

SHIP ARREST IN CANADA

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

Ship arrest Canada is quick, procedurally simple and relatively inexpensive.

The arresting lawyer must be provided with information and documents substantiating the quantum and details of the claim at issue. Upon receipt of the essential facts of the claim, the lawyer will prepare the three documents necessary for the Court to issue the Warrant of Arrest.

The three documents are:

1. The Statement of Claim which details the relevant facts of the claim and establishes the in rem jurisdiction of the Federal Court.
2. The Affidavit to lead warrant which supports the allegations contained in the Statement of Claim. Note that the Affiant can be the claimant, or the arrest lawyer.
3. The Warrant of Arrest which will be issued by the Federal Court.

In Canada, the arrest proceedings are filed at the Federal Court, which has offices throughout the country. The arrest proceedings can be filed urgently, after regularly Court hours. In certain circumstances, from the moment the lawyer is provided the necessary documents to draft the proceedings, the arrest can be carried out within a matter of hours.

Costs of arrest are: Court costs, Sherriff or Bailiff fees and legal fees associated with the preparation of the arrest proceedings.

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

No Convention applies to arrest of ships in Canada. The grounds for arrest are found in Canadian law, specifically the Federal Courts Act and Federal Courts Rules.

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

No.

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

Mareva Injunctions, or the freezing of the Defendants' assets can be granted by Canadian Courts. In the province of Quebec, under the appropriate conditions, a saisie conservatoire (or saisie avant jugement) can be granted. Alternatively, if a judgment has already been rendered against the Vessel Owner, then the vessel may be sold in execution of the said judgment.

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

The types of claims which give rise to a right of arrest are listed at s. 22(2) of the Federal Courts Act:

- (a) any claim with respect to title, possession or ownership of a ship or with respect to the proceeds of sale of a ship;
- (b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;
- (c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship therein or any charge 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 or for loss of life or personal injury caused by a ship either in collision or otherwise;
- (e) 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 or being loaded on or off, a ship;
- (f) 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;
- (g) any claim for loss of life or personal injury occurring in connection with the operation of a ship
- (h) any claim for loss of or damage to goods carried in or on a ship including loss of or damage to passengers' baggage or personal effects;
- (i) 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
- (j) any claim for salvage including claims for salvage of life, cargo or equipment
- (k) any claim for towage
- (l) any claim for pilotage
- (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including claims in respect of stevedoring and lighterage;
- (n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;
- (o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;
- (p) 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;
- (q) any claim in respect of general average contribution;
- (r) any claim arising out of or in connection with a contract of marine insurance
- (s) claim for dock charges, harbour dues or canal tolls

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

Yes.

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

As a general rule, unless the debt gives rise to a maritime lien, the Shipowner must be liable for the debt. However, if the Charterer incurs the debt while he is acting as the Owner's agent, then the vessel may nonetheless be validly arrested.

Canadian Courts will also recognize and enforce foreign liens, even if the claim would not give rise to a lien under Canadian law.

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

Section 43(8) of the Federal Courts Act allows for sister ships arrest however, ownership of the two vessels must be the same in order for the arrest to be valid.

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

Refer to answer of Question 7.

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

No, the Federal Court of Canada does not require counter-security in order to arrest a ship.

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

No, there is no difference in respect to arresting a ship for a maritime claim and a maritime lien. From a procedural standpoint, the arrest procedure is the same.

Nevertheless, the arresting party must bear in mind that if the maritime claim did not arise as a consequence of a maritime lien, then the vessel's ownership must have remained the same from the moment the cause of action arose to when it was arrested. In these cases, a change in ownership of the vessel could prove to be fatal to the in rem liability of the Ship.

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

Yes, Canada recognizes traditional English maritime liens. However, Canada is not a party to the International Convention on Maritime Liens and Mortgages. In accordance with the *Marine Liability Act*, Canada also recognizes maritime liens for Canadian suppliers of necessities (bunkers, goods, materials and services) to a foreign vessel. In addition, Canadian Courts will recognize foreign claims constituting a maritime lien under foreign law, even though the claimant does not enjoy a maritime lien under Canadian law.

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

Arresting a ship can be done very expeditiously provided that the claimant has provided us with all of the documents and particulars required to evidence the debt. The Solicitor will prepare a Statement of Claim, an Affidavit to Lead Warrant and a Warrant of Arrest. If the Vessel to be arrested is at the Port of Montreal, we are able to arrest within approximately two (2) hours.

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

No, a Power of Attorney is not required. Other than those listed at Question 13, there are no documents to provide.

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 Federal Court of Canada does not require any original or copied documents for the arrest of a vessel. However, documents will be required at a further stage in the litigation process.

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

Yes, Canadian Courts typically retain jurisdiction over the case.

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

The arrested ship under caveat will not be released. If there is no caveat binding the ship then the ship may be released in the following circumstances: 1) if the claim is satisfied because the amount claimed has been paid into Court, 2) if bail has been given in an amount fixed by the Court, 3) if the party who has initiated the arrest consents in writing to release the ship (for example upon receipt of an acceptable P&I LOU) and 4) if there is a discontinuance or dismissal of the action in respect of which the ship was arrested.

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

Parties may agree upon an LOU as security. Otherwise, the Federal Court Rules allow for the giving of bail to release arrested property. Once bail is given, property may be released. The parties may agree to the form of bail, failing which a guaranty or bond (as provided for under the Federal Court Rules) will be required. It is left to the designated officer of the Court to determine the sufficiency of bail.

19. Does security need to cover interest and costs?

As per the Federal Court Rules, the fixing of security is based upon the principle that a Plaintiff has a right to security measured by its “reasonably arguable best case” capped at the value of the vessel. The “best case” will often be the amount the Plaintiff asserts to be owing in its Statement of Claim.

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

As a matter of practice, P&I LOUs are customarily negotiated and accepted between the Parties. However, it is worth noting that P&I LOUs are not considered sufficient guarantees under the Federal Court Rules.

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

The release of the arrest vessel will occur very swiftly once the parties have negotiated a P&I LOU and once the arresting party has prepared the “Release from Arrest” proceeding.

22. Is there a procedure to contest the arrest?

Yes, there is a procedure to contest the arrest. The arrest can be contested in any case where the claimant deems that the vessel was either wrongfully arrested or that the arrest was carried out in an inappropriate jurisdiction.

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

In Canada, the legal action on the merits is taken simultaneously to the arrest proceeding as a Statement of Claim must be filed along with the Warrant of Arrest and Affidavit to lead warrant.

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

Yes, Canadian Courts acknowledge wrongful arrest. If the ship owner can prove that the ship was arrested as a result of gross negligence or malice, the Courts may award damages in its favour.

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

Canadian Courts are extremely reluctant when presented with requests to pierce and lift the corporate veil, as this principle is considered sacrosanct under Canadian law. Therefore, as a general

rule, Canadian Court will respect the corporate veil unless the corporate entity has used the corporate structure for fraudulent purposes.

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

The Federal Court may consider to have the ship sold pendente lite in certain circumstances. The Court will assess the following elements to determine whether there are ground to have the ship sold pendent lite: 1) the value of the vessel compared with the amount of the claim, 2) whether there is an arguable defence, 3) whether it is reasonable to assume that there will be a sale at some point, 4) whether there could by a diminution in value or sale price by reason of delay, 5) whether the vessel will depreciate by further delay (“wasting asset”) and 6) whether there is any good reason for a sale before trial.

****Marc de Man** is a founding partner of the Montreal law firm De Man Pillet. Marc was born in Antwerp, Belgium and lived several years in Buenos Aires, Argentina as well as in Santiago, Chile.*

Marc has extensive experience in maritime and transportation law, international trade and commercial law, arbitration and mediation, with more than 40 years of practice. He acts as counsel to a varied clientele in the maritime industry comprised of P&I Clubs, cargo underwriters, shipowners, charterers, ship suppliers, as well as shippers and consignees of cargo. In commercial matters, Marc represents banking institutions, shipping and trading companies. Marc's practice has led him to represent interests from North America, Central and South America, Europe, Asia and Australia. He is fully trilingual in French, English and Spanish, which enables him to deal directly and efficiently with his international clientele.

Marc is also a guest lecturer at McGill University and a sought-after speaker at various conferences and seminars, both in Canada and throughout the world.

***** Vanessa Major** is a senior associate at De Man, Pillet in Montreal, Quebec. She advises clients in all matters relating to maritime and transportation law as well as in civil and litigation matters. Vanessa acts as lead counsel to a wide range of clients including importers and exporters, bunker suppliers, freight forwarders and marine insurers. She has experience dealing with marine cargo claims in addition to ship arrests, marine coverage issues and charterparty disputes.*