

IS INDIA A BETTER FORUM FOR SHIP ARREST?

Admiralty jurisdiction can be invoked for any of the claims as set out in section 4 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 by filing a suit in the High Court in India having admiralty jurisdiction and obtaining an order of arrest of a ship. Admiralty suit can be filed when the ship is in Indian territorial waters being 12 nautical miles from the shore.

The key feature for ship arrest in India are:

- Low Legal cost and third party expenses
- Prompt response and immediate reliefs
- Extent of Admiralty jurisdiction on presence of a ship in Indian waters (12 nautical miles from shore)
- A ship can be arrested regardless of her flag, owner and registered address
- Ship can be arrested regardless of where the claim arose
- Admiralty court has admiralty jurisdiction to enforce maritime lien via an action in rem
- The jurisdiction of the High Courts of Bombay, Calcutta, Madras, Gujarat, Hyderabad Telangana, Karnataka, Kerala, and Odisha have Admiralty actions.
- Sister-ship arrests are allowed in India
- Ship arrests are allowed by High Courts having admiralty jurisdiction on establishing that there is a prima-facie case

- Ship arrests are allowed ex-parte without giving notice to the opponent or the opponent being heard
- Ship can be arrested under Admiralty jurisdiction only by filing Admiralty suit
- Claims can be in any currency
- Admiralty judges are available for arrest or release of ship even after court hours for extreme urgent cases
- Appeal can be filed to the Appeal court comprising of Division Bench of the High Court having Admiralty jurisdiction from the trial court (single Judge) and an Special Leave Petition (SLP) can be filed in the Supreme Court of India (Apex Court) from the order of the Appeal court
- Scan copy of the Power of Attorney or Letter of Authority are accepted by High Court having Admiralty jurisdiction for filing of Admiralty suit and obtaining order of arrest of a ship
- No cash bond or security is required to be furnished to the court by the Plaintiff for arrest of a ship but an undertaking by way of an Affidavit for wrongful arrest is required to be filed
- Ship can be arrested as security in Arbitration
- Parties promptly arrive at an out of court settlement
- High number of case withdrawals and disposals
- User-friendly procedures & environment
- Specialised shipping law firms for ship arrest work are available

Ship arrest is dealt with under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

There are effectively three ways to arrest or attach a ship an arrest in rem, an arrest in personam and a security arrest.

Arrest of a ship is part of the process by which an Admiralty Court gains jurisdiction over the subject matter in the suit and are known as "in rem" actions meaning that the action is against a "thing" rather than a person. Generally, the ship, itself, is responsible for payment of liens, mortgages or any other maritime lien that may arise. When the owner encumbers a vessel with a First Preferred Ship's Mortgage, it is the ship that guarantees payment rather than the owner. However, the owner may separately contract by a personal promise to pay or other type of guarantee to be personally liable.

An arrest of a ship is the prerequisite for the court to establish jurisdiction. If the ship cannot be arrested, the court may have no right over the ship. Arrest is the physical process by which, Sheriff or the Marshal goes aboard the ship and physically takes charge of it by serving the Warrant or the order of the court on the master of the ship or by pasting the Warrant or the order of the Court on the ship mast. The Warrant or the Order of the Court must be posted on the vessel, a copy given to the master or person in charge, as well as to the owner, the port and customs authority.

Once arrested, the ship is under custodia legis of the Court through the Marsdhal or the Sheriff and the owner loses all control. To avoid this situation and its effect on commerce, the court will allow the owner to furnish suitable security. Once the security is accepted, the ship is returned to the owner and the litigation continues with the security as the subject of execution of judgement.

Once the Sheriff or the marshal has seized a ship by arresting her, he is obligated to preserve the ship and its equipment. Generally, the custodian of a

seized ship should not interfere with the conduct of cargo and other operations normal to a vessel in berth unless directed so by court order.

It is important to realise that the Sheriff or the Marshal does not put hull insurance on a seized vessel. It is necessary for the owner or the Plaintiff to place adequate Port Risk Insurance on the vessel to protect their interest against loss.

If a vessel is not released by furnishing of security, the court may order an interlocutory sale. An interlocutory sale, means a sale prior to the completion of the litigation and the entering of a judgment. As a general rule the sale will not be allowed for four months unless the ship is in a precarious condition. The Plaintiff can make an application to the court for sale of the ship if the arrested property is perishable, liable to deterioration, or if the cost of keeping it is excessive or disproportionate and is danger to the environment and the surroundings.

Regardless as whether the sale is interlocutory or a judgment sale, the purchaser at the auction does not have any right in the ship, until the sale is confirmed by the court. Once confirmation is received, the buyer receives title which extinguishes all other liens and provided him with a clear title. An "in rem" action resolves claims of all of the world against the vessel and no lien for past debts can be created or asserted.

The proceeds of the sale are paid into the court and are used to satisfy any expenses incurred by the keeping of the vessel and fees to the Sheriff or the Marshal. The balance is paid to the claimants on priority basis and any balance left over is paid to the owner. If the sums received are not sufficient to pay all claims, the claimants pay proportionately to the shortfall.

Maritime claims applies in relation to all ships, irrespective of the places of residence or domicile of their owners; and all maritime claims, wherever arising and does not have effect in relation to a cause of action if, at the time when the cause of action arose, the ship concerned was a foreign ship.

The list of maritime claims found in the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 are closed lists are all claims that are expressed to or impliedly concern or relate to 'a ship'. They therefore contemplate some connection between the claim and a particular ship or ships. That being so, it is not sufficient for the pursuit of an action in rem that the intended claim be one against a ship owner either generally or in respect of its ships or operations generally. Nor is it sufficient that the person who is alleged to be liable for that claim happens to own a ship. It is therefore not possible to pursue as an action in rem against a ship a claim that is not related to or concerns that ship, or in the case of sister ship arrest, a maritime claim that is not related to or concerns some other ship that was at the time the cause of action arose owned or chartered by or in the possession or control of the owner of the sister ship.

Accordingly, in order to pursue a claim as an action in rem against a ship or other property, there must be some connection between that claim and either the ship that is intended to be the subject of the in rem proceeding or of which the ship the subject of the in rem proceeding is intended to be a sister ship.

There are two methods of enforcement of maritime claims, by action in rem and by an action in personam.

Claims enforceable by action in rem can be divided into the following:

- a. claims attracting a maritime lien or other charge on the relevant property

- b. claims enforceable by an action in rem against the relevant property
- c. claims enforceable by an action in rem against the relevant ship or sister ship provided certain conditions in relation to liability in personam are met
- d. claims not falling within the above.

In order to pursue a claim as an action in rem and to thereby arrest a ship or other property in support of that claim it is necessary to identify:

- a. first, the particular ship or property which is to be the subject of the proposed in rem proceeding;
- b. secondly, the nature of the claim that is sought to be pursued against that ship or other property. This is for the purposes of determining that the proposed claim is one that is capable of being pursued as an action in rem as described in Article 1 of the arrest conventions;
- c. thirdly, the relationship between that claim and the ship or other property the subject of the proceeding or in the case of sister ship arrest the relationship between the claim and the ship in respect of which the claim is said to arise;
- d. fourthly, in the context of in rem proceedings, the identity of the 'relevant person', that is the person who it is alleged would be liable for the plaintiff's claim had it been commenced as an action in personam;
- e. fifthly, the relationship of the relevant person to the ship or other property in respect of which the claim is made at the time the cause of action arose and in particular whether that person was the owner or charterer or person in possession or control of the ship at that time; and

- f. finally, the relationship of the relevant person to the ship or other property at the time the proceedings are commenced, and in particular whether at that time the relevant person was the owner of that ship in the context of in rem proceedings brought or the demise charterer of that ship in the context of proceedings brought.

Maritime Claim is defined in section 4 the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

In admiralty law, a maritime lien is a privileged claim upon sea-connected property, such as a ship, for services rendered to, or the injuries caused by that property. In common law, a lien is the right of the creditor to retain the properties of his debtor until the debt is paid.

It is a proprietary lien where interest is about the property. It should be understood that “res” may be the vessel including its appurtenances and equipment, the cargo, the freight or even the proceeds of sale. The rights include jus in re (right on the property) and jus in rem (right against the property). The doctrine of maritime lien is that a ship will be treated as a wrongdoer, not the owner, that the loss, damage or harm is caused by the maritime property, itself, and it has to make good for the loss. The attachment of maritime lien will start when the cause of action arises and will not be eliminated even by change of ownership in a good faith purchase.

Two significant differences between maritime liens, which only exist in admiralty law, and the right to keep that exist in general civil law are that in general civil law, "Prior in time is prior in right", i.e., the rights of the lien holder with the earliest lien are superior to those of later lien holders, whereas in maritime law the rights of the most recent lien holder are superior, and all maritime liens are superior to all non-maritime liens.