

SHIP ARREST IN MALTA

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

The law on ship arrest in Malta was, until relatively recently, governed by very archaic rules. Suffice it to say that our admiralty jurisdiction was still regulated by British statutes which had long become defunct in their own country of origin, namely the Vice-Admiralty Court Act 1840 and the Admiralty Court Act 1861. These provided very limited heads of jurisdiction ‘in rem’ on the basis of which a ship could be arrested, and in particular did not regulate the substance of the action in rem. Problems arose in more recent cases connected with bareboat charterers, for which no provision was made.

Furthermore, there was no right of sister ship or of associated ship arrest. All this changed with statutory amendments introduced in 2006, as further fine tuned in 2008. Although not strictly part of this Questionnaire, it ought also to be mentioned that these amendments also radically reformed the system regulating Judicial Sale by Auction of ships, as well as introduced the concept of Court Approved Sales for Ships.

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

Malta is not a signatory to the Arrest Conventions of 1952 and 1999. Ships are arrested in Malta by Warrant of Arrest issued on any one of the grounds listed in Article 742B of the Code of Organisation and Civil Procedure giving rise to the in rem jurisdiction of the Maltese Courts. These include all maritime claims recognised under the Convention. The law provides for a precautionary as well as for an executive warrant of arrest. Creditors seeking to arrest a ship in security of a claim which is not yet judicially acknowledged must have recourse to the precautionary warrant. Judgment creditors and other creditors being in possession of an enforceable executive title or of an Authentic Instrument pursuant to the provisions of Regulation (EC) No. 805/2004 (such as a Mortgagee) may immediately proceed to issue an executive warrant.

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

Ships may be arrested in Malta both in security of maritime ‘in rem’ claims as mentioned above, whenever the ship concerned is physically present within the territorial jurisdiction of the Maltese Courts, as well as in security of in personam claims in those instances where the shipowner may be personally subject to the ordinary jurisdiction of the Maltese Courts. Ships may also be arrested in Malta in security of arbitration proceedings commenced against the shipowner. Finally, ships may also be arrested in Malta pursuant to the provisions of Article 35 of Council Regulation (EC) No. 1215/2012, dealing with provisional including protective measures, in cases where the Courts of another Member State have jurisdiction as to the substance of the matter. However, in all these cases, the ship must always be arrested in virtue of the warrant of arrest, which remains the only way in which a ship may be arrested in Malta.

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

The law is very clear on this point. A ship can only be arrested in Malta in virtue of a Warrant of Arrest, and no other warrant may be issued out against a ship. In this context it is also to be borne in

mind that in virtue of Article 37A of the Merchant Shipping Act, dealing with detention of ships as security for debts, ships constitute a particular class of movables whereby they form separate and distinct assets within the estate of their owners for the security of actions and claims to which they are subject.

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

A total number of 25 Maritime Claims giving rise to in rem jurisdiction are provided for under paragraphs (a) – (y) of Article 742B of the Code of Organisation and Civil Procedure. These follow closely the British Supreme Court Act 1981 but also incorporate both Arrest Conventions of 1952 and 1999 even though Malta is not yet signatory to either. The basic heads of claim may be summarised as follows:

- a) Claims to possession / ownership / title to ship;
- b) Questions arising between co-owners;
- c) Claims in respect of mortgage / hypothec / charge on a ship;
- d) Claims arising out of a contract of sale;
- e) Claims for damages received by ship;
- f) Claims for damage caused by ship;
- g) Claims for loss of life / personal injury caused by ship;
- h) Claims for loss of low damage to goods, including baggage, carried in a ship;
- i) Claims arising out of agreement for carriage of goods / use or hire of ship;
- j) Claims for salvage;
- k) Claims for damage to environment by ship;
- l) Claims relating to wrecks;
- m) Claims for towage;
- n) Claims for pilotage;
- o) Claims for supplies / services rendered to ship;
- p) Claims for construction / repair / conversion / equipping ship;
- q) Claims for port / dock / harbour dues;
- r) Claims by crew for wages / repatriation;
- s) Claims for disbursements made;
- t) Claims for commissions / brokerage / agency fees;
- u) Claims arising out of general average act;
- v) Claims arising out of bottomry;
- w) Claims for forfeiture of ship;
- x) Claims for insurance premia and
- y) Claims for fees due to Registrar / tonnage dues.

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

Yes. The only requirement is that the ship has a length exceeding 10 metres, and that the claim in respect of which the ship is arrested be no less than €7,000. All matters relating to jurisdiction and ranking of creditors are subject to Maltese law as the *lex fori*.

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

With very few exceptions, there are no privileged debtors, so that a ship may be arrested irrespective of who the debtor might be. The exceptions relate to ships of war, and ships wholly chartered in the service of the Government of Malta or employed in any postal service either by the Government of Malta or by any other Government. Of course as shall be seen later, the underlying personal liability of the debtor for the maritime claim concerned is an essential requisite for an action in rem following an arrest to succeed.

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

In cases concerning any one of the maritime claims listed in (a), (b) and (c) under question 5 above, an action in rem may only be brought against that ship in connection with which the claim arose.

In all other cases concerning the remaining maritime claims listed in (d) – (y), an action in rem may be brought against (i) that ship, where the person who would be liable on the claim for an action in personam (the “Relevant Person”) was, when the cause of action arose, an owner or charterer of or in possession or in control of, the ship if at the time when the action is brought the Relevant Person is either an owner or beneficial owner of that ship or the bareboat charterer of it, and/or (ii) any other ship of which, at the time when the action is brought, the Relevant Person is the owner or beneficial owner as respects all shares in it. In these cases, therefore, sister ship and associated ship arrest is possible. The requirement of the Relevant Person being the owner or beneficial owner of the ship or the bareboat charterer of it at the time when the action is brought does not apply in regard to those maritime claims secured by a special privilege in accordance with Article 50 of the Merchant Shipping Act, which survive the voluntary sale of the vessel by up to one year from when such sale is recorded in the ship’s register.

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

The answer to this question is already to be found in the response given to Question 8 above. If at the time the cause of action arose the person who would be liable for the claim in personam (the “Relevant Person”) was the charterer (which therefore includes both bareboat charterers as well as time and voyage charterers) of the vessel concerned, then if at the time the action is brought that same person is either an owner or beneficial owner of that ship or the bareboat charterer of it, that particular ship may be arrested in security of that maritime claim.

Furthermore, if at the time the action is brought the same charterer liable for the claim in personam happened to be the owner or beneficial owner of any other vessel, then that other vessel could also be arrested in security of the maritime claim concerned.

It is therefore to be noted that a ship under time charter may not be arrested in Malta in security of claims for which the time charterer may be personally liable; and it is also to be noted that a ship under bareboat charter may only be arrested, in the scenario contemplated by the law as stated above, in security of an in rem action to be instituted before the Maltese Courts, in security of a recognised maritime claim giving rise to the in rem jurisdiction of the Maltese Courts, but not in security of an in personam action as may be instituted against the bareboat charterer.

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

An Owner whose ship has been arrested may request that counter-security be put up by the claimant; and the Court, upon good cause being shown, will uphold such request and determine the quantum of such counter-security in an amount of not less than €11,600 for the payment of the penalty for wrongful arrest, damages and interest; and in default the Court will rescind the warrant of arrest.

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

Maltese law does not recognise the concept of a ‘maritime lien’ as such. However, a number of ‘special privileges on ships’ are recognised under Article 50 of the Merchant Shipping Act. The difference between an ordinary maritime claim (as recognised under Article 742B of the Code of Organisation and Civil Procedure) and a special privilege is essentially twofold. Firstly, special privileges survive the voluntary sale of a ship for a period of one year from when such sale is recorded in the ship’s register. Secondly, special privileges would rank in priority to ordinary maritime claims.

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

As mentioned above, Malta does not recognise the concept of a ‘maritime lien’ as such; and Malta is not a signatory to any International Convention pertinent to maritime liens.

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

Provided of course that the ship to be arrested is physically in a Maltese port, or at an anchorage within the territorial jurisdiction of the Maltese Courts, and we have received (i) a sufficient background of facts in relation to the claim; (ii) documentation substantiating the claim, (iii) a power of attorney – all of which may initially be forwarded to us by fax or e-mail – as well as (iv) funds covering fees and costs, then we could proceed to arrest the ship well within 24 hours.

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

We always require a power of attorney as we need to substantiate our authority to act as special mandataries of the claimant. In practice we also require to be provided with documents in support of the claim itself, such as copies of agreements or invoices, in order to further support the application for the issuance of a warrant of arrest as well as to avoid any possible claim for wrongful arrest.

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

We should perhaps differentiate between two separate and distinct stages, being the stage at which the precautionary Warrant of Arrest itself is issued in security of a maritime claim; and the action on the merits which must follow the precautionary warrant of arrest in order to maintain in vigore the effects of the warrant of arrest. The Warrant of Arrest itself does not require to be substantiated by any documents according to law, which only requires the completion and filing of the official form of warrant. However, in the subsequent action on the merits, documents should be submitted to the Courts in original format, or at least as certified true copies in the manner required by the law of procedure. In the event that only copies of documents are available, these would need to be substantiated by evidence given either viva voce before the Court, or by means of a sworn Affidavit.

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

Provided the claim falls within the ambit of Article 742B of the Code of Organisation and Civil Procedure, thereby giving rise to a maritime claim, then the Maltese Courts would be vested with jurisdiction to entertain the substantive claim on the merits. There is of course a differentiation to be made between the in rem jurisdiction of the Maltese Courts, and the substance of the action in rem. We have dealt with the substance of the action in rem in response to Question 8 above.

The Maltese Courts would also be vested with jurisdiction over the substantive claim in those cases in which the Courts are vested with ordinary jurisdiction to entertain an in personam action against the shipowner pursuant to Article 742 of the same Code of Organisation and Civil Procedure.

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

The procedure entails an application requesting the Court to release the ship from arrest. This may be done by the person arresting the vessel or by the shipowner. A reason has to be given for liberating the vessel from arrest, such as settlement of the claim, the entering into of a compromise agreement, the deposit of the claim amount of an irrevocable local bank guarantee at the Court registry, or the setting up of alternative adequate security acceptable to the claimant.

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

The security involves either the deposit of the claim amount at the Court registry or the putting up of an irrevocable guarantee issued by a bank licensed to carry out the business of banking in Malta. By agreement between the parties also a P&I Letter of Undertaking can be placed for the release.

19. Does security need to cover interest and costs?

Yes, the security needs to cover interest and costs.

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

The great majority of maritime lawyers acting on behalf of claimants advise clients to accept P & I Letters of Undertaking.

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

Under normal circumstances the release can be achieved within the course of the day.

22. Is there a procedure to contest the arrest?

Yes, there is. The shipowner can file an application for the issuance of a Counter Warrant, requesting the Court to revoke the arrest, on any of the grounds contemplated by law, such as for example if any one of the conditions required by law for the issue of the warrant of arrest is missing; if the amount claimed is not prima facie justified or is excessive; or if it is shown that in the circumstances it would be unreasonable to maintain the warrant in force or that the warrant is no longer necessary or justifiable.

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

Action on the merits is to be brought, or arbitration commenced, in respect of the Claim stated in the Warrant of Arrest not yet being judicially acknowledged in virtue of a final and unappealable judgment or arbitration award or not otherwise constituting an executive title (such as would a Ship Mortgage), within 20 days from the date of issue of the Warrant.

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

Yes. Maltese Courts would recognise, and penalise, wrongful arrest. In case the Court were to find that a Warrant of Arrest was issued on a demand maliciously made or unjustly obtained, it may impose a penalty upon the arresting party in an amount of not less than €11,600.

Upon the request of the arrested party the Court may also condemn the arresting party to pay those damages which the issue of the warrant may have caused him. This is intrinsically linked to the same circumstances where a penalty for wrongful arrest may be imposed by the Court.

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

Our Courts would likely follow English principles of company law in this regard, and would therefore allow the piercing and lifting of the corporate veil in appropriate circumstances.

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

The Court may order the sale of an arrested ship pendente lite if, on application of a Creditor, it appears that the debtor is insolvent or unlikely to continue trading and maintaining the asset. In reaching its conclusion, the Court will have regard to all the circumstances, including the nature of the claim, as well as of the defence; as well as to such steps as the defendant may have taken to secure the claim or otherwise to preserve the ship.

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