traditional English maritime liens but is not a party to a Convention with respect to them. Canada also recognizes maritime liens for pilotage and if a foreign claim constitutes a maritime lien under the applicable foreign law, Canada will recognize the lien even though the same claim would not constitute a lien under Canadian law.

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

If we are provided with all the documents evidencing the debt or claim enabling the solicitor to swear the Affidavit to Lead Warrant, and the vessel is located in the port of Vancouver during normal business hours we can arrest in as little as 90 minutes. Otherwise, it can require up to 24 hours depending on the ship's location in Canada.

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

No, but to swear the Affidavit to Lead Warrant, we need written or oral advice from the claimant or his representative of the specific amount owing and the reason for the claim.

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

No original documents are required to arrest. Should the matter eventually proceed to a trial, original documents may then be required.

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

Subject to an application from the defendant on the basis of forum conveniens, the Court will generally keep jurisdiction. If the Court agrees to stay the proceeding in favour of forum conveniens, it will generally require that the arrest security be transferred to that alternate jurisdiction so that the Plaintiff is not prejudiced. In the instance of an arbitration agreement, the court may order a stay to enforce the arbitration agreement, but again the arrest security should stand wherever the arbitration is taking place. For cargo claims, Canada exercises Hamburg Rules - style jurisdiction, subject again to arguments of forum conveniens.

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

Except as where otherwise provided, Canada's Marine Liability Act requires that claims for all maritime matters be commenced no later than three years after the day on which the cause of action arose. By statute Canada applies the Athens Convention, LMCC, Hague Visby Rules, Bunker Convention and others. These specific time limitations will trump the general 3 year provision. The effect of contractual limitation periods under the Maritime Liability Act is not yet clear.

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

Canadian law on wrongful arrest follows that of the UK. Damages for wrongful arrest can be

awarded only when the owner of the arrested ship proves that the action was commenced with malice or gross negligence.

19. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil? Canadian Courts will generally respect the corporate veil except in the instances of fraud.

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

The Court will consider sales *pendente lite*, especially if the ship is a deteriorating asset that the interested parties are not maintaining, and is likely to be sold in any event. The length of time to sell is largely determined by the degree of resistance from the ship interests. It can be done in as little as two months – the Court order must be obtained for the sale, the ship appraised, the sale advertised and bids accepted and Court approval of the specific sale granted.



** Shelley has practiced maritime law for more than 20 years and has been involved in dozens of ship arrests and priority disputes. Her practice includes all aspects of maritime law. She is the Western Vice President of the Canadian Maritime Law Association and is recognized by Best Lawyers, LEXPERT and Who's Who in Shipping as one of the top maritime lawyers in Canada. She is ranked Band 1 for Shipping law in Canada by Chambers Global, as is the firm's maritime practice group.*

** Jason is a partner at Bull, Housser & Tupper LLP in Vancouver, Canada and has practiced maritime and transportation law for over 10 years. He acts for clients in a wide range of commercial maritime, transport and insurance matters. He has given presentations in the United States and Europe on arrest practice and enforcing maritime claims in Canada. He is a Member of both the Canadian and US Transportation Lawyers Associations. He is a Member of Canadian Maritime Law Association and has been ranked as a leading lawyer in Canada in the field of maritime law.*