

Maritime Attachment and Vessel Arrest in the US

BRUCE PAULSEN AND JEFFREY DINE, SEWARD & KISSEL LLP, WITH PRACTICAL LAW LITIGATION

A Practice Note on attaching and arresting vessels and other property in the US. Specifically, this Note explains the grounds for attachment and arrest under the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, the procedure for obtaining an order of attachment and the arrest of vessels.

Ships are by their nature transitory property, and shipowners are located worldwide. The laws of the US and other nations recognize that enforcement of judgments against shipowners, the enforcement of liens against vessels and other property, and attachment of shipowners property, can be difficult. Because ships are moving targets, US law provides creditors and claimants with robust remedies for pre-judgment attachment of property of parties that are subject to maritime claims and the arrest of vessels or execution on other property based on maritime liens or statutory rights. The procedures for enforcing these rights are set out in the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure (Supplemental Rules). The US is not a signatory to any international conventions that concern attachment and arrest.

USE OF MARITIME ATTACHMENT AND ARREST

PARTIES SUBJECT TO AN ORDER OF ATTACHMENT

Attachment under Supplemental Rule B may be used to attach property as security for a maritime claim and gives quasi in rem jurisdiction over the defendant. The plaintiff can then pursue its substantive claim in the district court or in arbitration up to the value of the property attached. Under Rule B, property in the judicial district, belonging to a defendant not found in the district, is subject to attachment. Property of the defendant in the hands of a third party that is in the district, such as debts owed to the defendant, may be subject to garnishment.

Rule C is used to enforce a maritime lien or certain statutory rights against a vessel or other property in rem. Under Rule C, the property of the defendant that is subject to a maritime lien is subject to arrest regardless of whether the defendant can be found in the district. Sister or associated ship arrest is not available. Federal statutes exempt vessels and other property owned or operated by or for the US or a federally owned corporation from arrest. They also limit the circumstances under which vessels or property of foreign states is subject to arrest or attachment (46 U.S.C. § 30908; 28 U.S.C. § 1605).

When a Claimant May Obtain an Order of Maritime Attachment or Arrest

Under Rule B, a claimant must have a *prima facie* valid maritime claim against a defendant not present in the district for jurisdictional or service of process purposes.

Under Rule C, a claimant must demonstrate a maritime lien or statutory right that may be exercised against a vessel or other property in rem located in the district at the time the order of attachment is served.

ATTACHABLE PROPERTY

Under Rule B, a plaintiff may seek attachment of any property of the defendant in the district, including:

- Vessels.
- Tangible property.
- Bank accounts.
- Debts owed by others.

A plaintiff also may seek attachment of property of related entities on an alter ego theory, subject to alleging sufficient facts supporting its alter ego theory of liability to satisfy Rule E(2)(a)'s heightened pleading standard (see *Vitol S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 541-43 (4th Cir. 2014) (discussing standards for vacating attachment for insufficient pleading under Rule E(2)(a) and dismissing the complaint under Fed. R. Civ. P. 8 and 12(b)(6)) and see generally, Practice Note, Piercing the Corporate Veil (<http://us.practicallaw.com/5-516-9543>). Choice of law for determining the



validity of an alter ego claim usually leads to US federal common law under federal maritime choice of law principles (see *Blue Whale Corp. v. Grand China Shipping Dev. Co.*, 722 F.3d 488, 500 (2d Cir. 2013)). Notably, electronic funds transfers passing through intermediary transferee banks in the district are not subject to attachment (*Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 71 (2d Cir. 2009)).

Under Rule C, property subject to a maritime lien may be the subject of arrest, including:

- Vessels.
- Freights.
- Bunkers.
- Vessel equipment.

RELEVANT RULES AND GROUNDS FOR MARITIME ATTACHMENT

RELEVANT RULES

Rule B governs attachment of property, including vessels, on the basis of quasi-in rem jurisdiction where the plaintiff has asserted a maritime or admiralty claim against the defendant in the district or another venue, including abroad. Under Rule B, the district court can exercise jurisdiction to determine the underlying claim, up to the value of the property attached. Rule B claimants may seek additional prejudgment relief under state law via FRCP 64. Rule B attachment may be in the form of a direct claim or in aid of proceedings elsewhere.

Rule C of the Supplementary Rules governs in rem actions, including enforcement of maritime liens, such as arrest, or under other statutory grounds. Maritime lien and mortgage creditors and those with rights under certain federal statutes providing for *in rem* proceedings, may enforce their rights in rem against vessels or other property. Maritime mortgages and certain liens are defined in the Federal Maritime Lien Act and the Ship Mortgage Act (46 U.S.C. §§ 31301-31343). Liens under maritime law include:

- Custodia legis expenses.
- Seaman's wages.
- Tort.
- Salvage.
- General average.

GROUNDS

Under Rule B, the plaintiff must show a basis for seeking security (such as a judgment or pending arbitration or litigation in another jurisdiction) on a maritime claim. The defendant must not be found in the district, meaning that it is not:

- Subject to general jurisdiction and has not registered as a foreign entity in the state.
- Not amenable to service of process in the jurisdiction.

Under Rule C, a valid lien or statutory interest in the property sought to be arrested must be alleged to support an order arresting the property.

Prima facie Valid Maritime Claim

Plaintiff must demonstrate a prima facie valid maritime claim. Whether or not a claim is "maritime" is determined under US federal law. The prima facie validity of the claim is determined under the law that applies to the claim. (*Blue Whale*, 722 F.3d at 494-495.)

Respondent Not Found In the District

While there is not complete uniformity among the circuits, case law under Rule B generally holds that to be "found" in the district, the defendant must have:

- Sufficient minimum contacts in the state in which the district is located.
- Specific personal jurisdiction arising out of the transaction at issue.

(*STX PanOcean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 130-31 (2d Cir. 2009); *Smith Mar., Inc. v. Lay Drilling Barge Akpevweoghene (Ex Cherokee)*, 2013 WL 140215, at *2 (W.D. La. Jan. 10, 2013).)

Registration as a foreign company with the Department of State of the state in which the district is located has been found to be sufficient to defeat the jurisdictional grounds for a Rule B claim (*STX PanOcean*, 560 F.3d at 133). The defendant must also be subject to service of process, as by an agent for service of process in the district. (*STX PanOcean* at 131; *Smith Mar.*, 2013 WL 140215 at *2-3; *Stolt Tankers B.V. v. Geonet Ethanol, LLC*, 591 F. Supp. 2d 612 (S.D.N.Y. 2008)).

Some courts have found that an attachment may be vacated on equitable grounds, where either:

- The defendant's presence in a convenient adjacent district suffices for the defendant to be found for jurisdictional purposes in the district.
- Both the plaintiff and defendant are subject to jurisdiction in a different district.

(See, for example, *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 444 (2d Cir. 2006); but see *Stolt Tankers*, 591 F. Supp. 2d at 612, 619).)

Property in the District

Because the order of attachment may be served only in the district (Rule E(3)(a)), only property (including intangible property) in the district may be attached (*Aqua Stoli*, 460 F.3d at 438).

PROVING ENTITLEMENT TO AN ARREST

Maritime Lien or Statutory Claim

Suppliers of "necessaries" to a vessel, which provide these necessaries on the order of the owner or a person authorized by the owner, have a maritime lien on the vessel that may be enforced by an in rem civil action (46 U.S.C. § 31342). Necessaries are defined by statute as including:

- Repairs.
- Supplies.
- Towage.
- Use of a dry dock or marine railway.

- Bunkers.
- Food.
- Spare parts

(46 U.S.C. § 31301(4).)

Any person providing necessaries to a vessel must rely on the credit of the vessel, but is not required to allege or prove that credit was given to the vessel (46 U.S.C. § 31342(a)(3)). For example, the supplier of necessaries is entitled to a maritime lien unless it has actual notice of a "no lien" clause in the vessel's charter.

The statute presumes that the vessel's owner, master, vessel manager at the port of supply or an officer or agent appointed by the owner, charterer, owner pro hac vice or agreed buyer in possession of the vessel have authority to procure necessaries for the vessel (46 U.S.C. § 31341).

There is no associated or sister ship arrest regime in the US under Rule C, which provides for *in rem* jurisdiction only over the vessel or other property subject to the lien. However, other property of a defendant, including other vessels owned by the same defendant, may be attached in a proper circumstance under Rule B because *quasi in rem* jurisdiction under Rule B is a form of personal jurisdiction over the defendant. Sister ship arrest is a presumptive veil-piercing of companies that own vessels that are all part of the same fleet.

Under the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16, 201-208, 301-307), a party to an arbitration agreement may begin its proceeding by libel (filing a complaint) and seizure of the vessel or other property of the other party under the Supplemental Rules. The court has jurisdiction to direct the parties to proceed with the arbitration and retain jurisdiction to enter its decree once the award is issued (9 U.S.C. § 8). For more information, see Practice Note, Interim, Provisional and Conservatory Measures in US Arbitration (<http://us.practicallaw.com/0-587-9225>).

PROCEDURE

Applying for an order of Attachment

Under Rule B, the plaintiff must file a verified complaint seeking attachment and a due diligence affidavit of the plaintiff or plaintiff's attorney attesting that, to the knowledge or information and belief of the affiant, that the defendant cannot be found in the district. The complaint may seek attachment in the hands of garnishees named in the complaint.

The court must review the complaint and affidavit. If it appears that the conditions of Rule B are satisfied, the court enters an order authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order without further court order. This application is customarily made *ex parte*. The attachment does not capture property acquired by the defendant after service of the order of attachment (*Reibor Intern. Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262 (2d Cir. 1985); *British Marine PLC v. Avanti Shipping & Chartering Ltd.*, 2013 WL 6092821, at *2 (E.D.N.Y. Nov. 19, 2013); *Oceanfocus Shipping v. Naviera Humboldt, S.A.*, 962 F. Supp. 1481, 1484-85 (S.D. Fla. 1996)).

For more information, see Practice Note, Commencing a Federal Lawsuit: Filing and Serving the Complaint: Serving Process on the Defendant (<http://us.practicallaw.com/9-506-3484#a420571>).

Bringing an Action for Arrest

To use maritime arrest, the claimant must have a maritime lien on the property to be seized. Unlike maritime attachment under Rule B, the remedy of arrest under Rule C can be granted even when the likely liable party can be found in the district.

Under Rule C, the plaintiff must bring a verified complaint that:

- Describes "with reasonable particularity" the property sought to be arrested.
- States that the property is in the district or will be there while the action is pending.

The court must review the complaint and supporting papers. If the conditions for an *in rem* proceeding appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property.

Under both Rules B and C, the complaint must be sufficiently detailed to enable the defendant to undertake an investigation of the facts and develop its response without seeking a more definite statement. Therefore, the pleading requirement is heightened from what FRCP 8 requires, but its parameters are not specified.

Also under both rules, if the plaintiff or its counsel certifies that there are exigent circumstances, so that there is not enough time to go before a judge, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden to show at a later hearing that exigent circumstances existed. (Rule B(1)(c), C(3)(a)(ii).)

Service of Process of Arrest or Attachment

If the property to be attached is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process (or, for Rule C, the warrant for arrest and any supplemental process) must be delivered to the US Marshal's service for service (Rule B(1)(d)(i), C(3)(b)(i)). The marshal has specific requirements and procedures for arrest, requiring, for instance, funds in advance to cover its up-front costs in keeping the vessel, such as wharfage, security, and insurance (28 U.S.C. § 1921). Costs vary depending on the size and nature of the vessel and other circumstances. A plaintiff seeking to have the marshal arrest or attach property should:

- Contact the marshals' office in the district before filing the complaint.
- Ensure strict compliance with the marshal's requirements and procedures.
- Provide the marshal with sufficient funds
- Make arrangements for a marshal to be available to seize the vessel.

The court frequently appoints a substitute custodian, which may be less costly than the marshal, to take over shortly after arrest.

Service regarding attachment or arrest of other tangible or intangible property may be served by:

- The marshal.
- Someone under contract with the US.

- Someone specially appointed by the court (for example, plaintiff's counsel or process server).
- For actions brought by the US, an officer or employee of the government.

(Rule B(1)(d)(ii), C(3)(b)(ii).)

In Rule B cases it is common for the plaintiff to submit an order permitting designated persons other than the marshal to serve process.

Process may be served only in the district (Rule E(3)(a)). Plaintiff may request that service be held in abeyance (Rule E(3)(b)), which can be used to give the parties time to negotiate a settlement or security without the disruption of attachment or arrest, or if the property is not yet in the district. Interrogatories may be and usually are served on a garnishee along with the Rule B complaint.

The marshal or other person or organization having process must execute it under Rule E(4). Because Rule B does not capture after-acquired property, the party seeking the attachment may wish to serve process on garnishees on a regular basis to be certain that the attachment is or becomes effective. Where authorized by the court, it is simpler and less expensive to have others (such as law firm paralegals,) conduct service instead of the marshal. The marshal generally takes tangible property that is attached or arrested into custody (Rule E(4)(b)). If the property is not of the type that can be taken into custody (such as a debt or other intangible property), the person executing process affixes a copy of the process to the property and leaves a copy of the complaint and process with persons having possession or their agent (Rule E(4)(c)). The marshal may request US Customs authorities to not give customs clearance to a seized vessel (Rule E(4)(b)).

Intangible property is attached or arrested by leaving a copy of the complaint and process with the garnishee or other obligor. Alternatively, the marshal may accept payment into the registry of the court of the amount owed up to the amount claimed by the plaintiff plus interest and costs. Payment into court of the amount owed (up to the amount the plaintiff claims, with interest and costs) discharges the garnishee's obligation to answer the complaint unless alias process is served (Rule E(4)(c)).

The court may, on a party's motion or sua sponte, enter any order necessary to preserve and prevent the removal of any attached or arrested property that remains in possession of its owner or another person.

Answer of Defendant or Garnishee and Attachment of Property

In case of attachment, the defendant must answer the complaint in 30 days of execution of process by attachment of property or service on a garnishee (Rule B(3)(b)).

The garnishee in a Rule B case must answer the complaint, and any interrogatories served on it under oath in 21 days after service of process (Rule B(3)(a)). If the garnishee does not respond, the court may award compulsory process against it to compel answers to interrogatories (see *Agrocooperative Ltd. v. Sonangol Shipping Angola (Luanda) Limitada*, 2015 WL 138114 at *7-8 (S.D. Tex. Dec. 15, 2014)). If the garnishee admits holding any property of the

defendant, the garnishee must continue to hold it or pay it into the court registry, subject to further order of the court (Rule B(3)(a)). As a practical matter, an answer to the complaint by the garnishee is often extended indefinitely.

In a Rule C case, any person asserting a right of possession or any ownership interest in the property must file a verified statement of right or interest in 14 days of execution of process or at another time set by the court (Rule C(6)(a)). The person must file an answer in 21 days after filing the statement of right or interest (Rule C(6)(a)(iv)). If property has been arrested and not released on posting of security in 14 days after execution, the plaintiff must give public notice in a newspaper designated by the court of the action and arrest, identifying the time to file a statement of right or interest (Rule C(4)).

A defendant's appearance on an arrest or attachment claim may be expressly restricted to the defense of that claim. If so, it is not an appearance concerning any other claim. (Rule E(8).)

Under Rule C(3)(c), the clerk also must issue a summons directing any person controlling the property to show cause why it should not be deposited into court until judgment is rendered where the plaintiff seeks arrest of either:

- Freight.
- The proceeds of property sold.
- Other intangible property.

POST-ATTACHMENT PROCEEDINGS

Posting of Security by Plaintiff

Security is not required at the outset of a maritime arrest or attachment. Under Rule E(2)(b), the court may require any party to give security in the form of a sufficient amount to pay all costs and expense that may be awarded against the party.

Countersecurity

Rule E(7) provides that the plaintiff must give security in the usual amount and form to respond in damages to the claims set out in the counterclaim, unless the court, for cause shown, otherwise directs, whenever:

- There is a counterclaim arising out of the same transaction.
- The defendant has given security, such as an arrest or attachment.

A district court also may exercise its discretion to deny countersecurity (see, for example, *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399-400 (2d Cir. 1995)). Security should be ordered where it furthers Rule E(7)'s purpose of placing the parties on an equality as regards security. (see *Front Carriers LTD. v. Transfield ER Cape Ltd.*, 2007 WL 4115992, at *3 (S.D.N.Y. Nov. 19, 2007)). It is well established, however, that "countersecurity will not be awarded for counterclaims that are blatantly without merit" (*Voyager Shipholding Corp. v. Hanjin Shipping Co.*, 539 F. Supp. 2d 688, 691 (S.D.N.Y. 2008)).

Security for Costs

Rule E(2)(b) gives the court discretion to order a party to post security for costs. Costs may include the premium for bonds obtained to release an attachment (see *Result Shipping*, 56 F.3d at 401).

Unless there is some basis for an award of attorneys' fees to the prevailing party, a security for costs order does not include projected attorneys' fees (see *Med-Asia Shipping Ltd. v. Cosco Beijing Int'l Freight Co.*, 2008 WL 925331, at *2 (S.D.N.Y. Apr. 2, 2008)).

Posting of Security by Defendant for Release of Property

Defendant may post security to release property from attachment or arrest. The parties commonly agree on the amount and the form, which is frequently a protection and indemnity (P&I) club (maritime liability insurer) letter of undertaking. A letter of undertaking may be posted in advance to avoid arrest or attachment. Rule E otherwise governs the determination of amount and form of security.

Following arrest, where the shipowner is in a distressed situation:

- Numerous claimants may appear.
- The posting of security can become problematic and unlikely.

When a vessel is arrested or attached, it can be released only in connection to the specific charge giving rise to the arrest or attachment after posting a special bond. The bond may be in an amount agreed by the parties or, absent agreement, as set by the court. Under Rule E, the principal sum of the bond is set at the lesser of the appraised value of the property or the amount of the plaintiff's claim plus interest and costs (all together not to exceed twice the amount of the claim). (Rule E(5)(a).) That is, the amount of security cannot exceed the value of the property. Property in the possession of the marshal or other authorized person is not released until their costs and charges are paid. A vessel owner may file a general bond against claims to avoid future attachments.

Hearing

To address due process concerns, the rules provide that any person claiming an interest in arrested or attached property is entitled to a prompt hearing, at which the burden is on the plaintiff to show why the attachment or arrest should not be vacated (Rule E(4)(f)).

Judicial Sale

A party, the marshal, or other custodian may apply to the court to sell attached or seized property, if the property is perishable or subject to deterioration, decay, or injury while under custody, unduly expensive to maintain, or there is unreasonable delay in securing release of property (Rule E(9)(a)(i)). The proceeds of the sale, up to the amount needed to satisfy the judgment, must be paid into court (Rule E(9)(b)). Alternatively, on motion by a defendant or person filing a statement of interest, the court may order the property to be delivered, subject to security, to the defendant or a person filing a statement of interest in the property (Rule E(9)(a)(ii)).

The process for selling a vessel or other property is governed by 28 U.S.C. §§ 2001 and 2004 (noting that local rules may address matters, such as advertisement of the sale), with additional requirements imposed by federal maritime statutes. The vessel is sold free and clear of prior claims, which attach to the proceeds of the sale, with some considerations for the priority of certain liens.

Wrongful Arrest

The court can find an arrest to be wrongful if made in bad faith, with malice or with gross negligence (*Comar Marine Corp. v. Raider Marine Logistics, L.L.C.*, 792 F.3d 564, 575 (5th Cir. 2015); *Indus. Mar. Carriers, LLC v. Dantzer, Inc.*, 611 F. App'x 600, 603 (11th Cir. 2015)). Damages for wrongful arrest include:

- Attorneys' fees.
- Costs.
- Damages directly attributable to the attachment, including lost profits.

(*The Conqueror*, 166 U.S. 110, 125 (1897); *Comar Marine*, 792 F.3d at 576-77; *Pace Shipping Servs. Network SA v. M/V Ocean D*, 2003 WL 1733538, at *7 (E.D. La. Mar. 31, 2003).)

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at practicallaw.com. For more information or to schedule training, call **888.529.6397** or e-mail training.practicallaw@thomsonreuters.com.