

SHIP ARREST IN MOZAMBIQUE

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

In recent years, Mozambique has enacted a number of important laws and regulations at the same time that it has ratified several key international treaties and conventions. The underlying purpose seems to be clear: follow and adopt the latest international trends in the industry and take advantage of the country's location and impacts of the multimillion LNG project in the North (Rovuma Basin) to increase levels of foreign direct investment, upgrade existing port and logistic infrastructures and therefore boost the economy and contribute to the wellbeing and social development of its population.

In that regard, it is important to note the recent enactment of a new Maritime Courts Law, which approves the organisation, composition, functioning and powers of the Maritime Courts. Although the Maritime Courts are not yet operational, it is anticipated that they will bring national legislation and judicial procedures closer to international best practices, notably on arrest proceedings. As an example, maritime courts will operate on public holidays, in a clear response to the need for speed in the assessment of shipping-related issues brought to national courts. This notwithstanding, it has been visible an increasing effort by ordinary courts and maritime authorities to ensure the swiftness that ship arrest procedures require.

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

The International Convention Relating to the Arrest of Sea-Going Ships 1952 (the "Brussels Convention") applies in Mozambique.

The United Nations Convention for the Law of the Sea ("UNCLOS") also applies in relation to vessels arrested for the suspicion of participation in criminal activity.

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

Outside the scope of the Brussels Convention, Mozambique's Civil Procedure Code applies. Please refer to next question.

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

Apart from ship arrest, the claimant may seek to obtain security through the attachment of any other property owned by the debtor (other than vessels) and non-specified injunctions as per the Civil Procedure Code.

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

Maritime claims in respect of which a vessel may be arrested are those set forth in Article 1(1) of the Brussels Convention:

- a. damage caused by any ship either in collision or otherwise;
- b. loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;
- c. salvage;
- d. agreement relating to the use or hire of any ship whether by charterparty or otherwise;
- e. agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

- f. loss of or damage to goods including baggage carried in any ship;
- g. general average;
- h. bottomry;
- i. towage;
- j. pilotage;
- k. goods or materials wherever supplied to a ship for her operation or maintenance;
- l. construction, repair or equipment of any ship or dock charges and dues;
- m. wages of Masters, Officers, or crew;
- n. Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- o. disputes as to the title to or ownership of any ship;
- p. disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- q. the mortgage or hypothecation of any ship.

Ships may also be arrested when there is the suspicion of participation in criminal activity, before or after criminal proceedings are initiated, under the UNCLOS.

A claimant may seek the arrest of either the vessel in respect of which the maritime claim arose, or any other associated vessel as long as both vessels are owned by the same person(s). Associated ships may not be arrested in situations foreseen in article 1.1, (o), (p), or (q) of the Brussels Convention.

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

Yes. Under Article 2 of the Brussels Convention a ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim. However the Convention does not extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or harbour authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1(1) (please refer to previous question 5.) or of any other claim for which the law of the Contracting State permits arrest.

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

It is not required that the owner is liable in persona for an arrest of a vessel to be accepted. Pursuant to Article 3(4) of the Brussels Convention, if the charterer (and not the registered owner) is liable (i.e., debtor) in respect of a maritime claim relating to a vessel, in the context of a charter by demise of a vessel, the claimant may arrest such vessel or any other vessel in the ownership of the charterer by demise, even though no other vessel in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The above-mentioned regime shall apply to any case in which a person other than the registered owner is liable in respect of a maritime claim relating to that vessel.

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

A claimant may seek the arrest of either the vessel in respect of which the maritime claim arose or any other associated vessel as long as both vessels are owned by the same person(s). Associated ships may not be arrested in situations foreseen in article 1.1, (o), (p) or (q) of the Brussels Convention (please refer to question 5.).

Outside of the Brussels Convention, sister-ships may only be arrested when the owner is personally liable for the debt.

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

Pursuant to paragraph (4) of article 3 of the Brussels Convention, in the case of a claim against a bareboat charterer, the claimant may seek the arrest of the bareboat (demise) chartered vessel or any other vessel in the ownership of the bareboat charterer, as the charterer and not the registered

owner is liable in respect of such maritime claim relating to that vessel. However, no other vessel of the ownership of the registered owner may be arrested in respect of such maritime claim. The above mentioned legal regime also applies to any case where a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

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

As a matter of principle, no security is required. Still, the judge is free to decide otherwise and ask the applicant to provide security in an adequate amount and form. Unless otherwise determined by the judge, the amount of the security generally corresponds to the amount of the claim. The security can be posted in any form acceptable by the court, cash deposits and bank guarantees (in terms to be agreed) being the most usual forms.

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

Maritime claims are dependent upon the ownership of the ship. The ship can only be arrested provided that the owner at the time that the cause of action arose is still the owner at the time of arrest. Maritime liens can be enforced irrespective of ownership and entitle the claimant to file a claim and to arrest the ship despite a change of ownership. The arrest procedure is the same, though.

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

Although it is understood that the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages is not applicable in Mozambique, as per the Mozambican Commercial Code the following categories of claims afford maritime liens:

1. court costs incurred in the common interest of the creditors;
2. remuneration for salvage;
3. pilotage and towage expenses;
4. tonnage, lights, anchorage, public health and other harbour dues;
5. expenses made in connection with a vessel's maintenance and storage of her appurtenances;
6. master and crew wages;
7. costs incurred in connection with the repair of the vessel, her appurtenances and equipment;
8. reimbursement of the price of the cargo that the master was forced to sell;
9. insurance premiums;
10. any unpaid portion of the price due in connection with the purchase of a vessel;
11. costs incurred in connection with the repair of the vessel, her appurtenances and equipment accruing during the past three years;
12. unpaid amounts arising from shipbuilding contracts;
13. outstanding insurance premiums over the vessel, if insurance coverage was taken in total, or over the covered part of her appurtenances, not mentioned in (11); and
14. sums due to shippers in respect of loss or damage to cargo.

Claims mentioned in (1) to (9) refer to those incurred in the last voyage and as a cause of it.

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

Subject to the receipt of all documentation relevant to the claim, the application to the court can take place within a matter of hours. The actual arrest will be dependent on the availability of local court in the area that the ship is located but should be effected within 24 to 72 hours of the warrant being issued.

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

Yes, an original power of attorney must be provided to the court. Where issued abroad, and as a condition for their local acceptance and enforceability, powers of attorney must be previously

notarised, legalised (before the Ministry of Foreign Affairs or equivalent body), translated into Portuguese language (by a sworn translator) and then consularized before the Mozambican Embassy or Consulate with jurisdiction over the country of their issuance (Mozambique is not a party to the 1961 Hague Apostille Convention).

The original power of attorney must be attached to the arrest application at the time of its filing. When that is not possible, lawyers may ask the court to grant additional time for submitting the original (where the original power of attorney is not available, the arrest application must be submitted along with a scanned (coloured) copy of the original power of attorney).

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

Although the submission of original documents is required, it is common practice to present scanned copies of the same, which in most cases is accepted. However, courts are always entitled to disregard copies or ask the parties to submit the relevant originals.

Documents submitted to the court must be written in Portuguese. When written in a different language, parties are required to submit the relevant originals along with their translation into the Portuguese language (the translation should be certified by a sworn translator).

Where, in view of the urgency, there is not sufficient time available to file the arrest application in compliance with all the required formalities, it is still possible to set the arrest procedure in motion while undertaking to the court to complete the formalities in a reasonable period of time (typically, no more than 10 calendar days).

Documents cannot be filed electronically.

There is no specific term for the preparation of an arrest application; this will typically depend on the urgency of the relevant arrest and on the complexity of the underlying claim.

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

Mozambique has enacted specialised courts in maritime and shipping matters. These are independent courts exercising jurisdiction over all sorts of maritime contracts (from engineering, procurement and construction contracts for vessels to bareboat charters and disputes. However these courts are not yet in operation and maritime claims are currently heard before common judicial courts. As a rule, jurisdiction clauses stated in contracts (including bills of lading) are valid and enforceable, provided they arise from a written agreement, in which the competent jurisdiction is expressly mentioned, as established by Article 99 of the Civil Procedure Code.

Law 10/2022 further establishes that Mozambican courts' jurisdiction cannot be excluded in matters of international maritime law which would be within the jurisdiction of Mozambican courts in accordance with its domestic law, unless the parties are foreigners and if it is a question regarding an obligation that must be performed in foreign territory and does not relate to assets located, registered or enrolled in Mozambique.

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

Pursuant to Article 5 of the Brussels Convention, the vessel shall be released upon sufficient bail or other security being furnished, save in arrests in respect of any of the maritime claims regarding disputes as to the title or ownership of the ship, or in disputes between co-owners of the ship as to the possession, employment or earnings of any vessel (foreseen in article 1.1, (o) and (p) of the Brussels Convention - please refer to question 5.). In such cases, the court may allow the person in possession of the vessel to continue trading it, upon such person furnishing sufficient bail or other security.

Outside the Brussels Convention, the vessel will also be released if security is provided in the form and amount deemed sufficient by the court.

The security may be deposited in any form considered acceptable by the court, including cash deposits or bank guarantees.

Both under and outside the Brussels Convention, the vessel shall also be released:

- upon payment of the debt;

- in the event the main claim is not commenced within 30 days – or a different time period established by the court when the claim is subject to a jurisdiction of a foreign court – from the arrest being ordered or has had no developments for a period of more than 30 days for reasons imputable to the creditor;
- the main claim is definitively dismissed;
- if the main claim is upheld but the debt remains outstanding and the creditor does not initiate the enforcement proceedings within six months from the claim being definitively upheld or they have no development for a period of more than 30 days for reasons imputable to the creditor; or
- if the credit ceases to exist.

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

Security can be posted in any form acceptable by the court or by the arresting party (e.g., cash deposits, bank guarantees, P&I LOUs).

19. Does security need to cover interest and costs?

Typically, the amount of the security corresponds to the amount of the claim (which usually includes interests). Nevertheless, the judge may end up reviewing it subsequently, namely where the amount being claimed does not reflect the amount being effectively disputed. The amount of the security is not likely to exceed the value of the ship.

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

Although not common, courts have already accepted P&I LOUs as security, dependant on the other party's agreement.

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

Once security has been posted the request for release can be lodged with the court immediately, but it will depend upon the availability of local court officials where the ship is located. Usually it takes between 24 and 48 hours.

22. Is there a procedure to contest the arrest?

After examination of the evidence produced, the arrest may be ordered without hearing the arrested party, provided that the legal requirements have been met; however, where the arrest has been requested to cover more assets than the sufficient to secure the debt/obligation, the guarantee shall be reduced to the just limits. In the particular case of arrest of a ship or its cargo, the arrest will not take place if the debtor immediately offers a guarantee that the creditor accepts or that the judge, within twenty-four hours, deems adequate.

Upon notification to the arrested party of the order granting the arrest, the latter may appeal against the order or lodge an opposition ("embargos"), or use both means of defence simultaneously.

The opposition shall be offered in duplicate within a period of eight days and shall be especially aimed at claiming facts that dismiss the grounds for the arrest or at requesting that the precautionary measure be reduced to its just limits where it has covered more property than necessary.

The arresting party is then notified to answer to the opposition; thereafter, without further pleadings, the terms of the summary proceedings shall follow.

Where the opposition is directed against the grounds of the arrest, the arrested party may claim that the arresting party or the witnesses knowingly failed to tell the truth and request that a fixed sum be fixed as compensation for the damage suffered; in such case, the witnesses shall be summoned to answer the opposition and, if the opposition is upheld, the arresting party and the witnesses in bad faith shall be jointly and severally liable for the compensation.

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

The claimant is required to take action on the merits within 30 days of the arrest order, or a different time period established by the court when the claim is subject to a jurisdiction of a foreign court.

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

According to the Civil Code, if the arrest is rendered unjustified or otherwise expires on account of the applicant, same will be held liable for damages caused to the respondent, when it is proved that it failed to act with the necessary normal prudence or due care. Also, if the arrest is in place and the claimant fails to file the initial claim for the main proceedings, within 30 days of the arrest order, the arrest shall be lifted.

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

Yes. Under the Mozambican Commercial Code, the legal personality of the company shall be disregarded (the same is to say, the corporate veil shall be lifted) and the shareholder shall be held responsible, where he or she acts intentionally, in the following cases: (a) the company is used as an instrument of fraud and abuse of economic power; and (b) in any case where the controlling shareholder or shareholder directs the company for an aim that is alien to the purpose of the company or against the company's interest, causing damage to the other shareholders and to the company.

The legal personality of the corporate company shall also be disregarded and the shareholder shall be held responsible, when the company violates essential consumer and environmental rights, through significant influence of the shareholder, and the corporate assets are not sufficient to repair the damage caused.

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

In principle, the judicial sale of a ship cannot take place during the arrest proceedings, requiring the bringing of a subsequent enforcement proceeding, in which the arrest is converted into a seizure of the vessel after the existence of the credit has been recognised by the competent court.

After an enforcement application is lodged, the court shall notify the debtor (owner or charterer and other interested parties) to settle the claim or oppose the enforcement and the seizure. If the debtor fails to pay or if no opposition is lodged within an appropriate period, the court will order the sale. To that extent, the court will then decide on how the sale will take place (public auction, private negotiation, sealed bids) and will appoint an auctioneer who will be responsible for the relevant proceedings and arrangements (such as organising the tender and visits to the vessel, collecting the bids, getting the proceeds of the sale and liaising with the court). The debtor will have the power to recover the vessel at any time before completion of the judicial sale, provided it deposits with the court the amount of the credit plus fees and expenses.

The proceeds arising from the sale of the vessel will be used to pay the claimant or other creditors with prevailing rights over the vessel that have claimed credits in the proceedings, the court costs and expenses (including auctioneer's fees) and other credits and expenses.

Lastly, the judicial sale of a vessel can take several months to complete.

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Francisco Campos Braz joined VdA in 2019 and is a senior associate of the Oil & Gas practice, with strong ties to the Equatorial Guinean jurisdiction, where he accumulated 10 years of experience in the areas of oil and gas, construction, corporate, employment, litigation, OHADA, foreign investment and maritime matters. Francisco has advised and assisted, particularly in Equatorial Guinea and Mozambique, international oil companies and oilfield services companies in the incorporation, registration and closure of local entities and branches, labour proceedings and collective dismissals, local content requirements, among other matters.

Kenny Laisse collaborates with VdA Legal Partners since 2016, integrating GDA – Sociedade de Advogados, as an Associate. He has been actively involved in criminal, civil, labour and litigation cases, representing and advising the most relevant national and international companies, inclusively in shipping disputes in Mozambique.