



SHIP ARRESTS & DEFENCES IN PANAMA



MORGAN & MORGAN

ABOGADOS - ATTORNEYS AT LAW

SHIP ARRESTS & DEFENCES IN PANAMA

**BY JUAN DAVID MORGAN JR.
PARTNER**

TABLE OF CONTENTS

Morgan & Morgan Main Office.....	4
Representative Clients.....	4
About the Firm.....	5
Ship Arrests.....	6
A. The Maritime Court of Panama.....	6
B. Types of Arrests.....	6
C. Arrests Procedure and Documentary Requirements.....	6
D. Arrest Costs.....	7
E. Associated Ship Arrests.....	8
F. Other Arrests.....	9
Arrest Defences.....	10
A. Lifting of Arrests.....	10
B. Arrest Prevention.....	10
C. “Apremio”.....	11
D. Appeal.....	12
Conclusion.....	13

MORGAN & MORGAN - Main Office

Swiss Tower - 16th Floor
Calle 53 E., Marbella
P.O. Box 0832-00232
World Trade Center
Panama, Republic of Panama
Telephone (507)265-7777
Fax: (507)265-7700
Maritime 24 Hours Tel.: (507) 263-8030
E-mail: info@morimor.com
Internet Web Site: www.morimor.com/lawfirm

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ABOUT THE FIRM

The origins of Morgan & Morgan date back to 1923, when Dr. Eduardo Morgan Sr., a Welsh immigrant, began his law practice in the Republic of Panama. In the early sixties, Dr. Eduardo Morgan Jr. and Dr. Juan David Morgan joined their father, giving the firm its present name: Morgan & Morgan. The firm today has about 50 lawyers with branch offices in Belize, British Virgin Islands, London and Madrid.

The firm's practice covers almost all areas of the law including litigation, insurance, shipping & admiralty, corporate law, tax and estate planning, labor law, government contracts, natural resources, intellectual property, and immigration. Specialized teams of attorneys concentrate in each specific area.

Our Shipping & Admiralty Department handles all types of maritime claims, including collision and salvage, personal injury, cargo claims, charter party disputes and marine insurance. Morgan & Morgan is committed to excellence in serving its international clientele of P&I Clubs, shipowners, hull and cargo underwriters, charterers and other shipping interests.

I. SHIP ARRESTS

A. The Maritime Court of Panama

The Maritime Court of Panama was created in 1982 as a result of the Torrijos-Carter Canal Treaties of 1977. It replaced a U.S. Federal District Court operating in the former U.S. Canal Zone and today occupies the very same premises as its antecessor. The jurisdiction of the Court extends to all maritime cases in the Republic of Panama, including, from the year 2,000, those against the Panama Canal Authority resulting from accidents occurring during transit of the Panama Canal.

B. Types of Arrest

Article 164 of the Panamanian Code of Maritime Procedure ("CMP") provides three distinct purposes for arresting a vessel:

- (1) To obtain security for a claim and prevent the defendant from dissipating its assets;
- (2) To confer jurisdiction to the Maritime Court of Panama over claims arising out of the Republic of Panama or its territorial waters; and
- (3) To enforce a maritime lien (in-rem proceedings).

C. Arrest Procedure and Documentary Requirements

According to article 165 of the CMP, the arrest petition must be filed with the Maritime Court together with a complaint. The complaint must describe, *inter alia*, the parties to the proceedings, the type of proceedings, the facts on which the claim is based and the quantum thereof. Prima facie evidence of the claim and its quantum must accompany the complaint, when the arrest is sought under numeral 2 & 3 of Article 164 of the CMP. Given the urgency surrounding the commencement of most arrest proceedings, the Maritime Court would initially issue an arrest order based on documentary and other evidence received by fax.

A power of attorney must also accompany the petition for arrest and the complaint; however, arrest proceedings may be commenced *ex-officio* upon posting the corresponding bond with the Maritime Court. Said bond is determined in relation to the quantum of the claim and may range from US\$100 to a maximum of US\$3,000. The bond posted to act *ex-officio* is returned after a duly legalized power of attorney is filed with the Maritime Court.

Once the arrest order is issued, the Marshall of the Court will go on board the vessel and serve the master with a copy of the writs, remove the vessel's Registry Certificate or other important documentation and, depending on the size and tonnage of the vessel, place one or two custodians on board. Since the master is considered to be an agent of the vessel and/or her owners, the complaint is considered as having been served with the execution of the arrest order. The 30 day period for the defendant(s) to answer the complaint thus begins to run.

An arrest can usually be effected within a matter of hours after receipt of faxed documents supporting the claim and its quantum and the Maritime Court is open 24 hours everyday of the year for purposes of arrest.

D. Arrest Costs

i) Counter-Security: According to article 166 of the CMP, if an arrest is sought for purposes of conferring jurisdiction to the Maritime Court over claims upon which it would not otherwise have it - those claims arising outside of Panama and involving defendants and/or vessels of nationalities other than Panamanian - or for purposes of enforcing a maritime lien (article 164(2)&(3) of the CMP), the counter-security which must be posted in advance by a claimant is US\$1,000, irrespective of the claim amount.

In relation to counter-security, it is the policy of the Maritime Court to allow the low US\$1,000 counter-security for arrests which, even though are merely to obtain security for a claim, have the effect of conferring jurisdiction over the cause of action to the Maritime Court. This policy has remained constant, even in arrest cases in which the merits of the claim are being litigated or arbitrated in a foreign jurisdiction and are therefore probably not going to be decided in Panama.

When an arrest is effected to secure an action in-personam and the Maritime Court already has jurisdiction over the defendant (a Panamanian company), the counter-security for the arrest increases to between twenty and thirty per cent (20%-30%) of the quantum of the claim. The Maritime Judge has discretion to decide the amount of counter-security within the 20%-30% range.

ii) Arrest Expenses: A claimant is required to post US\$2,500 for the Marshall's expenses to maintain the ship, irrespective of the size and tonnage of the vessel. Most arrests are lifted very quickly by posting security and the unused portion of said amount is returned to the claimant. However, in those cases where the defendant is unable to post security within a reasonable period (several weeks), the Court will require the arrestor to post additional sums. The most common arrest expenses are anchorage and port charges and custodian fees. In those cases where the arrest prolongs itself, article 177 of the CMP allows the Maritime Judge to order a pre-judgment judicial sale of the vessel. The crew would be repatriated at the arrestor's expense. All expenses are recoverable from the proceeds of the sale of the ship.

E. Associated Ship Arrests

In actions in-personam, the arrest of a vessel other than that in respect of which the maritime claim arose, but belonging to the same owner of the particular vessel in respect of which the maritime claim arose, is allowed under the CMP. Nonetheless, as most shipowners nowadays use single purpose shipowning companies to own each vessel in their fleet, one of the issues currently debated in Panama involves the so-called “associated ship arrest.” Being used to corporations limited by bearer shares, private foundations, private trusts, banking secrecy and other characteristics of an international offshore center, most Panamanian attorneys tend to have an almost natural and instinctive abhorrence to the “piercing of the corporate veil.” The issue became the focus of attention in **Blueye Navigation Inc. v. Petromin Shipping Co., et. al (1995)**. A brief discussion of the case is warranted, being the **Borzesti** the leading case in this area. It was a breach of charter party claim for the highest quantum (US\$34,880,725.00) which, at that time, had seen the Maritime Court. The claim was filed initially only against Petromin Shipping Co. (“Petromin”), which according to the Lloyd’s Confidential Index was the owner of the M/V “Borzesti”. After the vessel was arrested at Balboa, evidence of a restructuring and refinancing of Petromin showed that a number of its vessels, including the M/V “Borzesti”, had been recently transferred to Liberian companies. Petromin filed an “apremio” motion (a special motion to lift an arrest) with a Liberian Certificate of Registry, showing the M/V “Borzesti” under the ownership of Borzesti Inc. and a special hearing was called by the Maritime Court. Blueye Navigation Inc. countered such evidence with the First Preferred Liberian Mortgage over the M/V “Borzesti”. The loan agreement attached thereto proved that Borzesti Inc. was a 100% subsidiary of Petromin Overseas Inc., which in turn was a 100% subsidiary of Petromin. Said loan agreement also showed that all companies were consolidated into one single economic group headed by Petromin. The Maritime Judge, in maintaining the arrest, found that “being Borzesti, Inc. a consolidated subsidiary of Petromin Shipping Company, a fact voluntarily revealed, that explicit unity made the M/V “Borzesti”, owned by Borzesti, Inc., part of the patrimony of Petromin Shipping Company, ...” However, on appeal the Supreme Court reversed the Maritime Court’s judgment, maintaining the position that the corporate veil could only be pierced in cases where creditor fraud was involved or when the company was otherwise used for illicit purposes.

At the same time that the **Borzesti** was being decided, another charterer was pursuing a parallel claim, also for breach of charter party, against Petromin and its liberian subsidiaries in **Secnav Marine Ltd. v. Petromin Shipping Co., et. al**. This case indicates that, while it would not be possible for the Maritime Court to acquire jurisdiction over several foreign defendants whose property has not been seized in Panama, it is possible to acquire jurisdiction over that defendant whose property has been seized. The complaint in that case named Petromin and all its Liberian subsidiaries as defendants from the beginning and the Maritime Court granted the arrests of the M/Vs “Bobilna” and “Baia Nova”, owned by Bobilna, Inc. and Baia Nova Inc. The Borzesti and Secnav cases were later settled before the merits could be resolved, but those cases point out that, while it may be possible to effect associated ship arrests in Panama, if the merits of the claim are to be decided in Panama and a piercing of the corporate veil will become an issue, the decision on the merits is likely to be against the claimant, unless intent to defraud can be evidenced. Nonetheless, if an associated ship arrest is to be effected in Panama solely to obtain security and the merits of the claim will be decided in a foreign court or a foreign arbitration

tribunal with liberal laws on piercing the corporate veil, Panama may still be a viable arrest forum.

F. Other Arrests

Although this work is focussed on ship arrests, it is worth mentioning that the same simple ship arrest rules and procedures apply to the arrest of cargo, bunkers and any other property passing through the Panama Canal or otherwise entering the Panamanian jurisdiction -except that bunker arrests may not be brought under in-rem proceedings. Therefore, although Panama is better known as a ship arrest jurisdiction, shipowners and other interests may find in Panama a convenient forum in which to arrest cargo, bunkers or any other property found in or transiting through it.

II. ARREST DEFENCES

Having Panama become a popular international arrest forum, a matter of concern to shipowners and P&I Clubs is how fast can an arrest be lifted and what defences there are against arrests.

A. Lifting of Arrests

The Maritime Court is also open 24 hours and 365 days a year for purposes of lifting arrests. Amounts to be posted as security may be consigned to the Court in the following forms: (a) Guarantee Certificate drawn on cash (or certified cheque) from the Banco Nacional de Panama (sort of Panama's Central Bank); (b) a cashier's cheque or certified cheque from a bank with license to operate in Panama; (c) a letter of guarantee from a bank operating locally; (d) a bond issued by a local insurance company; (e) any other form of security which the parties may agree on. P&I LOUs, which come under (e) above, are probably the most common form of security for lifting arrests in Panama. However, they are not accepted as a matter of law and the claimant must consent to such form of security before the Maritime Court will accept them to lift an arrest.

The amount of security is determined by the quantum of the claim, and the legal interest and provisional judicial costs (including attorneys fees) set by the Maritime Judge. If the claim amount exceeds the value of the ship, the security may be limited to such value. But, if the parties can not agree on the value of the ship, the Court will have to order an appraisal, which could cause a substantial delay in the lifting of the arrest.

Once adequate security is posted, the Maritime Court will promptly issue the order lifting the arrest, which the Marshall of the Court will serve on the master of the vessel, returning the documents removed from the vessel and removing the custodian(s) from the vessel. The whole process could last from one to several hours, depending on the location of the vessel (Balboa or Cristobal).

B. Arrest Prevention

Under article 179 of the CMP, a defendant may suspend the execution of an arrest order by posting adequate security with the Court before the arrest order has been executed by the Marshall. This is important for defendants, since an arrest almost invariably means for the vessel to lose the Panama Canal's transit slot and a detention of a day or more, depending on traffic congestion at the Canal. Given the "ex-parte" nature of arrest proceedings, the opportunity to suspend an arrest from being effected often depends on the defendant's ability to anticipate the arrest or on the claimant's cooperation in informing the defendant or its lawyer about the arrest in advance.

In most cases, once the target vessel arrives at the Panama Canal, there is nothing to gain by the claimant with the execution of the arrest order. A sensible course of action for a competent

claimant lawyer may be to contact the vessel's lawyer or agent, in order to arrange for adequate security to be posted and prevent the arrest and resulting detention delays to the vessel.

C. "Apremio"

In case of a wrongful arrest, the CMP provides the aggrieved party with summary proceedings to lift the arrest. This is called "apremio," which consists of a special motion to lift the arrest upon showing sufficient evidence that the arrest was wrongful, which, under articles 185 to 187 of the CMP, means it was effected: a) over property (ship, cargo, bunkers, etc.) not belonging to the defendant; b) in contravention of a previous express agreement by the parties to refrain from arrests; c) when a maritime lien has been extinguished (in-rem claims); or d) when the property (vessel, cargo or freight) arrested is not that which is the subject of the in-rem claim.

Upon the filing of an "apremio" motion with the required evidence to support it, the Maritime Judge will consider and resolve the motion immediately. If the motion is granted, the Judge will call the parties to a special hearing to be held in the shortest possible amount of time (usually within one day), in which the claimant would have the burden of proving that the arrest was not wrongful and should therefore be maintained. If he fails to carry such burden of proof, the Maritime Judge will order the immediate release of the vessel (article 188 of the CMP). The claimant may appeal the decision, but that does not prevent the lifting of the arrest.

Even though the criteria on which an "apremio" must be based is very precise in the CMP, the Maritime Court has over the years expanded somewhat the basis for these proceedings to include similar situations. For example, in **Riverplex International Division of Godchaux-Henderson Properties Inc. v. M/V "Forrest Hawk" (1990)**, the Maritime Court ruled that if an "apremio" may be filed when a maritime lien has been extinguished, it may also be filed when a maritime lien clearly does not exist. This criteria was confirmed by the Supreme Court in **Transportes Maritimos S.A. v. M/V "Meera" (1991)**.

A source of controversy in Panamanian maritime jurisprudence has been whether an apremio may proceed when the vessel (or other property) is no longer arrested, having been substituted by security. In **Juan Cespedes Rodriguez v. M/V "Britanis" (1986)**, the Maritime Court initially indicated that an apremio could proceed when the vessel was no longer subject to the arrest and the purpose of the "apremio" was to liberate the security posted as a result thereof. However, in **Robert Sanford Morse v. Atun C.A. (1992)**, the Maritime Court reversed itself. The arrest over the M/V "Pacifico S" had been lifted by posting a bond from an insurance company. Thereafter, the defendant filed an "apremio" motion claiming that the vessel had been sold prior to the arrest. The Maritime Court, denying the motion, held that an "apremio", as contemplated by articles 185 to 188 of the CMP, could only proceed during the pendency of the arrest. The Maritime Court's decision was upheld by the Supreme Court, interpreting narrowly and restrictively article 186, which ends stating that "the arrestor must appear in due course to justify that the arrest should proceed and be maintained."

More recently, the Maritime Court has allowed “apremio” defences to proceed even if the vessel was released by the posting of security, provided that the “apremio” motion and evidence supporting it had been filed before the arrest was lifted (**Mercantil Shipstores vs. Serviocean** [1999]). This is a more balanced interpretation of articles 185 to 188 of the CMP, for it allows a party aggrieved by a wrongful arrest to mitigate the damages resulting from it, while at the same time preserving the main defence against it.

D. Appeal

An arrest order may be the subject of an appeal to the Supreme Court, as provided by article 482 of the CMP. This type of remedy is rarely used as a defence against an arrest, for the Maritime Judge has a lot of discretion in determining whether the plaintiff’s requirement to file Prima Facie evidence of the claim and its quantum has been met. Nonetheless, whenever the arrest order may not be challenged through an “apremio” defence, but it has infringed a provision of law, substantive or procedural, an appeal may be used to revoke the arrest order.

If the arrest order is revoked, the whole proceedings may actually be thereby entirely dismissed with or without prejudice, depending on the circumstances. That is the case for claims in-rem, which may not proceed without the arrest, or for claims in-personam, when the arrest has conferred jurisdiction to the Maritime Court to hear the claim. Recently, in **Franklin Caole vs. “Accord Express”** (1999), the defendant appealed against the arrest order arguing errors in the evaluation of the Prima Facie evidence filed in support of the claim and an infringement of article 18 of the CMP. The appeal proved successful and the in-rem proceedings were thereby dismissed.

III. CONCLUSION

Panama's strategic position and specialized maritime jurisdiction has turned it into a well-known arrest forum where shipowners, charterers, cargo interests, suppliers, and other shipping interests may secure and resolve their claims expeditiously and at relatively low costs. However, Panama's maritime jurisdiction also affords any party aggrieved by an unlawful arrest with quick and effective defences to defeat such arrests and recover any losses that may have been caused as a result.

