

SHIP ARREST IN USA

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

The Federal Rules of Civil Procedure (F.R.C.P.)'s Supplemental Rules for Certain Admiralty and Maritime Claims (hereinafter "the Supplemental Rules") govern the procedure for arresting or attaching a vessel in the United States. The Supplemental Rules apply to all admiralty and maritime claims within the meaning of F.R.C.P. 9(h). Rule C of the Supplemental Rules (hereinafter "Rule C") is the procedural mechanism used to arrest property (i.e. – a vessel) that is subject to a maritime lien or other U.S. statute that creates an in rem cause of action. Once the arresting party has obtained a warrant of arrest from the Court, the U.S. Marshal Service will serve the Court's warrant on the vessel to affect the arrest. Rule C(3)(b) provides that only the marshal may serve the warrant to seize the vessel.

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

None.

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

No.

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

Supplemental Rule B (hereinafter "Rule B") provides for the pre-judgment attachment of a defendant's property (including a vessel) if the claimant has an in personam maritime claim against the owner of the vessel, provided that the defendant/owner cannot be "found" in the district where the attachment is sought.

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

Under the applicable U.S. law, a vessel may either be arrested (under Rule C) or attached (under Rule B).

- Rule C arrest: Procedural mechanism used to arrest property subject to maritime lien or where U.S. statute provides for maritime action in rem

- Property arrested must be related to the Plaintiff's claim

- Maritime lien claims include: ship repairs; ship supplies; towage; use of dry dock or maritime railway or other necessities to any ship; crew wages; tort claims arising from a collision; personal injury claims (excluding Jones Act claims against employer); wharfage; stevedoring; cargo damage/loss; certain maritime contracts (e.g. breach of charter party); preferred ship mortgages; salvage; claims for maritime pollution.

- Rule B attachment: Allows a party to obtain quasi in rem jurisdiction over a defendant's property for any debt arising out of a maritime claim, when the defendant "cannot be found within the district."

- The property attached may be unrelated to the events giving rise to the claim, and the Plaintiff need not have a maritime lien on the vessel.
- Maritime claims include maritime torts and any claim arising from breach of a "maritime contract" such as a charter party or bill of lading. Under U.S. law, "maritime contracts" generally do not include shipbuilding contracts; vessel sale and purchase contracts; brokerage or other preliminary service contracts; or commodities sale and purchase contracts.

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

Yes.

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

Yes, except that you cannot arrest a vessel owned by a government or other foreign sovereign, as per the Foreign Sovereign Immunities Act.

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

Arrest of sister ships/associated ships is not possible, unless you can show an alter-ego relationship or other common ownership of assets.

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

A Rule C arrest can only be made for an in rem claim, as an arrest is made against the ship, not its owner or charterer. However, a Rule B attachment can only be sustained where there is a valid prima facie claim against a party in personam (including the bareboat or time charterer).

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

U.S. Courts do not require countersecurity in order to arrest or attach a ship. However, Rule E(7) provides that when a Defendant who has posted security for damages in an action asserts a counterclaim arising from the same transaction, a Plaintiff must post countersecurity in the amount of damages demanded in the counterclaim (unless the Court, for good cause shown, directs otherwise).

Additionally, Rule E(2)(b) allows the Court to require any party to post security, in an amount directed by the Court, to pay all costs and expenses that shall be awarded against the party by any interlocutory order, final judgment, or on appeal.

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

Under the applicable U.S. law, a vessel may either be arrested under Rule C (which requires a maritime lien) or attached under Rule B (which simply requires a maritime claim).

- Rule C: Procedural mechanism used to arrest property subject to maritime lien or where U.S. statute provides for maritime action in rem
 - o The property arrested must be related to the Plaintiff's claim
 - o The U.S. Marshal must be engaged to arrest the property
- Rule B: Allows a party to obtain quasi in rem jurisdiction over a defendant's property for any debt arising out of a maritime claim, when the defendant "cannot be found within the district."
 - o Property attached may be unrelated to the events giving rise to the claim, and the Plaintiff need not have a maritime lien on the vessel
 - o A special process server may be appointed by order of the Court to attach the property, instead of a U.S. Marshal

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

Yes.

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

Ordinarily, an attachment and/or arrest order can be obtained within a few hours, when filing an emergent motion. Rule C(3)(a)(ii) and Rule B(1)(c) require the Clerk to issue the summons and warrant for arrest of the vessel or process of attachment and garnishment, respectively, where the Claimant's attorney certifies that exigent circumstances exist that make court review impracticable. The Claimant has the burden of demonstrating at a post arrest/post-attachment hearing that exigent circumstances existed.

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

A POA is not required to arrest or attach a vessel. The documents to be submitted to U.S. Courts vary depending on the type of proceeding commenced and the U.S. jurisdiction in which the arrest or attachment is sought.

1. For Both Rule C arrests and Rule B attachments:

- Verified Complaint asserting that the Claimant's underlying claim is an admiralty/maritime claim within the meaning of Rule 9(H) of the Federal Rules of Civil Procedure, accompanied by supporting claim documentation
- Summons
- Agreement of Indemnity, agreeing to hold the Marshal harmless for damages if the arrest/attachment is later found to have been wrongful
- Form USM-285/U.S. Marshal Service Process Receipt and Return
- A bank or certified check (for an amount which varies by jurisdiction) as a deposit to cover insurance, guard services, and other costs related to arresting/maintaining the vessel
- Motion for appointment of substitute custodian, with supporting declaration of proposed substitute custodian and proposed order (not mandatory in some U.S. jurisdictions) – may reduce the costs that must be deposited with the Marshal

2. For Rule C Arrests: To commence a Rule C proceeding, the following additional documents are required:

- Affidavit containing the grounds for arrest
- Motion for Issuance of Warrant for Arrest
- Proposed Order for Issuance of Warrant Arrest – authorizing Clerk of the Court to issue a Warrant of Arrest providing the U.S. Marshal with authority to arrest the vessel
- Motion to Permit Vessel to Continue Cargo Operations and to Shift Berths (not mandatory) – requests authorization for the vessel to continue cargo operations during the period of arrest and to move within the district
- Proposed Order Allowing Vessel to Shift Between Berths – allows the Marshal or substitute custodian to move the vessel without petitioning the Court
- Warrant of Arrest
- Notice of Arrest – accompanies Complaint and Warrant of Arrest when the Marshal physically arrests the vessel

3. For Rule B Attachments: To commence a Rule B proceeding, the following additional documents are required:

- Affidavit certifying that the defendant cannot be found within the district
- Application for Order issuing writ of maritime attachment
- Proposed Order authorizing writ of maritime attachment
- Writ of maritime attachment, which is issued to the Marshal and provides authority to attach the defendant's property located in the district
- Notice of Attachment (to accompany writ of maritime attachment)

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

The Complaint must be verified by the Claimant, but if the Claimant resides outside the district where the arrest application is filed, the Complaint may be verified by the Claimants' attorneys. This verification must be notarized. The original documents required by each Court and the documents which may be electronically filed vary by jurisdiction. Most Courts require an original signature on all initiating documents, but require electronic filing of subsequent documents. Other Courts permit a claimant to commence an action by filing the Complaint and all related documents electronically.

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

Yes. Once a vessel has been attached/arrested, U.S. courts will assume quasi in rem or in rem jurisdiction, respectively, up to the amount of the claim. Accordingly, the courts will have jurisdiction over the substantive claim, unless a forum selection clause requires that the claim be brought in a foreign jurisdiction.

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

A ship may be released voluntarily by the Plaintiff, if a settlement is reached and/or if the vessel interests post substitute security in place of the vessel. In such cases, depending on the terms of the Order authorising the arrest, the vessel may be released without a further Court Order upon the Plaintiff's counsel providing notice in writing to the U.S. Marshal, the substitute custodian (if one has been appointed), and the Court that the vessel may be released from arrest. Additionally, the Vessel may be released by Court Order if, after conducting a post-seizure hearing pursuant to Rule E(4)(f) of the Supplemental Admiralty Rules, the Court determines that the arrest was improper and should be vacated.

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

Rule E(5) of the Supplemental Admiralty Rules permits the owner of a vessel to secure the release of the vessel by posting a bond or stipulating to another form of security, such as cash security or a Club Letter of Undertaking. In the event that the parties cannot reach an agreement as to the form or quantum of the substitute security, Rule E(5)(a) provides that the Court may order the posting of a bond and fix the principal sum of the bond. Although other forms of security can be agreed between the plaintiff and the vessel interests, the Court may only require the plaintiff to accept a bond a substitute security.

19. Does security need to cover interest and costs?

Yes. Rule E(5) allows a vessel to be released upon the posting of substitute security at an amount sufficient to cover the amount of the plaintiff's claim, fairly stated with accrued interest (at six (6) cents per annum) and costs; provided that the quantum of the bond does not exceed (i) twice the amount of the plaintiff's claim; or (ii) the value of the property on due appraisalment, whichever is smaller. Rule E(5)(a) provides that interest should be set at that rate of six per cent (6%) per annum.

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

Although an arresting plaintiff may agree to accept a P&I LOU as substitute security to lift an arrest, the Court cannot require the plaintiff to accept this form of security in lieu of the arrest of the Vessel.

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

The vessel will typically be released from arrest and permitted to continue on her voyage within hours of Plaintiff's counsel providing notice to the U.S. Marshal and/or substitute custodian that the ship may be released.

22. Is there a procedure to contest the arrest?

Rule E(4)(f) of the Supplemental Admiralty Rules provides that any person claiming an interest in arrested or attached property is entitled to a prompt post-seizure hearing, where the plaintiff will be required to show cause why the arrest or attachment should not be vacated. While the time frame in which this hearing must be held varies pursuant to the Local Rules of the jurisdiction in which the vessel is arrested, most Courts will hold the "Rule E(4)(f)" hearing within seven (7) days following the arrest and the challenge to same.

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

Although there is no set period of time in which a Claimant that has caused a vessel to be attached/arrested must commence substantive proceedings, the answer to this question will depend largely on the judge assigned to the case. Many judges require that such proceedings be commenced as soon as possible.

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

Yes; however, an arrest will only be set aside as wrongful in exceptional circumstances (i.e. – if the Defendant shows that the claimant acted with bad faith, malice or gross negligence).

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

Yes. In arresting a vessel under Rule C, a Plaintiff need not pierce the corporate veil because the action is in rem against the vessel. However, in a Rule B attachment action, the corporate veil may be pierced. Although there are no mandatory requirements, the U.S. Courts consider ten (10) factors in determining whether the corporate veil may be pierced, including:

disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors, and personnel; common office space, address & telephone numbers of corporate entities; the degree of discretion shown by the allegedly dominated corporation; whether the dealings between the entities are at arms length; whether the corporations are treated as independent profit centers; payment or guarantee of the corporation's debt by the dominating entity; and intermingling of property between entities.

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

Rule E(9) authorizes a Court to Order the marshal to conduct an interlocutory sale of a vessel if the property is perishable or subject to deterioration, decay, or injury by being detained in custody pending the action; the expense of keeping the property is excessive or disproportionate; or there is an unreasonable delay in securing the release of the property. The time frame for conducting the interlocutory sale of a vessel varies by jurisdiction/judge.

**George M. Chalos is the founding member of Chalos & Co, P.C.-International Law Firm and is experienced in all facets of maritime civil and criminal litigation. Mr. Chalos regularly acts as lead counsel in high profile Federal and State court matters throughout the United States, and has assisted in presenting claims before the London High Court of Justice. Additionally, Mr. Chalos is recognized as a leading attorney with respect to Marpol and other environmental pollution matters, including and particularly the defense of criminal pollution cases, as well as the complex third-party litigation arising from a pollution incident. Mr. Chalos is a published author with respect to the United States' vessel initiative program targeting suspected Marpol violators for criminal prosecution, as well as the presentation of claims to the Oil Spill Liability Trust Fund. For more information about vessel arrests or other questions of U.S. law, please feel free to contact Mr. Chalos.*