

FREQUENTLY ASKED QUESTIONS ON ARREST OF SHIP IN INDIA

SHIP ARREST IN INDIA

January 2012, Published by Brus Chambers, Advocates & Solicitors, Mumbai, India

Sector: Admiralty, Shipping and Maritime

Shrikant Hathi and Binita Hathi, partners with Indian law firm BRUS CHAMBERS, answers frequently asked questions on arrest of ship in India

1. Is India a signatory to any of the International Conventions on ship arrest? If so, which one?

No, Although the Brussel convention has not been adopted by legislation, the principles incorporated in the International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May 1952 are part of the common law of India and applicable for the enforcement of maritime claims against foreign ships as is held by the Supreme Court of India in *m.v Elisabeth-v- Harwan Investment & Trading Pvt Ltd.*, Goa. The Supreme Court of India in the matter of *m.v. Sea Success I* has also held that the principles underlying the 1999 Geneva Arrest Convention were applicable for ship arrest in India.

2. For what types of claims can you arrest a ship?

The Indian Courts possessing Admiralty jurisdiction have jurisdiction over the following claims and to hear and determine any questions with regard thereto the claims as defined under Article 1 of the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 'or' under Article 1 of the International Convention on the Arrest of Ships, Geneva, March 12, 1999 as setout herein under:

Article 1 of the Brussels Arrest 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 connection 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 agents 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.

Article 1 of the Geneva Arrest Convention

- (a) loss or damage caused by the operation of the ship;
- (b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- (c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- (d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);
- (e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- (f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
- (g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- (h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;
- (i) general average;
- (j) towage;
- (k) pilotage;
- (l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- (m) construction, reconstruction, repair, converting or equipping of the ship;
- (n) port, canal, dock, harbour and other waterway dues and charges;
- (o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

- (p) disbursements incurred on behalf of the ship or its owners;
- (q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- (r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- (s) any dispute as to ownership or possession of the ship;
- (t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
- (u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;
- (v) any dispute arising out of a contract for the sale of the ship.

3. What is the procedure for an arrest?

a. Claimant executes a Power of Attorney normally to a person as may be suggested by the Claimant's solicitor to act on behalf of the Claimant. A format of the said Power of Attorney is normally forwarded by the Claimant's solicitor with the name of the Constituted attorney. The said Power of Attorney is properly executed, notarized and legalised and the original is couriered to the constituted attorney, normally they are employed by the solicitors'. Since time is of essence the Power of Attorney when executed and notarized (pending legalization) is scanned and forwarded for further action. At the time of filing of the Plaint in the court Solicitors' give an undertaking to the court to produce the original when received from the Claimant. The Original Power of Attorney is required to be stamped under the laws of India.

b. Claimant's solicitor takes search of the caveat book for caveats against arrest.

c. Notice is given to the Consul General as per High Court Rules.

d. Claimant's files the Plaint, Undertaking, draft Judges Order, Draft Warrant of Arrest and its affidavit to the court under Admiralty jurisdiction. All the Exhibits and the documents relied are normally filed by way of a separate Compilation of Documents at the time of making an application for Arrest.

e. Urgent application for obtaining order of arrest is moved before the Admiralty Judge, at the time of making the said application Plaint and other pleadings including the draft Judges Order should be produced before the Judge. The Caveat book for caveat against arrest is also produced. Admiralty Judge passes an order in terms of the Judges Order given to court. In some cases Admiralty Judge dictates a separate order for arrest of a vessel. Sometimes Issue of Warrant of Arrest is dispensed with and also an order is obtained to complete service of the court order by fax to all concerned authorities.

f. If Warrant of Arrest is not dispensed with then the court issues the same signed by the Court.

g. The Bailiff effects or completes the service of the Warrant of Arrest or the Order of the court upon all the concerned authorities.

4. How is the Defendant named in an Admiralty Suit?

M. V. XXXXXXXX, vessel flying a xxxxx)
 flag together with her hull, tackle,)
 engines, machinery, paraphernalia)
 and all her appurtenant on board)
 presently lying and being at stream/port)
 and harbour/jetty of xxx, xxx and all)
 persons claiming to be interested)
 in the vessel) ...DEFENDANT.

5. Is it necessary that the ship should be in Indian waters for filing of an Admiralty Suit?

Yes. It is not necessary that the vessel should take berth, the vessel can be anywhere in the Indian territorial waters. An order of arrest of a ship can be obtained from the Bombay High Court and executed anywhere in India but Madras High Court and Ahmedabad High Court has reservations that the ship should be in their respective jurisdiction to file an Admiralty suit in their court.

In Great Pacific Navigation (Holdings) Corporation Ltd –vs- m.v. Tongli Yantai, the Bombay High Court on October 14, 2011 in appeal allowed that an order from Bombay High Court can be executed in any Indian territorial waters and is in agreement with the decision of the learned single judge answering the preliminary issue with regard to the jurisdiction of the court in Geetanjali Woollen Pvt. Ltd. Vs. M.V. X-Press Annapurna And Ors. dated 9th August, 2005 (2005 (6) BCR 31). It was also held by the single judge that the Court can acquire jurisdiction if the writ or if the warrant of arrest is executed on the ship when it arrives within the territorial jurisdiction of this Court. Although the question on jurisdiction was left unanswered by the appeal court in M.V. X-Press Annapurna And Ors. Vs. Geetanjali Woollen Pvt. Ltd, dated 11th March 2011, as it was in their opinion not necessary to decide that question in appeal. In an unreported appeal court judgment, dated 20th July 2001 in M.V. Umang, the Bombay High Court ruled that its admiralty jurisdiction extends throughout the territorial waters of India.

6. Can a ship be arrested if she is already beached for demolition?

Once a ship's Bill of Entry is filed for demolition the ship is no longer considered as a ship and therefore Admiralty action cannot be initiated.

7. Which are the High Courts in India that are vested with Admiralty jurisdiction and which court is most preferred for ship arrest?

The only Courts statutorily empowered to exercise admiralty jurisdiction in India are certain designated High Courts who derive their power pursuant to the Letters Patent. These are principally the High Courts of Bombay, Madras, and

Calcutta and pursuant to the States Reorganisation Act, the High Court of Ahmedabad, Andhra Pradesh.

Bombay High Court is preferred for several reasons as order of Bombay High Court can be executed anywhere in Indian territorial waters while there are restrictions at Gujarat, Madras, Calcutta and Andhra Pradesh High Courts.

a. Bombay High Court (Mumbai) is vested with admiralty jurisdiction. A ship anywhere in Indian territorial waters can be arrested by order from Bombay High Court.

b. Calcutta High Court (Kolkata) is vested with admiralty jurisdiction. Only ship at West Bengal waters can be arrested by order from Calcutta High Court.

c. Madras High Court (Chennai) is vested with admiralty jurisdiction. Only vessels at Tamil Nadu waters can be arrested by order from Madras High Court.

d. Gujarat High Court is vested with admiralty jurisdiction. Only vessels at Gujarat waters can be arrested by order from Gujarat High Court and also cause of action or a part of cause of action should have arisen within jurisdiction of the court over and apart from the vessel being in Gujarat waters.

e. Andhra Pradesh High Court is vested with admiralty jurisdiction. Only vessels at Andhra Pradesh waters can be arrested by order from Andhra Pradesh High Court.

f. Allahabad High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

g. Chattisgarh High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

h. Delhi High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction.

i. Gauhati High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

j. Himachal Pradesh High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

k. Imphal High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

l. Jammu & Kashmir High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

m. Jharkhand High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

n. Karnataka High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

o. Kerala High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

p. Madhya Pradesh High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

q. Orissa High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

r. Patna High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

s. Punjab & Haryana High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

t. Rajasthan High Court is not vested with admiralty jurisdiction. There is no case filed in this court invoking admiralty jurisdiction

8. Can an Indian flag vessel be arrested?

Ship flying any flag can be arrested.

9. Can a vessel be detained without going to Court?

Under section 443 (2) of the Indian Merchant Shipping Act a foreign ship can be detained that has occasioned damage. This is to temporarily detain the vessel from departing from Indian waters but an application should be made to the High Court obtaining order to that effect.

10. What is action in rem and action in personam?

Action in rem is an action against a thing, good or against certain property (ship or cargo) rather than a person. By proceeding against a res a plaintiff obtains security for his claim, the res may be arrested by the court and sold to satisfy a judgment in rem against it. An action may be brought in rem provided the property proceeded against (the res) is within the jurisdiction.

An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam.

It is however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not

merely the parties to the writ but everybody in the world at large who might dispute the plaintiff's claim.

It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to the "owner and parties interested in the property proceeded against." The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right in rem.

A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by forced sale. In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights in rem (Supreme Court Act, 1981). If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, she is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent court.

The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered his appearance, the proceedings continue in personam.

All actions in the civil law- whether maritime or not- are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe a competent tribunal with jurisdiction over the owner in respect of any claim. Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownerships as the res in question.

Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the court to devise procedural rules by analogy and expediency. Action in rem, as seen above, were resorted to by courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnish security for the release of the res; or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entering a decree and executing the same by

sale of the res. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice. To the courts of the "civil law countries" in Europe and other places, like problems seldom arise, for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action in rem and an action in personam.

Section 35 of the Admiralty Courts Act, 1861, 24 Vict. c.10 reads "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam. [Jurisdiction of the Court]".

An action in personam is an ordinary action as in common law courts.

In Halsbury's Laws of England, the nature of action in rem and the nature of action in personam at para 310 is stated to be as "Nature of actions in rem and actions in personam. - An action in rem is an action against the ship itself but the view that if the owners of the vessel do not enter an appearance in the suit in order to defend their property no personal liability can be established against them has recently been questioned. It has been stated that, if the defendant enters an appearance, an action in rem becomes, or continues also as, an action in personam; but the Admiralty jurisdiction of the High Court may now in all cases be invoked by an action in personam, although this is subject to certain restrictions in the case of collision and similar cases, except where the defendant submits or agrees to submit to the jurisdiction of the Court.

The foundation of an action in rem is the lien resulting from the personal liability of the owner of the res. Thus an action in rem cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant's ship, or for damage done at a time when the ship was in the control of third parties by reason of compulsory requisition. On the other hand, in several cases, ships allowed by their owners to be in the possession and control of charterers have been successfully proceeded against to enforce liens which arose whilst the ships were in control of such third parties.

The defendant in an Admiralty action in personam is liable, as in other actions in the High Court, for the full amount of the plaintiff's proved claim. Equally in an action in rem a defendant who appears is now liable for the full amount of the judgment even though it exceeds the value of the res or of the bail provided. The right to recover damages may

however be affected by the right of the defendant to the benefit of statutory provisions relating to limitation of liability."

11. What is maritime lien?

Only a limited class of maritime liens are recognised, the categories are

- i. any claim for damage done by any ship;
- ii. any claim for damage received by any ship or sea-going vessel;
- iii. any claim in the nature of salvage services;
- iv. any claim by a master or crew for wages, etc;
- v. any claim by a master in respect of disbursements;
- vi. any claim arising out of bottomry

A maritime lien adheres to the ship (res), from the time that the facts happened which gave the maritime lien, it travels with the ship (res) and is binding on the ship until it is discharged and it is immaterial as to who is in possession of the ship (res) even though he may be innocent of any liability to the lien holder and had no notice of the lien. Maritime lien continues until it is discharged, either by being satisfied or from the laches of the owner, or in any other way which, by law it may be discharged. It commences and there it continues binding on the ship until it comes to an end.

Action in rem and admiralty jurisdiction can be invoked for maritime lien.

12. What do you mean by a ship and sistership?

The word "vessel" was substituted for "ship" and is defined as including "any ship or boat, or any other description of vessel used in navigation," whilst "ship" includes any description of vessel used in navigation not propelled by oars. This latter definition does not exclude things not specified, so that it will include any vessel used in navigation not habitually propelled by oars, and will include a hopper barge not navigable without external assistance where it was held that a hopper barge with rudder and navigating lights but without means of propulsion, has been held to be a "ship". By the Judicature (Consolidation) Act, 1925, the expression "ship" is defined as including any description of vessel used in navigation not propelled by oars, and the statutory jurisdiction of the High Court over salvage claims for services rendered to a ship would therefore appear to be confined to services rendered to vessels not propelled by oars. The Admiralty Court Act, 1861 defines "Ship" under section 2 of the act:- "Ship" shall include any description of vessel used in navigation not propelled by Oars.

In Steedman -v- Scofield [1992] 2 Lloyd's Rep .163 (Sheen J.) Mr. Justice Sheen said, "To my mind the word "boat" conveys the concept of a structure, whether it be made of wood, steel or fiberglass, which by reason of its concave shape provides buoyancy for the carriage of persons or goods. Thus a lifeboat differs from a life raft in that the boat derives its buoyancy from its shape, whereas a raft obtains its buoyancy from some method of utilizing air receptacles."

"a vessel is usually a hollow receptacle for carrying goods or people. In common parlance "vessel" is a word used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transportation on water."

In Steedman -v- Scofield Mr. Justice Sheen considered what was meant by the phrase "used in navigation" and he said "Navigation is the nautical art or science of conducting a ship from one place to another. The navigator must be able to determine the ship's position and to determine the future course or courses to be steered to reach the intended destination. The word "navigation" is also used to describe the action of navigating or ordered movement of ships on water. Hence "navigable waters" means waters on which ships can be navigated. To my mind the phrase "used in navigation" conveys the concept of transporting persons or property by water to an intended destination. A fishing vessel may go to sea and return to the harbour from which she sailed, but that vessel will nevertheless be navigated to her fishing grounds and back again. "Navigation" is not synonymous with movement on water. Navigation is planned or ordered movement from one place to another."

Under the so called "Dead vessel" doctrine, a vessel permanently withdrawn from use for navigational purposes is not a vessel, in terms of admiralty jurisdiction. However, a vessel is not a "dead vessel" merely because it is not actively engaged in trade or commerce, where arrangements have been made to alter it to fit it for an intended maritime service. In addition, a ship may be a "live ship," not a "dead vessel," when it is in dry dock.

An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sistership" i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

In m.v. Mariner IV -v- Videsh Sanchar Nigam Limited decided on 15th December 1997 by the appeal court of the Bombay High Court observed that "In view of the decision of the in m. v. Elizabeth, we are of the clear view that the High Court does have jurisdiction to arrest a "sister ship" for securing any maritime claim."

The Appeal Court of the Bombay High Court in m.v. Sea Success I -v- Liverpool and London Steamship Protection and Indemnity Association Ltd., are of the view that a subsidiary company and a parent company of the subsidiary company are two separate entity. The Appeal court has the following view, "In maritime law worldwide ownership of a ship is denoted by the concept of the owner of the shares in a ship..... Fundamentally each company incorporated in law is a distinct legal entity and mere incorporation of 100% subsidiary company by its parent Company cannot lead to the conclusion that the assets of the former belong to and are owned by parent company.The action in rem under admiralty jurisdiction has been initiated by the plaintiffs against the defendant no.1 vessel Sea Success -I on the basis of allegations of it being a sister ship i.e. a ship

in the same beneficial ownership as the ships " Sea Glory" and " Sea Ranger" in regard to which the claim arose. In case of m.v.Mariner IV, 1998 (1) Mah. L.J. 751, the Division Bench of this Court held, "The admiralty jurisdiction could be invoked not only against the offending ship in question but also against a sister ship in regard to which the claim arose". The ships are deemed to be in the same ownership when all the shares are owned by the same person or persons (Article 3(2) of 1952 Brussels Arrest Convention).

The Appeal Court further viewed that "...the defendant no. 1 vessel is a sister ship of the two vessels " Sea Glory" and " Sea Ranger" in view of the beneficial ownership, management and control of all three vessels having vested in defendant no. 2. The basis of this deduction by the plaintiff in the plaint is that the defendant no. 1 vessel is owned by defendant no. 2 through its 100% subsidiary S.S. Shipping Corporation Inc., Monrovia"....the law permits the plaintiff to arrest a ship which is beneficially owned by the defendant no. 2 then the plaintiff is required to plead the material facts which discloses the beneficial ownership of the defendant no. 2 over the ship which is to be arrested and an inference drawn by itself in the pleading about beneficial ownership which is legally unsustainable cannot be said to disclose a cause of action. It is true that while ascertaining whether the plaint discloses a cause of action or not, the court is not required to make any enquiry into doubtful or complicated questions of fact or law and that the court proceeds with the assumption that the facts stated therein true but then those facts as they stand must disclose plaintiffs right to sue".

The Supreme Court of India in the matter of m.v. Sea Success I has stated that "...we do not intend to delve deep into the questions as to whether the two ships named hereinabove are the sister ships of the respondent No. 1 Vessel or whether the requirement of law as regard ownership of a ship in the Respondent No. 1 as beneficial owner has been fulfilled or not. Such issues must be considered at an appropriate stage".

13. What is the limit of Indian territorial waters?

Under section 3 (2) of The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976, the limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.

14. What do you mean by necessaries supplied on ship?

"Necessaries" as specified under the provision of the Admiralty Courts Act, 1861 reads as:

"5. The High Court of Admiralty shall have Jurisdiction over any Claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales : Provided always, that if is any such Causes the Plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or

expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court. [As to claims for necessaries]."

Articles 1(k) and 2 of the 1952 Brussels Convention as regards "Maritime Claim", are as under:

1. "Maritime Claim" means a claim arising out of one or more of the following:

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

2. 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, but in respect of no other claim; but nothing in this Convention shall be deemed to 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."

The term "necessaries" had not been defined in the Act of 1861. It was given a meaning by judicial pronouncements.

It stands accepted that having regard to the legislative and executive policy, England and Wales never considered the arrears of insurance premium as a 'necessary'. The Courts of England further maintained a distinction between a maritime claim and maritime lien. English Courts proceeded on the premise that for the purpose of considering as to whether any necessary has been supplied to a ship or not must have a sufficient and direct connection with the operation of the ship.

"The definition of the term "necessaries" given by Lord Tenterden in *Webster v. Seekamp* (4 B. & Ald. 352) adopted and applied in proceedings in Admiralty. Semble, there is no distinction between necessaries for the ship and necessaries for the voyage."

15. What do you mean by one-ship company?

It has long been the practice in the shipping business to arrange for several ships which are financed by a common source and managed or operated as a fleet, to be registered in the names of separate companies whose only asset is the particular ship registered in its name. Often such companies will be registered in a country where the identification of shareholders in companies is not a matter of public record. This arrangement has become known colloquially as the "one-ship- company" and has been a source of irritation to cargo interests and others who consider that they are thereby deprived of the benefit of the sister ship provisions. However, it is clear that the courts have recognised that the "one-ship company" is a legitimate business arrangement, and in the absence of evidence of fraud it is not permissible to lift the corporate veil in order to look behind the "one-ship company" structure for the purposes of identifying the beneficial owner of the company and say that the beneficial owner of the company is the

beneficial owner of the ship. In law the beneficial owner of the ship is the company, which is a separate and distinct legal entity or person from the beneficial owner of the company."

16. Can an Admiralty court pass an order of arrest even if the vessel is outside that state jurisdiction but within Indian territorial waters?

Yes, An order of arrest of a ship can be obtained from the Bombay High Court and executed on the vessel anywhere in Indian territorial waters but Madras High Court and Ahmedabad High Court has reservations that the ship should be in their respective jurisdiction to file an Admiralty suit.

17. What is the Effect of arrest of ship?

The effect of arrest is that it constitutes the ship or other property as security in the hands of the court for the claim in the action and this security cannot be defeated by the subsequent insolvency of the owner of the arrested property. The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment.

Once the warrant for arrest has been executed, the property is arrested and is in the custody of the Sheriff/ Marshal on behalf of the court. Interference by any party with the arrest process such as removing the property to be arrested with knowledge that an arrest has been issued is a contempt of court, this includes any interference with the custody of the property after arrest such as moving the property within the jurisdiction without authority, or removing it from the jurisdiction, as was held in *The "Jarlinn"* [1965] 1 W.L.R. 1098 and also in *The "Abodi Mendi"* [1939] 178.

The arrest of a ship is a defining moment in its life. Immediately upon arrest the ship becomes security in the custody of the court to abide the result of the proceedings giving rise to the arrest. Once arrested, the ship remains in the custody of the court until released upon the provision of alternative security or sale by the court. As Sheen J explained in *The Falcon*:

A ship is usually arrested in order to provide security for the plaintiff's claim. The extent of that security is measured by the net proceeds of the sale of the vessel. The amount of the net proceeds of sale is arrived at by deducting from the gross proceeds of sale the expenses of that sale and other expenses incurred by the Sheriff/ Marshal and the necessary costs of the plaintiff in whose action the ship was arrested up to the moment of arrest and all subsequent expenses of maintaining the arrest up to and including the completion of the sale of the ship.

A warrant of arrest on a ship covers everything belonging to it as part of its equipment, even items which are physically detached from it, but not items which do not belong to the ship owner such as the personal property of the master and crew or the luggage of a passenger.

A ship may be arrested but the cargo on board her is not under arrest, or cargo is arrested but the ship in which it is laden is not. If a ship is to be arrested while she is in the course of discharging her cargo, the Sheriff/ Marshal will not stop the discharge operations unless the arrest is in respect of the cargo. When cargo is arrested the ship owners can request the Sheriff/ Marshal to take the appropriate steps to enable the ship to be discharged.

When arrest of a ship in a port causes considerable and continuing disruption to the operation of the port and the port authority had to turn away other ships so harming its reputation and causing its financial loss in such circumstances the court has inherent jurisdiction to allow a party to intervene if the effect of an arrest is to cause that party serious hardship or difficulty or danger. The court may pass directions to remove the ship to a safe berth in such other place as he shall think appropriate.

A ship is arrested by the Sheriff/ Marshal acting as an officer of the court. The ship comes into the custody, but not the possession, of the Sheriff/ Marshal. The position was described by Lord Atkin in *Government of the Republic of Spain v SS "Arantzazu Mendi"*.

The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Sheriff/ Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all remedies which are based on possession.

Once arrested, a ship cannot be moved from the place of arrest without the authority of the Sheriff/ Marshal. To move the ship without such authority, whether to another place within the jurisdiction or to flee the jurisdiction, constitutes contempt of court. Similarly, any interference with the ship while under arrest, whether or not it involves any movement or attempted movement of the ship, will constitute contempt.

The duty of the Sheriff/ Marshal is to ensure the safe custody and preservation of the ship.

The Sheriff/ Marshal shall, unless the court otherwise orders, take all appropriate steps to retain safe custody of, and to preserve, the ship or property, including removing from the ship, or storing, cargo that is under arrest; removing cargo from a ship that is under arrest and storing it; removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest; and moving the ship that is under arrest.

The Sheriff/ Marshal owes no duty to the crew on board as such.

18. How quickly can an arrest be effected?

If court passes an order allowing that service can be effected by fax then in such case all concerned authorities such as ports and customs are notified the same day by fax depending on availability of the order passed by the Judge, but the authenticated copy of the order of arrest should be hand-delivered by the Bailiff of the court with a cover letter. Normally a junior lawyer or an office clerk is accompanied by the Bailiff for service on all concerned authorities and on the vessel.

19. What expenses are incurred?

Court fees: variable but the maximum in the Bombay High Court is ` (INR) 3,00,000 (approx USD 6600) exact amount can be calculated using the link

<http://bruschambers.com/info/calculator.htm>

The Court has a discretionary power to accept or reject legal expenses incurred prior to filing of the claim, it is therefore advisable to add approx USD 8000 - 10000 to the Particulars of Claim.

Lawyers' fees: variable

There are expenses/disbursements such as institution fees, photocopying, transport, travel and stay (if required), expenses at the department, port and bailiff and other miscellaneous expenses.

20. How do you obtain a ship's release?

- i. at the request of the claimant, before an appearance in person or a vakalatnama (appearance) is filed by the opponent; or
- ii. on the opponent paying into Court the amount claimed in the suit; or
- iii. on the opponent giving such security for the amount claimed in the suit as the Court may direct; or
- iv. on any other ground that the Court may deem just.

A release can usually be obtained promptly provided the requirements for release are satisfied. If the matter is settled out of court without opponents' appearance then in such case depending on the Claimants' instruction to Claimant's Solicitor, search of the caveat book for caveats against release will have to be taken and produced before the Judge at the time of obtaining order of release of the vessel. Normally Release Instrument is dispensed with by the court; if the same is not dispensed with then the Release Instrument will have to be issued by the court. Poundage is payable at 1% of the claim amount or the settled amount, whichever is less before the vessel is released.

21. Can you arrest a ship to obtain security for both court judgments and arbitral awards?

Yes

22. Can bareboat-chartered ships be arrested?

Yes, Whether a bareboat-chartered ship can be arrested depends upon the type of claim being brought.

23. Can time-chartered ships be arrested?

Yes, Whether a time-chartered ship can be arrested also depends upon the type of claim being brought.

24. Can legal sister ships be arrested?

Yes, An action in rem lies in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sistership" i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

In m.v. Mariner IV -v- Videsh Sanchar Nigam Limited decided on 15th December 1997 by the appeal court of the Bombay High Court observed that "In view of the decision of the in m. v. Elizabeth, we are of the clear view that the High Court does have jurisdiction to arrest a "sister ship" for securing any maritime claim."

25. Is counter-security required? If so, in what form and how much?

No, But the court has discretionary power to pass order for counter security if required.

26. Effect of Arbitration clause (if any) on arrest?

The Supreme Court of India in SLP (Civil) no.17183/ 1999, the Owners & Parties Interested in m.v "B.C" & Anr -vs- State Trading Corporation of India Ltd & Anr has held that "On a careful consideration of the entire matter we are of the view that there is no good ground or acceptable reason why the intention of the parties to incorporate the arbitration clause in the Charter Party Agreement in the Bill of Lading should not be given effect to. The High Court was not right in rejecting the prayer of the appellants for stay of the suit...".

A claim which is brought in the Admiralty Court by an action in rem is subject to an arbitration agreement so that if an action were commenced the court would stay the proceedings to arbitration upon the application of the defendant.

27. What maritime liens are recognised?

As is held by the Supreme Court of India in the matter of m.v. Al Quamar -vs- Tsaviris Salvage (International) Ltd & Ors, this Court spoke of two attributes of maritime lien as noticed herein before. The International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages at Brussels in 1967 defined the maritime lien to be as below:

- a. wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;
- b. port, canal and other waterways and pilotage dues;

- c. claims against the owner in respect of loss of life or personal injury occurring, whether on land or water, in direct connection with the operation of the vessel;
- d. claims against the owner based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water in direct connection with the operation of the vessel;
- e. claims for salvage, wreck removal and contribution in general average.

Incidentally, the Admiralty Court Act, 1861, read with the International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 1926 read with Brussels Arrest (Of Seagoing Ships) Convention 1952 and Brussels Maritime Liens Convention, 1967 clearly indicates that a claim arising out of an agreement relating to the use and/or hire of the ship although a maritime claim would not be liable to be classified as maritime lien.

28.. How soon after the arrest is effected will the claimant have to take action on the merits?

There is no delay between the arrest and the action on the merits.

29. Will the courts that ordered the arrest accept jurisdiction over the substantive claim?

In general, yes, unless there is a valid jurisdiction or arbitration agreement between the parties to the contrary.

30. Do the courts acknowledge wrongful arrest? If so, what is the test?

Yes. The ship-owner must prove that the action was so unwarrantedly brought as to imply malice or gross negligence on the part of the Plaintiff and must show and establish malice and willful conduct.

31. Do the courts acknowledge the piercing and lifting of the corporate veil?

Yes, but the courts will only lift the corporate veil in limited circumstances e.g. where the corporate structure is used to evade an existing legal obligation or to defraud.

In *Great Pacific Navigation (Holdings) Corporation Ltd –vs– m.v. Tongli Yantai*, the Bombay High Court on October 14, 2011 in appeal pierced the corporate veil to establish beneficial ownership.

32. Is it possible to have a ship sold prior to obtaining a judgment? If so, how long does such a sale take?

Yes, but the court will only make an order for auction sale if there is a good reason e.g. where the costs of maintaining the arrest may exceed the value of the claim, thereby diminishing the value of the claimant's security, depreciation of vessel or there is a danger for the vessel to sink or cause casualty. Interim application will have to be taken out for sale of the vessel, normally advertisement is given in two Indian newspaper in Lloyds List and

Tradewinds.

33. Can you arrest foreign State owned vessel?

If the ship belongs to Government of Foreign State, in that event consent of the Central Government in India would be required to proceed against the vessel and its owners.

34. What is the difference in respect to arresting a ship for a maritime claim and a maritime lien?

A ship could be arrested in respect of a maritime claim or to enforce a maritime lien. Maritime lien is extended only to following five heads of claims. They are:

- a. Damage done or received by a ship
- b. Salvage
- c. Seamen's wages
- d. Master's wages and disbursements
- e. Bottomary and Respondentia.

35. Does India recognise maritime liens? Under which International Convention, if any?

There is no domestic statute dealing with the concept of maritime lien. However, only those claims mentioned in Answer 11, 19 and 26 hereinabove have been recognised judicially.

36. What are the duties and responsibilities of the Sheriff/ Marshal towards crew on board after arrest of ship?

The Sheriff/ Marshal owes no duty to the crew on board as such. The relationship of the Sheriff/ Marshal to the crew will depend upon the circumstances as they affect the discharge of the Sheriff/ Marshal's duty to retain custody of, and to preserve the ship.

The arrest of a ship does not operate to determine the employer/employee relationship between the owners or demise charterers and the master and crew. Nor does it follow that the issue of a writ/ warrant against the ship by the master or crew to recover outstanding wages automatically determines the employment relationship. It will be a question of fact in each case whether or not there is conduct on the part of the owner amounting to repudiation of the employment contract, for example, failure to pay wages and allowances which are owing, which is accepted by the crew as terminating the relationship.

If the employment relationship is terminated, then crew members may seek to recover wages up until the termination and thereafter damages for breach of contract calculated by reference to the wages lost, the cost of sustenance for a reasonable time at the place of termination pending repatriation to their home port, and the cost of repatriation. Such a claim ranks after the Sheriff/ Marshal's claim against the ship, substitute security, or proceeds of sale for the Sheriff/ Marshal's charges and expenses, the plaintiff's costs of the action, and other claims having priority.

If the crew continue in employment after arrest, the ongoing liability for wages reduces the value of the ship or proceeds of sale to satisfy claims which have lesser priority than the claims of the master and crew. Although the continued engagement by the owner of the crew will give them a right to wages and entitlements, accommodation on board and the right to sustenance, those rights are not enforceable against the Sheriff/ Marshal. However, the Sheriff/ Marshal may, if the Sheriff/ Marshal considers it is necessary to the safety of the ship or to preserve it, pay wages and provide accommodation and sustenance to the crew on board for such time following arrest of the ship as the Sheriff/ Marshal considers is necessary. With leave of the court the Sheriff/ Marshal may also provide minimal sustenance in order to avoid hardship to the crew.

The presence of the crew on board is justifiable only for so long as it does not interfere with the ship or the Sheriff/ Marshal's custody of it and does not increase the Sheriff/ Marshal's costs of maintaining custody of the ship and preserving it. For example, if a ship can conveniently be laid up as a dead ship pending trial or the provision of security, a crew will not be permitted to remain on board where that would involve unnecessary expense in providing power or access to the ship to enable the crew to live on board.

What happens if the crew refuse to leave or prevent the Sheriff/ Marshal from laying up the ship if that is the appropriate course to follow in the circumstances? Such conduct is prima facie contempt of court for interfering with the Sheriff/Marshal's custody of the ship. However, the cases do not suggest that crew members are lightly dealt with for contempt.

A refusal by the master or crew to leave a ship is not uncommon. This is particularly so when a ship needs to be moved within the port or to another port or where the ship is to be sold pendente lite. In both cases, there is an attempt to force the Sheriff/ Marshal or some other party to pay the outstanding claims for the master and crew and their costs of repatriation. In the case of a sale pendente lite, there is often the hope that a purchaser will re-engage the crew and thus will provide them with continuity of employment. How the issue of an obdurate crew is resolved can have significant consequences upon the fund ultimately available to satisfy the plaintiff's costs and claim and the claims of others against the ship.

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

Order could be obtained within 24-48 hours (excluding Public Holidays) on receipt of all the documents/papers including a Power of Attorney. The Power of Attorney has to be executed in favour of any person in India who is not the lawyer dealing with the subject matter. The order of arrest could also be obtained even if the Court is not working.



SHRIKANT HATHI
Partner Mumbai Office
Advocate & Solicitor
BCom., LL.B., LL.M., Solicitor (India & United Kingdom),. PhD.
Advocate Bombay High Court
Advocate Supreme Court of India
Advocate on Record Supreme Court of India
Solicitor England and Wales (Non-Practicing)

Practising law since 1992

Brus Chambers
Advocates & Solicitors
8, Rajabhadur Mansion, 3rd Floor,
Ambalal Doshi Marg, Fort, Mumbai 400001, India
Ph.: +91-22-22659969,
Mobile: +91-9769946865,
Fax: +91-11-2372 3909,
Email: shrikant@bruschambers.com



BINITA HATHI
Partner Mumbai Office
Advocate & Solicitor
BCom., LL.B., LL.M., Solicitor (India)
Advocate Bombay High Court
Advocate Supreme Court of India
Advocate on Record Supreme Court of India

Practising law since 1992

Brus Chambers
Advocates & Solicitors
8, Rajabhadur Mansion, 3rd Floor,
Ambalal Doshi Marg, Fort, Mumbai 400001, India
Ph.: +91-22-22659969,
Mobile: +91-9769946864,
Fax: +91-11-2372 3909,
Email: binita@bruschambers.com