

SHIP ARREST IN PANAMA

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

The Republic of Panama and the Panama Canal are brand names in international shipping. The Panamanian Ship Registry is the largest in the world in number of vessels as well as tonnage. The Panama Canal is a focal point since there are over 21,000 ships calling Panamanian Ports every year and over 14,000 of them transit the waterway, more cargo and port activities are the result of the enlargement inaugurated in 2016. In reference to maritime jurisdiction, until March, 1982, a United States Federal District Court for the Canal Zone handled maritime claims at the Panama Canal. Since then, as a result of the Panama Canal Treaties Torrijos-Carter, Panama took over maritime jurisdiction in all canal waters and the Maritime Court of Panama was created by Law 8 of 1982. The Maritime Court of Panama adopted procedural rules closely patterned following the U.S. Rules of Civil Procedure. Since 1982 Maritime Court of Panama functioned as a specialized tribunal where the Judge is required by law to bear maritime law expertise, being fluent in English among other requirements; today there are two specialized maritime courts, being a direct consequence of a growing practice in the maritime litigation field. Furthermore, the National Assembly of Panama adopted a bill amending the existing procedural rules for admiralty claims. The Maritime Code of Panama amended by Law 12 of 2009, fashioned after the U.S. Supplemental Rules for certain Admiralty and Maritime Claims of Federal Rules of Civil Procedure, incorporated American procedural devices such as: oral trials, discovery, speedy arrests procedures, limitation of liability and mixed *in rem* and *in personam* claims. All ships present in Panama, whether transiting the canal or calling any Panamanian port, are subject to the jurisdiction of the Maritime Courts of Panama, regardless of the flag, or the place where the claim arose, whether inside or outside Panama, the Maritime Courts will exercise its maritime jurisdiction if requested. This is commonly referred to as *forum arresti*. Any vessel present in Panama is subject to be arrested either under an *in rem* theory or an *in personam* action against owners and charterers.

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

Panama has not ratified any of the International Conventions related to Ship Arrests. However where the applicable law to the underlying claim is that of a country which has ratified any Convention the Maritime Courts of Panama will enforce it in cases where the law of the flag or the law of a particular country applies to the dispute. In the area of conflicts of law Panama adopted a statutory provision for the determination of the applicable law.

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

Under our procedural rules, there are three ways to arrest a vessel. First, any vessel or property can be arrested so that a defendant cannot dissipate assets beyond the jurisdiction by depositing a 20-30% bond of the amount in controversy when defendant's property is found within the territory of the Republic of Panama. A defendant is "present" in Panama when its real and effective place of business is in the territory of the Republic of Panama. Second, a vessel can be arrested ascribe the Courts jurisdiction when such a defendant is not present for purposes of jurisdiction or when an asset of defendant property is attached in order to serve process. Third, a Maritime Court may exercise its jurisdiction to enforce maritime liens or encumbrances via an *in rem* action. Another option which has become very popular is the "flag arrest", which is an injunction preventing the vessel from being sold, deleted, mortgaged, transferred to another registry, in other words maintain

the status quo until the court decides otherwise. Under Article 206 of the Panama Maritime Code, any Panamanian Vessels' Registration can be blocked at the Shipping Registry so as to prohibit its sale, deletion, transfer or registration of a mortgage or encumbrance. The evidentiary standard for this type of proceeding requires a showing that an "immediate and irreparable harm" may occur. A discretionary deposit may be ordered by the Court in the sum of no less than US\$10,000 to not more than US\$50,000, the court decision as to bond is totally based on the available evidence of the claim.

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

Panama does not have the *saisie conservatoire* or freezing orders as they are known in France or in the United Kingdom. However, the same results are obtainable under the arrest procedure established by the Maritime Code.

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

In the case of *in rem* claim, if the applicable law concedes a maritime lien or a statutory right *in rem*, any vessel can be arrested. In Panama cargo or freight belonging to the defendant are also subject to being arrested on an *in rem* claim. In the case of an *in personam* claim, any claim arising out of acts related to maritime commerce, transportation and traffic arising inside or outside the territory of Panama and when the claims arises from an act or that are or should be executed from, through or to Panama the Court will try the claim. The amended maritime Law of 2009 also permits the filing of "mixed" or combined actions *in rem* and *in personam*, where the applicable law sets *in rem* and *in personam* liability for the underlying claim. Claims that have been tried in the Panamanian Courts involve Personal Injury claims, Seaman labour claims, Longshore workers claims, Insurance litigation, P&I direct actions, Collisions & allisions, Charter party disputes, Contractual claims, Cargo claims, Necessaries, Bunkers, Maritime claims based on negligence, Vessel property disputes, Mortgage executions, Towage, Limitations of liability procedures, Salvage, General Average and Arbitration.

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

Yes, in Panama the mere presence of any vessel at Panamanian waters, whether to transit the Panama Canal or to call any Panamanian port, gives the maritime court jurisdiction *in rem* over the vessel and *in personam* over the owners, operators and charterers. Panama does not recognize governmental immunity for state owned commercial trading vessels.

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

In Panama, the claims subject to Panamanian Law permit the arrest of a vessel, regardless of whether the underlying debt is incurred by owner, disponent owner, operator or charterer. Under Panama Law anyone with authority binds the vessel *in rem*, if the supplier is not timely notified otherwise.

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

There are two separate matters here. If the applicable law to the claim permits the arrest of sister ships or associated ownership vessels, Panama will recognize it. In cases where Panama Law is applicable sister ship arrest is permitted if the vessel are owned by the same company in an *in personam* claim. If the claim is *in rem*, the action has to be directed against the same vessel. However, Panama permits mixed or combined claims, where there is a maritime lien or a statutory right *in rem* and there is *in personam* liability upon owners, operators or charterers. In addition, where the applicable foreign law permits the arrest of "associated" ships Panama will recognize it. In Panama piercing the corporate veil is an extraordinary remedy only available in cases of fraud or violation of public policy.

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

Under Panama Law anyone with authority over the vessel, owner, disponent owner, bareboat charterer, operator and/or time charterer binds the vessel for goods and services provided, except where the supplier is timely advised otherwise. As to cargo damages liability, the vessel is liable in rem regardless of who has control. In addition Bareboat and Time Charterers are liable in an in personam claim where the applicable law so permits. Notice should be taken that under Panama law there is a system of registration of bareboat charters, which sets the liability of the charterer for operative liability of the vessel, keeping ownership issues in the original registration.

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

Yes. Under Article 166 of Law 8, it would depend on the purpose of the arrest: a) if it is to prevent disposition of the vessel and solely as security for the outcome of the proceedings, 20 to 30% of the amount of the complaint; or b) to give jurisdiction to the court over the owner, US\$1,000.00; or c) for enforcement of maritime liens, US\$1,000.00. An up-front amount of US\$2,500.00 would be required upon submitting the arrest petition for maintenance and arrests costs, and the Marshall would thereupon be entitled to require additional amounts. Failure to do so within five days would result in the release of the vessel.

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

Not in terms of the procedure for the arrest itself. Law 8 also provides for mix proceedings (in rem and in personam). Foreign law could apply to determine the right to arrest.

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

The concept of maritime lien is contemplated in the law of Maritime Commerce and implies the right to enforce certain claims against the vessel, freight and cargo, irrespective if the obligor is the ship owner, which includes contractual or extra-contractual claims. The list of such claims and their order of priority in each case are also expressly contemplated in said law. Liens may be recognised under foreign law, by application of conflict of law rules and there are also special provisions for enforcement of naval mortgages, which apply to national and foreign vessels which are arrested in Panama. Panama has not ratified international conventions on 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?

No specific time lapse is required. The arrest of a vessel could be arranged on a same day basis, considering that the Court and the Marshall would be available (as provided in the law) 24-7, including holidays. The Maritime Courts, two of them, would have shifts for arrests outside working hours and personnel assigned to attain those tasks.

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

The POA, in principle, and prima facie evidence of the right to claim would be needed when submitting the application for arrest (and the corresponding complaint). The PoA must be provided in original form, notarized and either apostilled or legalized by a Panamanian Consul.

By supplementary application of the Code of Civil Procedure, it is possible for a lawyer to act in lieu of POA (i.e. negotiorum gestor). The POA would have to be submitted within two months. In case of foreign entities, proof of existence of the same (i.e. certificate of existence or good-standing) as well as authority of the grantor, in case of individuals acting for entities, would also be necessary. Such separate evidence would not be required if the notary attesting the PoA confirms (pursuant to evidence submitted) such elements of authority and existence.

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 general rule is that documents must be filed in original form; in particular, documents deemed of a “public” source (coming from an official or Governmental entity).

The law expressly provides that public documents issued outside of Panama would have to be legalized to be admissible in Court, either by Panamanian Consul or, where the 1961 Hague Convention applies, Apostilled, or in lieu thereof by the Consul of a country deemed amicable to Panama.

The law provides for the possibility of admission of copies, including discovery motions to seek agreement of the parties in this connection, which is commonly accepted. The Judge should assess the evidence overall and altogether, including indicia, under rules of logic and experience (i.e. *sana crítica*).

Documents deemed essential for the representation of the parties, such as powers of attorney are to be produced in original and duly notarised and legalised (see 14 above). Currently, documents are to be filed with the Court as opposed to allowing electronic filings. Nonetheless, a new procedure for electronic filings and docket keeping is currently available.

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

Generally, the arrest in the events mentioned in item 10 above are meant to support proceedings which, in turn, implies the review of a matter on the merits by the Court. For example, the rules of competence and jurisdiction contained in the Law of Maritime Procedure, grant exclusive jurisdiction to the Maritime Courts of Panama, when an asset of the defendant is arrested, i.e. a vessel in respect to a claim against its owner.

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

The law provides that the plaintiff may unilaterally do so. Also, by posting security and filing a request. This could be made unilaterally by the defendant/owner of the asset or a third party, or jointly by plaintiff and defendant/owner of the asset. Failure of the plaintiff to consign relevant maintenance amounts, after five days from a request, also allows the Marshall to proceed with the release.

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

The law provides the following alternatives:

1. Cash or Certificate of Judicial Deposit at the National Bank of Panama
2. Letter of Guarantee, Certified or Cashier's Cheque from a local bank holding a general license.
3. Surety from an insurance company licensed in Panama.
4. Other which the parties may agree.

19. Does security need to cover interest and costs?

Generally, yes, these would be assessed by the Judge upon fixing the amount of release bond. The defendant, shipowner or any interested party may request the release of the arrest, in which case the law provides for the amount of the security to cover principal, legal interest for three years and judicial costs as assessed by the Judge based on a schedule of fees approved by the Supreme Court.

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

Yes. These would be subject to the acquiescence of the plaintiff.

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

Usually within the day of filing of the petition (including if the necessary release bond is duly consigned with the Court), as the law provides for availability 24-7 for this.

22. Is there a procedure to contest the arrest?

Yes, this involves a motion duly supported for wrongful arrest, when there is a mistake in the asset to be attached or ownership thereof, the absence or inexistence of an alleged maritime lien causing the arrest or in breach of a previous agreement not to arrest.

On a more recent case, we have been able to lift a flag arrest, which could apply to a physical arrest, based on a procedural defense of lack of standing to sue the owner in a case with more than one defendant sued for damages related to the cargo, whilst the owner had bareboat chartered the vessel. Due to the proven disconnection of the owners with the operation of the vessel, the owner was dismissed and the flag arrest which served as security, was vacated as being an asset of the owner and not otherwise tied to the claim.

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

As per 16, above, the complaint would have to be filed at the same time that the petition for the arrest is filed. The Court would review if the underlying claim stands (prima facie) as to initiate the proceedings with the admission of the complaint and order the arrest under separate order, back-to-back. Court documents including the order of admission of the complaint and arrest order would be served on the master of the vessel when the arrest is carried out by the Marshall.

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

The law contemplates the following scenarios of arrest done in bad faith as wrongful arrest, to wit:

- a) If the arrest has been performed over property which is different from the one against which the suit was brought; or
- b) If the arrested property does not belong to the defendant in cases where the arrest is carried out to give the court jurisdiction over the owner as defendant; or
- c) If the maritime lien or in rem right for whose execution the arrest was requested is extinguished or inexistent; or
- d) If the arrest was requested in contravention of a prior agreement between the parties not to arrest.

We have applied the rules of wrongful arrest to have successfully obtained the release of an injunction over the vessel, known as “flag arrest”, and such mechanism is now being used by other colleagues. However, there are new rulings which tend to reject such position, under a narrow interpretation that the rules of arrest do not apply to the special provision of the law which allow general protective injunctions, whilst said section of the law is contained within the Chapter of the law corresponding to the arrest of assets and it expressly states that the injunctions are subject to procedures within said Chapter.

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

This would be in exceptional situations involving fraud or criminal actions, before competent courts in that respect. Therefore, it should be noted that Maritime Courts may be reluctant to do so, on strictly maritime causes of action, without an order or further support from a Criminal Court or Judicial authority in respect to criminal investigations.

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

Yes, in the following situations:

- a) If the arrest may result in a deterioration of the vessel (depending on its type);
- b) If 30 days have elapsed from date of the arrest without the same having been lifted;
- c) If the costs for custody and maintenance become excessive with respect to the sale value;
- d) If the complaint is not timely answered*;

The first three scenarios would require the intervention of both parties, *whilst the fourth would proceed at the request of the claimant and in case of enforcement of naval mortgages, ipso jure. The proceeds would then be deposited at the National Bank of Panama, in an interest-bearing account. The process for the sale would be the same as for a regular judicial sale and it may take in the region of six months, from the initiation until final adjudication. However, the order of adjudication may be appealed and the process may be objected pursuant to other motions provided in the law, which may extend such estimated timeframe.

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