

## ARREST OF A VESSEL AS A SECURITY FOR CREDITOR'S CLAIMS IN MARITIME DISPUTES

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Maritime freight transport plays an important role in international trade. With heightened pressure from the west sanctions, the risks of maritime disputes, including the one arising from charterparties, maritime liens, cargo loss and damage, are increasing. One of the means of providing additional security to the creditor, as well as a potential bargaining chip, is a maritime arrest warrant, the procedure for which is characterized by complex international and national regulations. This alert will cover the main requirements and procedure for the maritime (vessel) arrest, as a remedy in maritime disputes.

### Executive Summary

- The procedure and grounds for arresting a vessel is governed by a combination of international and national law. The applicable substantive and procedural rules are determined with respect to each specific case.
- Arrest is carried out in the context of maritime freight transport solely for maritime claims, i.e. claims arising from legal relationships governed by maritime law: from the charterparty, from rights over the vessel, from compensation for damages caused by the vessel, etc.
- Arrest is permitted only within the territorial sea of the state in which the arrest is sought (12 nautical miles from the coast of the state).
- It is permissible to arrest not only the vessel to which the maritime claim is directly related, but also other vessels belonging to the same owner in respect of which the maritime claim has arisen.

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- The arrest of a vessel in one jurisdiction does not prevent the merits of the dispute from being considered by an international commercial arbitral tribunal or another tribunal agreed by the parties. Conversely, an arbitration clause or choice of forum clause does not prevent a vessel from being arrested in another jurisdiction.

### International Framework for Vessel Arrest

The "arrest" of a vessel refers to its detention for the purpose of securing a claim. The arrest of a vessel can also be one of the most effective mechanisms for obtaining cargo that the consignee, for one reason or another, could not otherwise obtain.

The main international act regulating arrest of vessels is the *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (Brussels, 1952)* (hereinafter referred to as the "**1952 Convention**"), which applies to 75 states, including Russia, France, Great Britain, Italy, Denmark, Hong Kong and other states. The USA is not a party to the 1952 Convention. A vessel is arrested under the 1952 Convention if the arrest is made by a court of a contracting state and the arrested vessel flies the flag of the contracting state.<sup>1</sup> If the arrested vessel does not fly the flag of a contracting state, the law of the forum state applies, which can permit arrest on any claim, not just those enshrined in the 1952 Convention (e.g. Germany).

Within the meaning of the 1952 Convention, arrest of a vessel means detention of a vessel under a court order to secure a *maritime claim*, but does not include detention of a vessel to enforce a court order.<sup>2</sup> Other claims, which are not maritime claims, cannot be secured by arrest of a vessel, which is also the case in the Russian jurisdiction.<sup>3</sup> For example, a vessel cannot be arrested to secure a claim under a contract for the sale of marine equipment.

The 1952 Convention establishes a closed list of maritime claims, including claims arising out of the following circumstances:<sup>4</sup>

- causing harm to a person's life or health while operating a vessel;
- breach of contract of carriage of goods or charterparty;

- loss of or damage to cargo;
- general accident;
- dispute concerning ownership of a vessel;
- dispute concerning mortgage over a vessel, etc.

The *International Convention on Arrest of Ships (Geneva, 1999)* (hereinafter the "**1999 Convention**"), to which 13 states are parties, including Denmark, Finland, Norway, Spain and Turkey, provides a similar definition of arrest of a vessel. The 1999 Convention, unlike the 1952 Convention, applies irrespective of the flag of the vessel if the arrest is sought in the jurisdiction of a contracting state.<sup>5</sup>

The 1999 Convention also extends and clarifies the list of maritime claims admissible for arrest,<sup>6</sup> which should be taken into account when applying for arrest of a vessel in a court of a state party to the 1999 Convention. For example, the convention applies to any dispute arising out of contracts for the sale of a vessel, not just to disputes over ownership.<sup>7</sup>

While both conventions (1952 and 1990) regulate the general grounds for the arrest of vessels, the procedure for making such arrest is governed by the national law of the country in which it is sought. In the event that neither the 1952 Convention nor the 1999 Convention applies, the law of the state of the court in which the arrest is sought will determine the grounds for arrest.

### Criteria for Arrest

Irrespective of the convention applicable to the claim for the arrest, the jurisdiction of the state of the vessel where arrest is sought is limited to the internal waters and territorial sea of that state in accordance with the *United Nations Convention on the Law of the Sea (Montego Bay, 1982)* (the "**1982 UN Convention**", together with the 1952 Convention and the 1999 Convention – the "**Arrest Conventions**").

The boundary of the territorial sea is established by a state at no more than 12 nautical miles from the baselines.<sup>8</sup> As a rule, the baselines run along the line of highest tide off the coast of the state concerned,<sup>9</sup> but other special rules of the 1982 UN Convention can also apply.<sup>10</sup> Consequently, when preparing to arrest a vessel, it is necessary to consider separately the coastal state's

<sup>1</sup> Art. 2 of the 1952 Convention.

<sup>2</sup> Art. 1 para. 2 of the 1952 Convention.

<sup>3</sup> Paragraph 2 of Art. 388 CMT RF; [Decision of the AC Far Eastern District from 04.02.2022 in case N A59-1514/2019](#); [Decision of the AC Far Eastern District from 06.08.2020 in case N A51-1534/2020](#).

<sup>4</sup> Art. 2, para. 1, of the 1952 Convention.

<sup>5</sup> Art. 8, para. 1, of the 1999 Convention.

<sup>6</sup> Art. 1, para. 1, of the 1999 Convention.

<sup>7</sup> Subp. "v" para. 1 of Art. 1 of the 1999 Convention.

<sup>8</sup> Art. 4 of the 1982 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>9</sup> Art. 5 of the 1982 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>10</sup> For example, the determination of baselines of states on archipelagos or with indented baselines (Articles 6-7 of the 1982 UN Convention).

decisions on baselines in order to determine correctly whether the vessel is within the territorial sea. Should the vessel fall outside the territorial sea of the state in which the arrest is claimed, it would be impossible to arrest it.

A vessel can only be arrested on the basis of a judgement of a court or other competent judicial authority, if the Arrest Conventions apply.<sup>11</sup> States that are not parties to the Conventions can provide for other arrest procedure, including through administrative proceedings. The jurisdiction within the state in which the arrest is sought is determined by the national law of that state.

Importantly, the holder of a maritime claim against the owner of a vessel has the right to claim the arrest not only of the vessel involved in the dispute, but also of any vessel owned by the debtor (with the minor exception of certain subtypes of maritime claims).<sup>12</sup>

The application for arrest must be made in accordance with the requirements of the relevant jurisdiction (and/or applicable Arrest Conventions) and should be founded. In the event of a subsequent wrongful arrest, the applicant can be required to pay compensation to the owner of the vessel. The rules for calculating are determined by the law of the state of the court.<sup>13</sup>

### **Arrest Procedure**

As explained above, procedure for the vessel arrest is provided by national laws of each state. To give you a better picture how vessel arrest works, we will examine a detailed arrest procedure using the example of one of the key jurisdictions for maritime transport in the Asia-Pacific region, India.

#### 1. Applicable law

India is neither a party to the 1952 Convention, nor a party to the 1999 Convention. Consequently, the grounds and the procedure for arrest, as well as the need for counter-security are governed by Indian domestic law, namely the *Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017* (hereinafter referred to as the "**Maritime Act 2017**") at the federal level and by acts of separate Indian states, which may be in addition to (but in any case cannot be in conflict with) the Maritime Act 2017.

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<sup>11</sup> Art. 4 of the 1952 Convention, Art. 2 para. 1 of the 1999 Convention, Art. 388 para. 1 of the CMR of the Russian Federation.

<sup>12</sup> Article 3(1) of the 1952 Convention; Article 3 of the 1999 Convention.

<sup>13</sup> Art. 6 of the 1952 Convention; Art. 6 of the 1999 Convention; Art. 393 of the CMR; *Francesco Berlingieri, Berlingieri on Arrest of Ships. A Commentary on the 1952 and 1999 Arrest Conventions*, 5<sup>th</sup> ed., Informa, 2011, §16.01-16.59.

#### 2. Nature of the claim

Although India is not a party to the Arrest Conventions, Indian law likewise allows for the arrest of a vessel only based on maritime claims: disputes arising out of ownership over the vessel, various charter contracts, recovery for damages caused by the vessel, etc.<sup>14</sup>

#### 3. Location of the vessel

As stated above, the right of a state to arrest a vessel can only be exercised within the territorial sea of a state. India is a party to the 1982 UN Convention and, thus, defines the territorial sea under the *Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976* to a maximum limit of 12 nautical miles from the baselines of the 1982 UN Convention (which applies to 169 participants).<sup>15</sup> This rule is also an international custom and is therefore binding on all countries in the international community (not just those that have signed and ratified the 1982 UN Convention).

Consequently, as a general rule, it must be determined whether the vessel is closer than 12 nautical miles from shore.<sup>16</sup>

#### 4. Competent court

If the vessel is located within the territorial sea of India, it is necessary to determine which Indian court has jurisdiction over the application for the arrest of the vessel. The High Courts of the states to whose territory the relevant segment of the territorial sea adjoins<sup>17</sup> have jurisdiction to arrest vessels. For example, if a vessel is in the Gulf of Cambay, the competent court would be the Gujarat High Court.

#### 5. Arrest application and its consideration by the court

An application for arrest with evidence of a maritime claim should be filed with the appropriate High Court of India. The law allows the application for arrest to be heard with or without summons (*ex-parte*). In practice, the second option prevails, as prior notification of the application for arrest to the debtor could enable him to remove the vessel from the jurisdiction of the state.

The court could also require the applicant to provide an *unconditional undertaking to pay* or other sufficient counter-collateral in case it is necessary to compensate for losses due to wrongful arrest.<sup>18</sup> By filing an application for arrest with the court, the applicant undertakes as part

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<sup>14</sup> Art. 4 of the Maritime Act 2017.

<sup>15</sup> Art. 3(3) of the Law on Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones 1976.

<sup>16</sup> The baselines cannot coincide with the coastline. The territorial sea area near indented coastlines and near archipelagos should also be investigated separately.

<sup>17</sup> Art. 3 of the Maritime Act 2017.

<sup>18</sup> Article 11 of the Maritime Act 2017.

of the application to pay compensation to the owner of the arrested vessel, if the arrest is found to be wrongful (and the applicant's bad faith is proven).

The question of the good / bad faith of the applicant is of great importance in determining damages for wrongful arrest under Indian law, which followed English law approach in this respect. The good faith of the applicant in submitting the application is assessed separately while determining the applicant's liability for the wrongful arrest of a vessel – the applicant would be liable for damages arising from the wrongful arrest only if it is proven that he intended in bad faith to injure another person by arresting his vessel.<sup>19</sup> The mere fact that the claim is not sufficiently founded, in the absence of evidence of bad faith, does not in itself render the applicant liable to the defendant for such damages.

Interestingly, this is not the case under Russian law. In Russia, if the court determines that the arrest was unlawful, the applicant is still obliged to compensate the defendant for any losses incurred as a result of such wrongful arrest. The applicant's good faith in filing an application for arrest is irrelevant, as the liability of a good faith applicant in such a case will not differ in any way from the liability of a bad faith applicant.

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<sup>19</sup> Decision of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 14.09.2015 No 307ES15 3663 in case No A5617785/2014.

## 6. Merits of the dispute

As a general rule, Indian courts are competent to hear a dispute from a maritime claim on the merits after arrest,<sup>20</sup> if the dispute on the merits have not yet been initiated elsewhere / have already been terminated.<sup>21</sup> Should the parties have an arbitration or prorogation agreement for a forum outside India, such forum should prevail.

However, in absence of any objections regarding Indian courts' jurisdiction from either of the parties due to existence of a valid arbitration agreement, a court in India would likewise be competent to consider the case on the merits, irrespective of such arbitration / prorogation agreement.

### **Practical Recommendations**

As can be seen from the above, vessel arrest is an expeditious procedure for securing a creditor's maritime claim and can be applied in a wide range of maritime legal relations. At the same time, complex international and domestic regulation requires a detailed analysis in respect of each jurisdiction in which it is planned to claim the arrest. Such analysis should be performed in a short time, due to a high risk that the debtor's vessel will leave the territorial sea of a state where the arrest is sought.

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<sup>20</sup> Article 6 of the Maritime Act 2017.

<sup>21</sup> Article 7 of the Maritime Act 2017.



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