

**ARREST OF VESSELS
UNDER THE BRAZILIAN PERSPECTIVE**

THE PROJECT OF A NEW BRAZILIAN COMMERCIAL CODE



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□ TO KEEP IN MIND

➤ Brazil: Civil Law regime

➤ Brazil has NOT ratified the 1952 and 1999 International Arrest Conventions

✓ Sources of law relating to arrest of vessels currently in force in Brazil :

- the Brazilian Commercial Code: enacted in 1850.

- the 1926 Brussels Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages : promulgated through Federal Decree 351/1935.

- the Civil Procedural Code (“CPC”), establishes general procedural rules for judicial disputes.

➤ Brazilian jurisdiction must apply for the arrest measure and also for the main collection claim, since, as a rule, the claimant is obliged to commence substantive proceedings in Brazil regarding the claim itself.

- Jurisdiction of the Brazilian courts (CPC, art. 88)

“Article 88 – The Brazilian judiciary authority has jurisdiction where:

I- the defendant, whatever its nationality, is domiciled in Brazil;

II- the obligation is to be performed in Brazil;

III- the fact which gave rise to the claim results from a fact occurred or an act performed in Brazil.

Sole Paragraph: A company is considered domiciled in Brazil, when said company has an agency, branch or subsidiary located here.”

- Contractual jurisdiction/arbitration provisions may prevail (exception: contracts of adhesion)

- Exception: arrest as a security for a foreign arbitration – former decision from Brazilian Courts admitting the arrest.

➤ Types of Arrest:

- The arrest as a measure for enforcement of a final judgment/award.
Obs.: Foreign decisions to be enforced in Brazil must be previously ratified by the Superior Court of Justice, in Brasilia.
- The arrest as a specific precautionary measure as security for a credit to be ascertain in a future judicial/arbitral decision.

➤ Classes of Arrest :

- *In rem*: credit against the vessel.
Based on the liens/privileged credits provided by the Commercial Code and 1926 Brussels Convention.
- *In personam*: credit against the owner.
Based on the Civil Procedural Code.

➤ Ranking and priorities of maritime liens (Brazilian Commercial Code + 1926 Brussels Convention)

1. Federal taxes;
2. Legal costs and expenses;
3. Claims resulting from the employment of Master, crew and ship personnel;
4. Indemnities due for salvage;
5. General Average contributions;
6. Obligations undertaken by the Captain outside the port of registry for maintenance needs or continuation of the voyage;
7. Indemnities due as a result of collisions, or any other sea accident;
8. Ship mortgages;
9. Port dues;
10. Outstanding payments due to depositaries, warehouse rentals, ship equipment;
11. Expenditures for the upkeep of the ship and her appurtenances;
12. Short delivery and cargo losses;
13. Debts arising out of the construction of the vessel;
14. Expenses incurred for repairs of the vessel and her appurtenances;
15. Outstanding price of the vessel.

➤ Need of the arresting party to put up a security:

- Foreign claimants without assets within the Brazilian territory may be obliged to post security at court (10% and 25% of the amount under dispute) in order to guarantee the legal costs and opponent lawyer's fees (art. 835 of the Civil Procedural Code)

- The court may also require a counter-guarantee, upon Judge's discretion, in order to compensate eventual losses sustained by Vessel's interests in case of a "wrongful arrest".

Types of guarantee: deposit in cash or a letter of credit issued by a first line bank situated in Brazil. Other kinds of guarantees, as P & I Letters, may be offered, however its acceptance would be on the judge's discretion.

➤ Risks of wrongful arrest:

- Loss of suit expenses: reimburse the Defendant of the court expenses as well as pay fees to the latter's lawyers up to 20% of the amount under dispute.

- Future claim for the damages arising out of the arrest (loss of profit, port expenses, etc)

□ RELEVANT CHANGES:

➤ Possibility of arresting as security of a foreign claim or arbitration:

Art. [229]. Without prejudice of international jurisdiction general rules provided by law, the Brazilian judiciary authority has jurisdiction to:

(...)

II – hear lawsuits involving the arrest of foreign vessels located in Brazilian jurisdictional waters, regardless of the place of fulfillment of the obligation, even if such obligation does not derive from a fact occurred or act performed in Brazil;

➤ Exemption of the arresting party from posting a counter-security

Art. [238]. Once the existence of the privileged credit is evidenced, the judge shall order the arrest of the vessel in limine, regardless of bond and without hearing the other party, ordering the Maritime Authority to take the necessary measures for her detention until final determination of the court.

□ RELEVANT CHANGES:

➤ Possibility of arresting sister ships:

• Currently: there are no provisions dealing with arrest of sister ships under Brazilian Law.

• *In rem*:

*Art. [236] The arrest for privileged credit may be imposed on: (...)
II – another vessel owned by the same owner;*

• *In personae*:

Art. [237] The arrest for non-privileged credit may be imposed on any vessel owned by the debtor, without prejudice of his broad proprietary liability, also governed by the procedural laws in effect.

□ RELEVANT CHANGES:

➤ Specif provision regarding the arrest of bunker:

Art. [239]. Seizure of the fuel of bare boat or time chartered vessels is admitted to guarantee the debts of her charterers. In such case, the arrest of the vessel shall be ordered until the fuel is transferred to storage facilities at the defendant's expenses, except for the minimum necessary to ensure the safety of navigation.

Sole paragraph. If the fuel on board is not sufficient to ensure the totality of the debt, court costs and lawyers' fees , the judge shall extend the reach of the fuel seizure order to the cover supervening supplies, until the guarantee is fully paid up.

- Currently: the arrest of bunkers is not a common practice within the Brazilian jurisdiction and there is no specific domestic provision dealing with such measure. It follow the general rules of the Civil Procedural Code and requires the existence of Brazilian Courts' jurisdiction for main dispute.

❑ RELEVANT CHANGES:

- Specific provision regarding the consequences of a wrongful arrest. Possibility for the Defendant to claim for indemnity in the arrest proceedings.

Art. [242]. Without prejudice of the compensation for procedural damage, the claimant is liable to the respondent for the loss caused thereto by the enforcement of the measure, in case the main claim is not favorable thereto.

Sole Paragraph. The indemnity shall be liquidated in the same records in which the measure was granted

□ CASE STUDY 1

➤ Facts:

- Bunker claim (alleged unpaid bunker);
- Bunker negotiated and supplied abroad with foreign jurisdiction clause (Greek Courts);
- Claimant: Foreign bunker supplier;
- Defendant: Foreign ship-owner;
- Vessel currently trading in Brazil;

➤ Arrest claim filed before the Brazilian Courts.

➤ The first instance judge rendered an *ex parte* decision determining the arrest of the vessel as a guarantee to the bunker claim, recognizing the “*periculum in mora*” and “*fumus boni juris*”.

➤ The judge also determined the foreign claimant to present a security of 10% of the claim amount and to file the main lawsuit (collection claim) within 30 days.

- As soon as the master received the summoning order immediate legal actions were adopted by the ship-owner in order to release the vessel:
- A P&I Club Letter of Undertaking (LOU) was presented in substitution for the arrest, avoiding further costs with the detention.
 - Defence and appeal were filed by the ship-owner challenging the claim and the jurisdiction of the Brazilian Courts based in the:
 - a. article 88 of the Civil Procedure Code since (i) the defendant was not domiciled in Brazil; (ii) the obligation was not to be performed in Brazil; (iii) the fact that gave rise to the claim did not result from a fact occurred or an act performed in Brazil; and
 - b. foreign jurisdiction clause provided in the bunker agreement.

- After analyzing the defence the judge recognized that indeed the Brazilian Court did not have jurisdiction for this claim and the lawsuit was dismissed and the vessel released.
- The judge released the ship-owner from the burden of keeping the LOU and also condemned the Claimant to pay the court costs and legal fees.
- Claimants filed an appeal against such decision, without success.
- Conclusions:
 - The judge was initially convinced to grant an ex parte arrest even though the jurisdiction requirements were not fully present;
 - The ship-owner did not surrender to the pressure and decided not to negotiate a settlement, but to challenge the claim at court.

□ CASE STUDY 2

➤ Facts:

- Near collision incident involving a foreign bulk carrier and a platform in Brazil;
- Oil and Gas company operating a drilling unit and other supply vessels under charter at the offshore oil fields in the Brazilian coast.
- Foreign bulk carrier sailing nearby faces an engine problem, losing power for several hours, while the crew attempted to repair the engine.
- The bulk carrier slowly adrifts inside of the exclusion zone of the platforms and in the direction of one drilling unit.
- Only then the master of the vessel decides to make radio contact and request assistance.
- The field operator determines the suspension of the activities and evacuation of the drilling unit also dislocating some supply vessels to try to pull the bulk carrier away from a collision route.

- The efforts ended up being successful and the supply vessels succeeded in pulling the bulk carrier a hundred meters away from colliding with the platform, preventing a disaster;
- The supply vessels maintained assistance to the bulk carrier until her engine was finally repaired;
- The Brazilian oil company pursued claim in Brazil for losses (2 days out of operation) and salvage reward against the owner of the bulk carrier;
- The judge granted the arrest:
 - the “*fumus boni iuris*”: justifiable claim (evidence of the facts; the losses); Salvage claim (privileged credit/lien)
 - the “*periculum in mora*”: risk of the vessel leaving Brazilian waters; owners were a foreign company, without any other assets in Brazil to secure the claim.
- After the arrest was granted the Claimants filed the main indemnity lawsuit, in which the losses and the salvage reward shall be discussed and calculated.
- The vessel was released after the Owners presented a Club LOU, which is kept as a security to the main claim.

CASE STUDY 2



□ CASE STUDY 3

➤ Facts:

- Brazilian Shipping Company and Foreign Ship Operator had an Operational Agreement for the chartering in of a vessel in Brazil for a Brazilian Oil Company;
 - Ship Operator stopped remitting funds for the costs with the vessel in Brazil, that were supported by the Brazilian Shipping Company and the hire received in Brazil was not enough for this;
 - The charter party with the Brazilian Oil Company was ending.
- Arrest claim filed by the Brazilian Shipping Company granted by the Corporate Courts of Rio de Janeiro, previously to hearing the other party, forbidding the vessel to leave Brazilian waters.
- Rumors that Owners would try to take the vessel away in contempt of the court order (the arrival of a “CONDOCK”). Order of apprehension of the vessel at the port obtained on behalf of the claimants.

- Registered Owner's attempt to release the vessel, by alleging that his asset could not be retained in Brazil since he was not party of the Operational Agreement.
- Judge denied the request, based in the joint liability of the registered owner, beneficial owner, ship operator, etc regarding the debits incurrent for the maintenance of the vessel.

Art. 494 – All owners and co-owners are JOINTLY LIABLE for the debts the captain takes on to repair, equip and provision the ship; and this liability may not be contested under the allegation that the captain exceeded the limits of his duties or instructions if creditors prove the sum lost was applied for the benefit of the ship (article 517). Such owners and co-owners are jointly liable for the losses the captain might cause to third parties for lack of due diligence he is obligated to use for the good safekeeping, packaging and conservation of the effects received on board (article 519). This liability ends if the former have to abandon the ship and freights due or that will become due during the respective voyage. The owner or co-owner who is also the captain of the ship is not allowed to abandon the ship.

- Decision on the merits still pending.

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Thank you.

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