

SHIP ARREST IN BRAZIL (QUESTIONS 1 TO 9)

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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 294, 300 and 301 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 laws.

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

Based on Article 300 of the Brazilian Code of Civil Procedure, the arrest may be ordered by court as an injunctive relief, even before Defendant is serviced of 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.¹

¹ Pursuant to Article 83 of the Brazilian Code of Civil Procedure, counter-security is, however, deemed to be mandatory whenever Plaintiff is a foreign company or individual with no assets in Brazil (provided that there is no international treaty or convention preventing the need of posting security).

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.

**Partner in the area of litigation and dispute resolution of Felsberg Advogados, Marcus graduated from the University of São Paulo, School of Law (1998), and holds a Doctor's Degree from the same University (2004). Marcus has taught law for seven (7) years, having been part of the Roman Law Research Group of the Law School of the University of São Paulo (1995-2002) and of the Teaching Assistance Program of the same University (2000-2002), and a visiting researcher at the "Istituto di Diritto Romano" of the School of Law of the University of Rome I – "La Sapienza" (2003). Marcus has extensive experience of complex domestic and cross-border litigation and arbitration, in a number of areas of civil and commercial Law, including shipping and aviation. Has acted as co-counsel and expert witness in cross-border matters in New York, London, Houston, The Bahamas and Canada. Marcus has been listed in Chambers Latin America Guide 2017 as "having a wealth of experience representing shipping clients in litigations and alternative dispute resolutions".*

SHIP ARREST IN BRAZIL (QUESTIONS 10 TO 26)

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

In accordance with article 300 of the Brazilian Procedural Code it is at the judge's pure discretion for the cases where the claimant is solvent. When not solvent the law suggests that no counter security be required.

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

The Brazilian Commercial Code lists what are the maritime claims and an arrest should be allowed only for that items. In practical sense, however, if one has a possibility of a real claim and some danger that the enforcement might be not warranted in case the claim succeeds any claim be of maritime or lien nature shall be allowed.

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

Brazil is part of the Brussels Convention on Maritime Liens and Mortgages, 1926. The Commercial Code lists maritime claims which are also maritime liens. They shall attach the vessel and allows the claimant to pursue this even if a change of ownership has occurred. Theoretically actions in rem against the ship should be possible but the practicality suggests to name the new owner as defendant because the Procedural Code is not well fitted for an action in rem against a ship.

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

From one day to another is feasible if the client is quick in providing documents and POA which will have to be translated.

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

Yes, POA and plaintiff's company register documents proving that who signs the POA has authority to do this. POA will have to be apostilled since Brazil is part of the Apostille Convention.

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

POA and papers company as declarations shall be apostilled. Main Brazilian Courts are accepting electronic proceedings.

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

In Brazil you can arrest to secure a foreign arbitration. If the claimant is not arresting to secure an arbitration, once the arrest is made in Brazil, the judge will have jurisdiction for the substantive claim which will have to be made within 30 days if not the arrest is cancelled. The arrest, however, will be possible to be made in Brazil for the hypothesis where Brazilian judges would have jurisdiction to deal with a substantive claim

which are: a) when the fact or act which grounds the action occurred in Brazil, when an obligation ends in Brazil or when the defendant is domiciled in Brazil. For this last hypothesis it is accepted that a foreign company is domiciled in Brazil when they have a branch or agency here.

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

First the defendant shall verify if all the legal requirements for the arrest were complied with as for example if the Brazilian Court has jurisdiction, if the company named as defendant is the registered owner, if the registered owner is the actual debtor, if the claim is in the list of the maritime claims and if the vessel is not loaded with more than one quarter of her cargo. If one of the legal requirements is not complied with the defendant can challenge the arrest. If the arrest is legal, at least initially, the option for the defendant is to substitute the vessel for another security, which can be cash or bank guarantee. Sometimes P&I securities are accepted mainly if the claimant is happy with that.

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

Cash deposit, real state and bank guarantees are accepted for sure. Sometimes a P&I LOU is an option whenever the claimant is happy with that.

19. Does security need to cover interest and costs?

There is no imposition from the Law in this regard but this is negotiable from case to case. Usually you may assume at least the claim plus 20 to 30% .

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

It is arguable but when the claimant is happy with that, yes.

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

One to two days.

22. Is there a procedure to contest the arrest?

Yes. The judge in the end of the day will judge the claim but also if the arrest was wrongful or not. If, for example, the claimant does not win the substantive claim this is enough to have the arrest being considered wrongful and this entitles the defendant to claim damages caused by the wrongful arrest against the claimant.

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

In accordance with the article 308 of the Brazilian Procedural Code the substantive claim must be filed within 30 days after the arrest is effected.

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

Yes and in accordance with the article 302 of the Brazilian Procedural Code it might happen if the substantive claim fails for a procedural or material reason or if the claimant does not bring the substantive claim within 30 days after the arrest has been conceded or if means are not provided to summons to be effected within 5 days.

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

Yes it can be lifted as per articles 133 to 137 of the Brazilian Procedural Code and 50 of the Brazilian Civil Code.

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

It can take easily 1 year but it is possible for assets as ships which can perish or deteriorate as per article 852 of the Brazilian Procedural Code.

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