

# Pratt's Journal of Bankruptcy Law

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# Maritime Liens and Arrests Under U.S. Law

*By Alexandra Clark and Emma C. Jones\**

*Maritime liens typically arise from torts, contracts or particular maritime services such as salvage or towage. In this article, the authors discuss categories of maritime liens, arrests and attachments and more.*

## WHAT IS A MARITIME LIEN?

A maritime lien is a non-possessory right in a vessel that gives the lienholder a right to proceed *in rem* against the property. In the United States, maritime liens are based on the fiction of a “personified” vessel. Under this legal fiction, a vessel is considered to be a legal person separate and distinct from its owner or operator and can be held liable for torts and contractual obligations. A person claiming to hold a maritime lien against a vessel may file suit *in rem* against the vessel and have the court order the arrest of the vessel to secure their claim.

Maritime liens arise by operation of law. Although parties may waive or surrender the right to a maritime lien by contract or otherwise, they may not agree to confer a maritime lien where the law does not provide for one. Maritime liens are governed by the Commercial Instruments and Maritime Liens Act (“CIMLA”) and general maritime law.

## Categories of Maritime Liens

Most maritime liens arise from torts, contracts, or particular maritime services such as salvage or towage. Maritime claims that give rise to maritime liens include the following claims:

- Seamen’s wages;
- Salvage operations;
- Torts that arise under the general maritime law;
- General Average claims;
- Preferred ship mortgages;
- Supplies, repairs, and other necessities furnished to a vessel;
- Towage, wharfage, pilotage, and stevedoring;

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- Claims for damages or loss of cargo;
- Claims by carriers for unpaid freight; and
- Breach of charter parties.

### **Ship Mortgage Act**

The Ship Mortgage Act was first enacted in 1920 and has since been recodified and incorporated into the CIMLA. Under the Ship Mortgage Act, a preferred mortgage is “a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel.”

In order to qualify as a preferred ship mortgage, CIMLA sets forth certain requirements. Properly filed ship mortgages are valid against third parties from the time it is filed. By perfecting a preferred ship mortgage on a vessel, the lender creates a maritime lien against the vessel, enforceable by an action *in rem*. Preferred ship mortgage liens have priority over all claims against the vessel except for *custodia legis* expenses and preferred maritime liens.

Maritime liens that arise prior in time to a preferred ship mortgage or which have preferred status because they arise out of a tort—such as a collision—outrank preferred ship mortgages. Preferred maritime liens are defined by CIMLA as follows:

- (1) Arising before a preferred mortgage was filed under CIMLA;
- (2) For damage arising out of a maritime tort;
- (3) For wages of a stevedore;
- (4) For seaman’s wages;
- (5) For general average; or
- (6) For salvage (including contract salvage).

### **Necessaries**

CIMLA defines “necessaries” as “repairs, supplies, towage, and the use of a drydock or marine railway.” The term “necessaries” has been broadly defined by the courts to encompass any goods or services that are reasonably needed for the venture in which the vessel is engaged. Necessaries can include fuel and lubricating oil, insurance, stevedoring services, pilotage, food, repairs, radar, and equipment, but also taxi fare for crewmembers, linens for a dinner cruise vessel, or gambling equipment for a cruise ship—really anything that keeps the vessel in operation and enables the vessel to perform its function.

In order for a maritime lien to arise in favor of a supplier of necessaries, the necessaries must be supplied “on the order of the owner or a person authorized by the owner.” This is key—a common ground that is often raised for

contesting a maritime lien focuses on whether the underlying good or service was in fact provided on the order of the owner or person authorized by the owner.

### **Extinguishment of Maritime Liens**

Maritime liens can be extinguished in several ways:

- Waiver: Maritime liens can be waived by agreement or by implication. Courts will require clear evidence of an intent to waive the lien in favor of other security.
- Laches: A maritime lien is extinguished when a lienholder has unreasonably delayed asserting their lien to the prejudice of the other party.
- Complete and total destruction of the res.
- Payment of the claim.
- Judicial sale of the vessel by a federal court sitting in admiralty.

## **ARREST AND ATTACHMENT**

Arrest is an essential step to enforce a maritime lien. It also has the important result of giving the claimant security for its claim. Unlike many other countries, the United States is not a signatory to any international ship arrest conventions. Actions involving ship arrests and attachment are governed by the Federal Rules of Civil Procedure's Supplemental Admiralty Rules. Rules B and C are the rules related to maritime attachment and arrest, respectively, and Rule E governs the process for each.

### **Maritime Attachment Under Rule B**

Although similar to an arrest in that property is seized and may ultimately be sold, maritime attachment is practically quite different. While a maritime lien is required for an arrest, a maritime attachment is based on an *in personam* claim. A maritime arrest requires the vessel to be present in the jurisdiction, while maritime attachment allows for the seizure of a party's assets if that party otherwise is not present in the jurisdiction.

Attachment is a procedure designed to (1) provide security, and (2) establish *in personam* jurisdiction of a defendant up to the amount of security obtained. In seeking an attachment, a plaintiff must assert a "maritime claim." The attached property, however, need not be maritime.

### **Maritime Arrest Under Rule C**

Because ships are constantly moving from port to port, the ability to carry out an arrest quickly and on an *ex parte* basis is important. Under Rule C, a



claimant must demonstrate a lien that may be exercised against a vessel or other property *in rem* that is located in the district at the time the arrest order is served.

The requirements for a Rule C arrest action include the filing of a verified complaint, which means it includes written verification, under penalty of perjury, attesting to the truth of the statements therein. The arresting party will also file a memorandum of law setting forth the reasons why the warrant should be issued and can also file motions to allow the vessel to continue cargo operations and for a substitute custodian.

### **Substitute Custodian**

The U.S. marshals are the law enforcement arm that serve the warrant on the vessel. Generally, the marshals will not remain on the vessel while the is under arrest. Instead, the plaintiff will move to have a substitute custodian remain with the vessel on the marshals' behalf. Such appointment is conditioned on acceptance by the substitute custodian of responsibility and liability during the appointment and plaintiff's agreement to hold the marshal harmless.

### **Notice**

If the vessel is not released within 14 days after execution of the warrant, the plaintiff must give public notice of the arrest as provided by Rule C(4). If the arresting party is a mortgagee, they also must provide written notice to all known lienholders.

### **Intervention**

Any party with a claim against the vessel may seek to intervene in the proceedings, regardless of who initiated the arrest. The vessel will be considered arrested by all intervening parties and all then share in the costs and benefits of the arrest. If the claim is successful, the intervening parties are paid out of the proceeds of the sale or the security posted, in order of lien priority.

### **Security and Release**

When property is seized under Rules B and C, it can be released upon the posting of adequate security. The parties will generally agree upon the amount and the type of security, though the court can also order security to be posted. Adequate security can take a number of different forms, including bank guarantee, bail bond, insurance company bond, and cash bond. The most common form is a P&I (protection and indemnity) Club Letter of Undertaking ("LOU"), which is issued in lieu of a bond. The wording is important both when drafting and receiving a LOU. Some key items to include in a LOU include:

- Description of the incident;

- Definite and reasonable amount of security;
- Law and jurisdiction clause;
- “Inclusive of interests and costs”;
- Subject to final judgment or agreement between parties with the P&I Club’s consent;
- Issued without prejudice to liability;
- Consideration to not arrest/rearrest as broad as possible; and
- Member’s defenses including rights to limit not waived.

If the vessel’s owner does not promptly offer to post security, the arresting party can move for an order directing the interlocutory sale of the vessel. The arresting party must show that (a) the vessel is subject to deterioration; (b) the expense of keeping the vessel is excessive; or (c) the owner’s delay in posting security has been unreasonable.

### **Countersecurity**

Under Rule E(7), a defendant who has given security to the plaintiff is entitled to seek countersecurity for any counterclaim arising out of the same transaction or occurrence as the main claim. The court has discretion as to whether to order the posting of countersecurity and, if so, in what amount.

### **Wrongful Arrest**

The wrongful arrest standard is very high. An arrest can only be held to be wrongful if made in bad faith, with malice, or with gross negligence. Damages for wrongful arrest include attorneys’ fees, costs, and any damages directly attributable to the attachment, including lost profits. A claim for wrongful arrest has been held not to arise out of the “same transaction or occurrence” as the claim upon which the arrest or attachment is premised, such that a party cannot demand countersecurity for a wrongful arrest claim under Rule E(7).