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SHIP ARREST IN THE REPUBLIC OF PANAMA AND ITS HARMONIZATION WITH INTERNATIONAL LAW

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Ship arrest in the Republic of Panama and its harmonization with international law

Dr Víctor Hugo Chacón[*]

Ship arrest is the most efficient and effective instrument for the enforcement of maritime claims. At the same time, arrest can be a very risky and harmful practice if it is not responsibly directed. The Republic of Panama is well-known for its long tradition in providing maritime services. Its geographical position and a world-famous canal make Panamanian waters an essential path for international navigation. As the locus of the largest ship registry of the world and the most called at ports in the Latin American region, the country has become the perfect place for the enforcement of maritime claims. In 1982 the country created a specialized maritime jurisdiction, empowered to order the arrest of vessels. Although Panama has not ratified any of the international Conventions on ship arrest, it has its own set of rules which share some the general principles in these conventions. It has created a unique system that combines aspects of the Anglo-American system with the procedural rules of a Civil Law system. This paper examines the main characteristics of the ship arrest system in Panama and compares it with the international regimes as well as with two other relevant maritime forums, the United Kingdom and Singapore.

Keywords: Ship arrest, Panama, enforcement of maritime claims, maritime jurisdiction of Panama, maritime liens, jurisdiction clauses, forum selection.

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1 Introduction

Ship arrest has been, and is, the most practical and effective instrument to enforce maritime claims. In most cases, arresting a vessel is the only recourse a maritime creditor has to recover its debts, providing access to asset security for those who, directly or indirectly, finance the maritime adventure or suffer damages or losses from vessel operations and related activities. Notwithstanding this, detaining a ship which is subject to fixed schedules, even for a short period, may cause tremendous damage, not only for shipowners or charterers but also for the whole chain of international trade that depends on the safe and timely arrival of goods at destination. Considering its relevance to the shipping industry, the international community has devoted effort in the adoption of two Conventions seeking to harmonize international law governing this practice. The first of these instruments was the Convention Relating to the Arrest of Sea-going Ships 1952.[1] Almost 50 years after its enactment, the United Nations and the International Maritime Organization (IMO) proposed a second instrument containing updated rules, the International Convention on the Arrest of Ships 1999.[2] Both Conventions have entered into force and govern the issue in many countries around the world.[3]

The Republic of Panama, though playing a paramount role in the international shipping industry, has not ratified these Conventions. Instead, it has enacted its domestic law which observes some of the general principles contained in the Conventions. Law 8 of 1982 establishes the purposes, requirements, and procedure for the arrest of ships in Panama and until now this has provided a relatively efficient arrest system. However, due to the increasing number of vessels transiting the Panama Canal and calling into the Panamanian ports, a further revision may be required, in order to adapt domestic law to international standards.

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1 International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952, in force 24 February 1956.

2 International Convention on Arrest of Ships, Geneva, 12 March 1999, in force 14 September 2011.

3 For a detailed list of countries that have given the force of law to these arrest Conventions or have included them wholly or partly their national law, see Francesco Berlingieri, *Berlingieri on Arrest of Ships* (6th edn, Informa 2017) vol 1, paras 2.17, 2.45; vol 2, para 2.04.

This paper sets out a brief description of the services that make the Republic of Panama a maritime nation before explaining the background, characteristics, and jurisdiction of the Maritime Courts of Panama, providing a better understanding of the context in which ship arrest is practised. The ship arrest system will be analyzed, comparing the law in Panama with the norms established in the Conventions as well as two important forums that practice ship arrest, the United Kingdom and Singapore. The first, the United Kingdom, is selected because of its long tradition underpinning the institution of ship arrest and because it continues to be a reference point in those Common Law countries whose maritime laws derive from English law.[4] The second, Singapore, is selected because of its location in the middle of the most populous area of the earth and the importance of its shipping and logistics services to three of the largest economies and other fast-growing markets.[5] Its state of the art seaport is one of the busiest in the world[6] and, with the possibility of a substantial number of ship arrests, the decisions of the Singapore courts on this subject may have a global resonance in the near future.

2 The Republic of Panama: a maritime country

The geographical position of the Panamanian isthmus has catapulted the maritime services of this country to prominence. With a world-famous canal, the largest ship registry in the world and the busiest ports in Latin America, the Republic of Panama is a well-known maritime nation. As one of the smallest states in the Americas, with a population of nearly 4 million people, the nation has made substantial efforts to develop its maritime potential. The Panama Canal, opened in 1914, now reports around 14,000 transits annually. The country recently completed a US$5.25 billion expansion project of the Canal, opening its third set of wider locks on 26 June 2016. In the first two years of operation, over 3,000 new-

4 William Tetley, 'Arrest, attachment, and related maritime law procedures' (1999) 73 Tulane LR 1895, 1898.

5 According to the World Economic Forum, China, Japan and India are among the 10 largest economies in the world, and Indonesia is expected to be the fourth largest economy by 2050. The Asian bloc represents over a third of the global GDP: see, eg, <https://www.weforum.org/agenda/2017/03/worlds-biggest-economies-in-2017/> accessed 10 August 2018.

6 The port of Singapore receives around 130,000 vessels calls every year: see <https://www.mpa.gov.sg/web/ portal/home/port-of-singapore> accessed 10 August 2018.

Panamax vessels have crossed the expanded canal.[7] Such enlargement is accelerating international trade substantially, especially between north and central Asian countries and the east coast of the United States.

The Panamanian ship registry, which started in 1917, was the first open registry of the world. Since 1993, it has consistently been the world's largest ship register and at present there are over 8,000 vessels on the register.[8] To assure the quality of this service, Panama has ratified over 32 IMO Conventions,[9] including the recently in force Ballast Water Convention,[10] among others. In 2009, it was one of the first countries to ratify the Maritime Labour Convention of 2006.[11] In November 2001, the IMO elected Panama to its Council in category A, of countries with the largest interest in providing international shipping services, along with China, the United States, the United Kingdom, Greece, and five others.[12] Owing to the efforts of the Panama Maritime Authority and its network of safety offices and inspectors around the world, Panamanian vessels have a very low number of detentions by port state control and, since 2011, Panama has been featured in the White List of both the Paris[13] and Tokyo[14] MOUs.

The logistics industry is another sector where Panama is continuously improving. Taking advantage of its privileged location, the nation has developed an outstanding port infrastructure that has positioned it as the best logistics provider in Latin America.[15] The

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7 By 26 June 2018, 3,745 Neopanamax vessels had transited the expanded waterway: see <https://www.pancanal.com/eng/pr/press-releases/2018/06/26/pr653.html> accessed 10 August 2018.

8 UNCTAD Secretariat, 'Review of Maritime Transport 2017' (UNCTAD/RMT/2017) 32.

9 <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.asp> accessed 10 August 2018.

10 Law 41 of 12 September 2016: Gaceta Oficial (GO) No 28117-B of 1 September 2016.

11 Law 2 of 6 January 2009: GO No 26200 of 13 January 2009.

12 The election took place in the 22nd IMO Assembly, held November 2001, entering into force a year after: see <http://www.imo.org/en/MediaCentre/MeetingSummaries/Assembly/Archives/Pages/default.aspx> accessed 14 September 2018. Panama has maintained the same category since its first appointment in 2002. For the most recent biennium 2018/2019 see <http://www.imo.org/en/About/Pages/Structure.aspx> accessed 10 August 2018. The other countries are Italy, Japan, Norway, Republic of Korea, Russian Federation. See also Panama Maritime Authority and M Labrut, *Panama Ship Registry, 100 years serving the world* (Seatrade, 2017) 4.

13 Panama Maritime Authority and Labrut (n 12) 5. For the period 2017-2018, see <https://www.parismou.org/ detentions-banning/white-grey-and-black-list> accessed 10 August 2018.

14 According to the last report of 2017, available at <http://www.tokyo-mou.org/doc/ANN17.pdf> accessed 10 August 2018.

15 *Connecting to Compete 2016, Trade Logistics in the Global Economy, The Logistics Performance Index and its Indicators* (World Bank 2016) x.

movement of containers in Panama is much higher than in larger Latin American economies such as Chile, México or Argentina.[16] Furthermore, bunkering and ship chandlers' services are also both growing industries in the country.

The volume of ships navigating Panamanian waters also means that this is where the largest number of ship arrests takes place in Latin America. The administration of justice in maritime matters became, in consequence, crucial. As a response to the need to provide a judicial service capable of dealing with such claims, in 1982 the nation created a specialized maritime jurisdiction. The maritime courts of Panama have exclusive jurisdiction over maritime claims and are considered the fourth pillar of the maritime services platform of Panama. With the continuous growth of the shipping services offered in Panama, the country is expecting the arrival of more and bigger vessels in future years, increasing the importance of these courts.

3 The maritime jurisdiction of Panama

3.1 Origin

The origin of the maritime jurisdiction in Panama is directly connected with the construction and operation of the Panama Canal. According to the treaty for the construction and administration of the waterway signed in 1903 between the Republic of Panama and the United States of America, an area of 10 miles (5 miles on each side) along the interoceanic way was transferred to the government of the USA.[17] This area, the Canal Zone, also covered the only two deep-water ports, Cristobal on the Atlantic, and La Boca on the Pacific.[18] The admiralty and maritime jurisdiction on the shores of the waterway was

[16] In 2017, the Panamanian port system reported the movement of 6.8 million containers. See <http://perfil.cepal.org/l/en/portmovements_classic.html> accessed 10 August 2018.

[17] W De Castro, 'The law enacted March 30, 1982 establishing the maritime court of Panama and governing its procedure' (1983) 57 Tulane LR 1373. This was according to article II of the Panama Canal Convention, commonly known as the Hay-Bunau Varilla Treaty, signed between United States and the Republic of Panama on 18 November 1903.

[18] George W Goethals, *Government of the Canal Zone* (Princeton University Press 1915) 20; De Castro (n 17) 1373.

excercised by the District Court of the Canal Zone, an American judicial body which was created in 1914.[19] This District Court was under the jurisdiction of the United States Courts of Appeals for the Fifth Circuit and applied US Federal Rules of Civil Procedure. Any arrest of a ship crossing the Panama Canal or calling at Cristobal or La Boca had to be filed with this court, as Panama had no jurisdiction over those waters, nor specialized courts to handle maritime claims.[20] By the 1970s, the District Court handled a considerable amount of admiralty cases and 'became a forum that was highly acceptable to maritime litigants'.[21] In 1977, Panama and the United States signed new treaties to turn over to Panama the Canal Administration as well as the territories occupied by the US government. One of the provisions contained therein was an obligation to return to Panama judicial jurisdiction over the entire Canal Zone.[22] Panama therefore recovered sovereignty over the canal territories and jurisdiction over maritime claims and the ability to order the arrest of ships on the canal and adjacent waters.

The general civil courts of Panama had no specific rules for the arrest of ships. As Panama lacked a specialist maritime and admiralty jurisdiction, it was necessary to create tribunals and a judicial procedure to handle these disputes. The then President of Panama appointed a drafting commission, which proposed a law creating the specialized maritime jurisdiction of Panama and associated rules of procedure.[23] The Panamanian Assembly approved this and enacted Law No 8 of 30 March 1982, commonly known as the Maritime Procedure Code (MPC).[24] One day later, the District Court of the Canal Zone closed its doors, but its tradition

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19 Ibid 11, 94, 99. The Spooner Act authorized the US President to acquire territory for the construction of a canal and to establish therein judicial tribunals in order to enforce the necessary rules to preserve order and public health in such territory. This court was established in the Panama Canal Act, enacted on 24 August 1912, 37 Stat 560, 565, and entered into force on 1 April 2014. The judge and a marshal were appointed for a term of four years by the President of the United States with the advice and approval of the Senate.

20 A Kouruklis, *El Secuestro de Naves en el Derecho Procesal Marítimo* (Editorial Mizrachi & Pujol 1994) 7-8, 37.

21 De Castro (n 17) 1374.

22 The Panama Canal Treaties of 1977, signed on September 7, 1977, established in art III 6, as follows: 'The Republic of Panama shall be responsible for providing, in all areas comprising the former Canal Zone, services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing, in accordance with this Treaty and related agreements.'

23 Eight lawyers composed the commission; most of them regularly practicing maritime litigation in the District Court of the Canal Zone: see De Castro (n 17) 1374, Kouruklis (n 20) 37.

24 GO 19539 of 30 March 1982.

remained[25] because the MPC replicates many of the rules and practices of the former US District Court. The new procedure created was a hybrid, combining some institutions of Anglo-American civil procedure law, inherited from the previous US court, with procedural rules applicable in a Civil Law country. The thinking behind keeping important features of US procedure was to provide an adequate system capable of meeting the needs and standards related to the international character of the maritime industry, which the Canal Zone District Court had provided for over six decades.[26] Panamanian maritime procedure therefore preserves such institutions as the forum arresti as an instrument to acquire jurisdiction over causes originated abroad and the in rem action, to execute maritime liens against ships. Also retained are discovery, as an instrument to obtain evidence, and the service of process by affidavit by a duly admitted lawyer at the defendant's domicile, among others.[27] The MPC continues to observe the principal concepts of the Supplemental Rules for Admiralty or Maritime Claims and Assets Forfeiture Actions of the Federal Rules of Civil Procedure of the United States, as formerly implemented by the District Court of the Canal Zone. Although most of these institutions were unknown to a Civil Law country such as Panama, after over 36 years of application they were the hallmark of convenience and efficacy for the resolution of maritime claims.

3.2 Jurisdiction over maritime claims

3.2.1 Jurisdiction over maritime matters

Article 19 of the MPC establishes a general rule on the cases eligible for decision by the maritime courts. The first paragraph of the article reads as follows:

> **Article 19**. The Maritime Courts have exclusive jurisdiction over cases that arise from acts concerning maritime trade, transport, and traffic, occurring within the territory of the Republic of Panama, in its territorial sea, in the navigable waters of its rivers, lakes

[25] The Panama Canal Treaties entered into force on 1 October 1979, granting a thirty-month transition from that date, ending on 31 March 1982. See <https://www.usmarshals.gov//history/panama/> accessed 10 August 2018.

[26] De Castro (n 17) 1374.

[27] Ibid 1383.

> and in those of the Panama Canal. These causes will include claims arising from acts that are executed or must be executed from, to or through the Republic of Panama. The claims that involve the Panama Canal Authority must comply with the provisions of its Organic Law.

This provision is an umbrella provision that covers all kinds of maritime claims. This is of major importance and underlines the Panamanian preference for a simpler and broader rule comprising any possible dispute that may arise from the activities of the maritime industry or activities related to it.[28] The direct consequence of this approach is that the practice of ship arrest in Panama is not limited to cases with causes of action corresponding to a closed list of maritime claims. This may be compared with art 1(1) of both the Arrest Conventions of 1952 and 1999.[29] The United Kingdom[30] and Singapore,[31] as well as some other countries,[32] contain similar lists restricting the jurisdiction of the courts to the named cases. This restriction might be considered impractical as new claims related to the maritime industry arise with the constant evolution of the shipping business. It may even be said, in the words of Tetley, that the Conventions' approach is 'regrettable', as an 'open-ended' list provides more flexibility for the courts to apply ship arrest rules to new types of maritime claims.[33] The fact that the 1999 Convention included six new claims that were not covered by the 1952 Convention is evidence of the inconvenience of closed lists.

In Panama, therefore, an arrest is warranted in any claim arising from activities related to the maritime industry. Which claims are these? The Civil Branch of the Supreme Court of Justice of Panama (SCJ), acting as the tribunal of maritime appeals, has made it clear that, as the MPC does not offer a descriptive list of the acts related to the maritime trade subject to

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28 This is similar to the position of South Africa in the Admiralty Jurisdiction Act No 105 of 1983, s 1(1)(ee).

29 The list introduced in the 1952 Convention reproduces the list enacted in the English Supreme Court of Judicature (Consolidation) Act of 1925: see Tetley (n 4) 1908.

30 Senior Courts Act 1981 (SCA), s 20(2).

31 High Court (Admiralty Jurisdiction) Act (HC(AJ)A), cap 123, s 3(1). This Act has been subject to some revisions and amendments, making it in some very minor aspects different from the original English source, the Administration of Justice Act 1956: see <https://sso.agc.gov.sg/Act/HCAJA1961> accessed 9 August 2018. See also *Halsbury's Laws of Singapore* (2006) vol 17(2) para 220.0148.

32 China, Russian Federation, India. Also, the Comunidad Andina composed of Bolivia, Colombia, Ecuador and Peru included in Decision 487, similar list and other provisions of the 1999 Arrest Convention: See Berlingieri (n 3), vol 2 paras 2.18, 2.21.

33 Tetley (n 4), 1965.

the jurisdiction of the courts, this must be resolved on a case-by-case basis.[34] The Supreme Court has also added that the jurisdiction encompasses all claims, not just limited to those general maritime contracts regulated in the Code of Commerce, and includes other contracts or acts governed by civil, penal or labour laws so long as these are connected with maritime commerce.[35] Therefore, claims arising from a corporate dispute between companies operating vessels,[36] a helicopter crash on the high seas while serving a fishing vessel,[37] and damages caused to fishing activities by an oil spill,[38] are within the jurisdiction of the court.

3.2.2 Jurisdiction over foreign claims

The first paragraph of art 19 refers only to maritime claims originating within Panamanian territory, apparently setting a clear geographical scope for those matters falling within the jurisdiction of the courts. Article 19, however, contains further paragraphs setting out the conditions under which these courts may also have jurisdiction in cases which originate beyond the borders of Panama:

> The Maritime Courts also have exclusive jurisdiction to hear actions derived from the acts referred to in the previous paragraph, occurring outside the territorial scope above indicated, in the following cases:

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34 *ADL Business v Silver Shadow Shipping Co Ltd*, SCJ, 17 October 2012. The decisions of the Supreme Court of Justice of Panama are available in Spanish at <http://bd.organojudicial.gob.pa/registro.html> accessed 9 August 2018.

35 *Pesquera Monteblanco CA v Naviera Industrial SA*, SCJ, 8 November 2002; *Máximo Padilla Sánchez v The Steamship Mutual Underwriting Association (Bermuda) Ltd*, SCJ, 31 August 2007. However, the second Maritime Court, whose decision was upheld by the Supreme Court of Justice, refrained from exercising jurisdiction over an action disputing the ownership of a vessel, when the alleged new ownership resulted from an act of expropriation of a government over a private company. An action of that type requires the analysis and decision over the legitimacy of such expropriation, which escapes from the court's jurisdictional scope. See *República Bolivarina de Venezuela v Sunbulk Shipping V & Vencement Investment*, SCJ, 13 October 2010.

36 *Carmelina Gentile v Inversiones Naviera Condesa de los Mares*, SCJ, 25 September 1995.

37 *Annie Patricia Canabal Vergara v M/N Sea Gem, Aerotech International Panamá Inc, Pescatún de Colombia SA, Seatech International Inc, Industria Ecuatoriana Productora de Alimentos CA, Sea Trading International, Tuna Atlantic Ltd, and Ocean Trading International Inc*, SCJ, 20 March 2014.

38 *Comunidades Indígenas de Chiriquí Grande v Petroterminal de Panamá SA*, SCJ, 29 May 2012; *Eliseo González v Petroterminal de Panamá SA*, SCJ, 12 November 2012.

1. When the respective actions are directed against the ship or its owner, and the ship is arrested within the jurisdiction of the Republic of Panama, as a consequence of such actions.

2. When the Maritime Court has arrested other property belonging to the defendant, even if it is not domiciled within the territory of the Republic of Panama.

3. When the defendant is within the jurisdiction of the Republic of Panama and has been personally notified of any actions presented in the Maritime Courts.

4. When the ship or one of the ships involved is of Panamanian flag, or substantive Panamanian law is applicable under the contract or provided by Panamanian law itself, or the parties expressly or tacitly submit to the jurisdiction of the Maritime Courts of the Republic of Panama.

This provision establishes the basis for jurisdiction over foreign claims and is where the influence of US procedural law is evident. The first paragraph establishes jurisdiction over actions in rem if the vessel is effectively arrested in Panama. The second paragraph assigns jurisdiction over in personam claims through the arrest or attachment of the defendant's property, based on the forum arresti. It is noteworthy that the provision enables the execution of an arrest against any property, not only ships, owned by the defendant, including, for example, the bunkers on board a ship. In any case, the arrested property must be owned by that defendant. The arrest of a vessel chartered by demise, possible under art 3(4) of the 1952 Arrest Convention or art 3.1(b) of the Arrest Convention of 1999, or against its beneficial owner is not expressly permitted, although there may be some exceptions. Article 27 of Law 55 of 2008, on maritime commerce, assumes that anyone employing a

vessel is to be considered its owner in his relations with third parties.[39] On this basis, the arrest of vessels for debts of its charterer have been allowed.[40]

The third paragraph contemplates the forum for the service of process. When the defendant is physically in Panama and the court serves the lawsuit filed against him, the court obtains jurisdiction. A similar principle is followed by the English courts, where jurisdiction is obtained by the service of a writ, a 'claim form', on the defendant, without requiring any further connection of the claim or link with the jurisdiction.[41] English courts acquire jurisdiction over claims by the service of process, in the case of an in rem action over maritime property, or in the case of an in personam action over the defendant.[42] In Singapore, jurisdiction is also based on the service of process to the defendant or submission to the jurisdiction.[43]

The fourth paragraph contains three more situations in which the Panamanian maritime courts have jurisdiction.[44] The first is when the claim involves a vessel registered in Panama. The original wording of the article said, 'When *one* of the ships involved is of Panamanian flag'. The Supreme Court of Justice interpreted this provision as requiring two ships, as in cases of collision or towage. Claims outside this, such as necessaries provided to a Panamanian flagged ship, could not be decided by the maritime courts unless the ship was arrested or any of the other conditions for asserting jurisdiction occurred.[45] However,

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39 GO 26100 of 7 August 2008, 7: '**Article 27.** Whoever, for maritime traffic and for his own account, employs another's vessel, whether he directs it by himself or through another, will be considered in his relations with third parties, such as his owner. The true owner can not object to the effective performance of the rights that third parties acquire as creditors of the ship and as a result of their use, unless the owner demonstrates the illegitimacy of the credit and the creditor's true knowledge of such illegitimacy prior to compliance of the benefit that was requested.' Modified by law 27 of 28 October, 20144. GO No 27653-C of 29 October 2014, 20.

40 *Associated Steamship Agents SA v MV Baku*, SJC, 23 April 2014. The vessel in this case was released from arrest due to a no-lien clause in the charterparty.

41 DC Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Law 2005), para 3.2; Bernard Eder, 'Wrongful arrest of ships: a time for change' (2013) 38 Tulane Maritime LJ 115, 120.

42 Jackson (n 41) para 3.3. Notwithstanding, the same author notes that such approach has been lately modified by the enactment into English law of international Conventions requiring a substantive connection between the case and England.

43 Halsbury (n 31) para 220.0105.

44 *Louis Dreyfus Commodities Suisse SA, Louis Dreyfus Commodities Mea Trading DMCC, & Amlin Corporate Insurance v Fioralba Shipping Co Ltd*, SCJ, 15 June 2012; *Annie Patricia Canabal Vergara v M/N Sea Gem, Aerotech International Panama Inc,* SCJ, 20 March 2014.

45 *Fil Cargo Shipping Corporation v Caterpillar Marine Power Systems 'Branch Office' of Caterpillar Motoren Gmbh & Co Kg, & Caterpillar Motoren Verwaltungs GmbH,* SCJ, 11 January 2011.

following amendments to the MPC in 2009, the court can decide any case so long as a Panamanian ship is involved.[46] The second situation refers to cases governed by Panamanian substantive law and the third when the parties agree to submit to the jurisdiction.

Comparing this to the United Kingdom and Singapore, the geographical scope of Panamanian maritime jurisdiction seems to be more restrictive. Both English and Singapore law accept maritime claims irrespective of the ship's registry, the domicile of her owners, and wherever these claims arise.[47] The main exception in English law concerns in personam actions related to collision claims, where the defendant is not domiciled in England and Wales, or the collision did not occur in inland waters or within port limits.[48] Singapore follows the same approach.[49] In Singapore, in addition, the Court may also reject cases relating to the ownership of foreign ships when the dispute has no connection with Singapore save for the presence of the vessel in the jurisdiction.[50] Panama accepts collision claims, in rem or in personam, regardless of the place of occurrence or defendant's domicile, if any of the required conditions occur.[51] The same applies to disputes relating to the ownership of foreign vessels.

As there are no other contact points or elements requiring a further connection with the Panamanian forum, this is said to encourage forum shopping,[52] because the plaintiff is able

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46 *Louis Dreyfus Commodities Suisse SA, Louis Dreyfus Commodities Mea Trading DMCC, & Amlin Corporate Insurance v Fioralba Shipping Co Ltd*, SCJ, 15 June 2012; *Fortis Corporate Insurance v Spring Oil Carriers,* SCJ, 29 November 2012*; Cocket Marine Oil Limited v Tribute Holdings SA,* SCJ, 23 April 2014; *American Steamship Owners Mutual Protection & Indemnity Association Inc v Gulfwind Shipholding SA, Integer Maritime Inc, Royal Diamond Shipping Ltd, Blue Link Holding SA, Seacalm SA, Seadestiny SA, Seapride Management SA, and/or Strand Management SA*, SCJ, 14 October 2014. It is also formulated to meet the duty of having a genuine link over the vessel required by art 91(1) of the United Nation Convention on Law of the Sea.

47 M Tsimplis, 'Procedures for Enforcement', in Y Baatz (ed), *Maritime Law* (4th edn, Routledge 2015) 498, 499; Eder (n 41) 121. See SCA, s 20 (7)(a)-(c); HC(AJ)A, s 3(4)(a)-(c); Halsbury (n 31) paras 220.0094, 220.0106.

48 SCA, s 22. Tsimplis (n 47) 500.

49 HC(AJ)A, s 5(1).

50 Halsbury (n 31) para 220.0108. The Court may grant a petition to stay based on forum non conveniens and may follow the reasoning in *The Lakhta* [1992] 2 Lloyd's Rep 269.

51 *Mutua de Seguros de Armadores de Buques de Pesca de España v Yamato Kaiun (Panama) SA*, SCJ, 30 May 1994 (collision of vessels occurring in Morroco).

52 Even the Supreme Court of Panama has warned on this issue to justify staying a case: see *Alejandro Rafio v Intermodal Shipping Inc*, SCJ, 26 November 2007.

to select a forum which would be more advantageous to its interest, to the detriment of the defendant. It is submitted, however, that this is not necessarily the case, as the selection of a forum for the enforcement of maritime claims is obviously affected by the need to locate and arrest a debtor's property, normally a ship sailing worldwide. Such a situation certainly limits the opportunity for a creditor to recover its unpaid credits. Hence, for many claimants, it is not that they are seeking substantive or procedural advantages over the defendant, but they have to file their claim in the forum where the vessel is physically present and can be arrested. In many cases, such a forum is the only chance the claimant has to enforce its claim. In addition, having arrested property in the country and once security is provided for releasing the ship, the forum becomes the one where a final judgment can be executed and where the claimant can satisfy its debt.[53] This element provides a sufficient connection with the forum so as to enable it to decide the merits of the case. This is an old practice and widely accepted mode of enforcing maritime claims. Indeed, in both international Conventions jurisdiction on the merits of the case of the arresting forum is the natural consequence of having arrested the ship.[54] The Conventions grant jurisdiction on the merits by the actual arrest, as long as the arresting court has jurisdiction according to its domestic law and without indicating that further points of connections with that forum must concur. Under English law, the arrest produces the same consequence, and their courts can decide the merits of the case.[55]

A Panamanian Court, by contrast, will decide the case according to the applicable substantive law that governs the obligation. Panama does not apply the lex fori, unless Panamanian substantive law applies to the claim. In contractual obligations containing a choice of law clause, the Panamanian judge will apply such legislation to the complaint. In the absence of an agreed governing law, the MPC provides rules of conflict of laws for determining the applicable substantive law.[56] Plaintiff and defendant are under an obligation to demonstrate the content and construction of such legislation through the case law, doctrinal studies, and most commonly from the legal opinions of attorneys admitted to

53 Tsimplis (n 47) 510.
54 See art 7 of both instruments.
55 Tsimplis (n 47) 510.
56 Article 566 MPC.

the practice of the corresponding country.[57] Defendants have the same defences and rights that will be recognized by the natural forum applying the same law. On this point, therefore, the Panamanian system differs from the Arrest Conventions as well as English and Singaporean law, which apply the law of the forum. Panama applies its local procedural law to the arrest and the claims proceedings.

Jurisdiction clauses

The Arrest Conventions provide an exception to the normal rule granting jurisdiction upon the merits to the arresting court when the parties 'validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction or to arbitration'.[58] In the United Kingdom, the fact that foreign law governs the contract or the contracts contains an arbitration or a jurisdictional clause appointing another forum, does not prevent the court issuing a warrant of arrest.[59] The court may, however, stay the proceedings at defendant's request, based on the jurisdiction or arbitration clause, or on the grounds of forum non conveniens, but retaining security for the arrest.[60] However, Tetley points out that the '… United Kingdom courts have always made every effort to keep jurisdiction to hear foreign and foreigner's claims'.[61]

The MPC contains the same exception in art 22.3, which enables judges to stay a case where a forum selection clause appears in the contract. The jurisdiction of the Panamanian courts has been challenged in multiple cases under this rule, as bills of lading, charterparties, and ship supplier's terms and conditions regularly include such clauses. Their effect, however, could be far more dramatic when inserted in seafarer's labour contracts. The previous wording practically obliged the courts to respect such clauses, and to admit petitions staying the proceedings, ordering that proceedings be started in the agreed forum.[62] Such decisions

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57 Articles 209 and 221 MPC.

58 Article 7(1) of the 1999 Arrest Convention. A similar provision is found in art 7(3) of the 1952 Arrest Convention.

59 Eder (n 41) 121.

60 Ibid.

61 William Tetley, 'Maritime liens, mortgages and conflict of laws' (1993) 6 University of San Francisco Maritime LJ 1, 11.

62 *Miguel Vanegas v MV Curimagua*, SCJ, 14 February 2011 (the case was decided under the previous MPC provision, as the decision and the appeal was submitted before the amendments); *A/S Dan Bunkering Ltd*

often caused harm to claimants, prompting the amendment of the rule. During the second half of the 1990s and into the new millennium, a series of claims for personal injuries or wrongful death suffered by Filipino seafarers were filed at the Panamanian Maritime Courts with an arrest petition.[63] As most of their labour contracts contained a jurisdiction clause referring any dispute to offices in the Philippines,[64] the courts respected those agreements and the claims were stayed, ordering claimants to start proceedings in their own country.[65] A similar situation occurred with the cargo claims of some Latin American exporters, where the courts, under similar provisions in bills of lading, declined their claims to foreign courts.[66] In the maritime industry it is well-known that certain forums have been historically appointed for the resolution of claims and, as a result, such forums have provided abundant case law on the subject. The problem is that these forums are now less than effective venues for the enforcement of maritime claims as their ports are no longer the busiest and ship arrest is not frequently easily practised. The courts of such places are also not the fastest in deciding cases. In addition, the main cargo liners are not registered there, so they do not offer major contact points for most claims compared with newer jurisdictions which are flourishing and offer, perhaps, more efficient maritime claims enforcement systems. For some creditors, such as small and middle-sized companies, these traditional jurisdictions have, in certain ways and for many reasons, become financially inaccessible. Problems have arisen when staying cases and, though keeping the security in Panama, claimants were

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v MV Ocean Honey, SCJ, 18 October 2012*; La Carambola SA v Crowley Liner Services, Inc*, SCJ, 18 November 2008.

63 The claims were filed in Panama because in the Philippines there were some procedural limitations, as well as a lack of vessels calling at its ports, making it almost impossible to arrest the vessels and succeed in those claims.

64 The Philippine Overseas Employment Administration (POEA) — <www.poea.gov.ph> accessed 10 August 2018 — or the National Labor Relations Commission (NRLC) — <http://www.nlrc.dole.gov.ph/> accessed 10 August 2018.

65 *Mario L Latayada v Sea Romance Shipping Co*, SCJ, 17 February 1998; *Angel A Castro v Gearbulk Shipping Ltda*, SCJ, 30 July 1998; *Helen Villareal Tobias v MV Star Cebu*, SCJ, 14 May 2001; *Luz Marina Reyes v Mitsui OSK Lines & Diamond Camellia SA,* SCJ, 21 May 2001; *Florida Suello y Edna Suello v MV Atlantic Ocean*, SCJ, 8 October 2001; *Dina Quilenderino v Indian Shipping Co*, SCJ, 13 December 2001; *Nenita Canedo v Hanjin Shipping Co*, SCJ, 25 June 2002; *Erlinda Dayrit v Gearbulk Shipowning Ltd*, SCJ, 11 June 2003; *Uldarico Castillo R v MV Mandarin Arrow*, SCJ, 28 July 2003; *Cipriano Alonsabel v MV Diamonds A*, SCJ, 19 September 2000; *Roberto Candelario v NCN Corp*, SCJ, 31 January 2003; *Ubaldo Avellaneda v Atlantica SpA di NAV*, SCJ, 12 May 2004; *Noel Dimaguila v Seafarers Shipping Inc & Victoria Ship Management Inc,* SCJ, 17 March 2004; *Felipe Vitagan v MV Sun Sapphire*, SCJ, 24 February 2006; *Lourdes Quitton v Cho Yang Shipping Co Ltd, Twinhill Tanker Lines SA & Jupiter Conveyer SA*, SCJ, 8 March 2007.

66 *Agrowest SA, Dos Valles SA & Consorcio Del Agro SA v Compañía Sudamericana De Vapores (CSAV)*, SCJ, 11 November 2008; *La Carambola SA v Crowley Liner Services Inc*, SCJ, 18 November 2008; *Productos de Espuma SA & Prodex Comercial SA v Crowley Liner Services Inc*, SCJ, 16 July 2009.

unable to file the cases there or, even worse, the actions were time-barred. Such a situation represents a denial of justice to claimants and caused concern among the legal community in Panama, as this would imply violations of constitutional provisions regarding the right of access to justice.[67]

The 2009 amendments of the MPC introduced a partial solution to this issue. Following these amendments, the courts can abstain from deciding a case because of a choice of forum clause, but this is conditional on submitting written evidence that such a clause was the result of a real negotiation and not a simply imposition in a contract of adhesion. A judge in Panama can refrain from continuing with a case 'when the parties have negotiated, prior and expressly, to submit their disputes to a Court in a foreign country, and have agreed to it in writing', and the same rule clarifies that 'pro forma or contracts of adhesion shall not be considered as prior and expressly negotiated'.[68] Therefore, those jurisdictional clauses imposed by a party in a 'take it or leave it' contract, where the other party has no chance to negotiate or vary the terms, are not accepted as the basis for a petition to stay the case in favor of 'contractual' forum. Since the amendment, no case has been declined based on a jurisdiction clause contained in a contract of adhesion.[69] In cases where there is written evidence of a duly negotiated and valid jurisdiction clause, the petition to stay is admitted but, similarly to the Arrest Conventions, the courts will keep the security and are entitled to establish some conditions to protect party's rights. For example, the courts may fix a period to file the claim in the new court or the deposit of security in such court. Regarding the time bar limitation, the judge can require a defendant to refrain from raising the time bar in the new forum. Prior to the 2009 amendments, the judges had already set out some of these conditions, but the Supreme Court revoked those decisions because of the argument that it restricted the defendant's rights, especially regarding the invocation of the time bar.[70]

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67 Panama is a signatory to the American Convention on Human Rights, art 8 of which establishes a right of access to justice. This article is also part of the constitutional order of Panama, according the jurisprudential theory of the 'Block of Constitutionality' developed by the Supreme Court of Justice.

68 Article 22.3 MPC.

69 *Roberto Ariel Martínez Monroy v MN Enchantment of the Seas; Enchantment of the Seas Inc*, SCJ, 7 November 2012. This is so even if the clause is contained in a service contract — see *Harvest Fresh Growers Inc v Maersk Line AP Moller-Maersk Group*, SCJ, 6 January 2014.

70 *Lourdes Quitton v Cho Yang Shipping Co Ltd, Twinhill Tanker Lines SA & Jupiter Conveyer SA*, SCJ, 8 March 2007; *Felipe Vitagán vs MV Sun Sapphire*, SCJ, 24 February 2006; *Atlantic Mutual Companies Co v Maersk Sealand, trading name of the AP Moller Group-Dampskibsselskabet AF 1912, Aktielselskabet*

Arbitration clauses are also respected.[71] The MPC states that, when a clause states that the disputes must be submitted to an arbitral court in the Republic of Panama, the court must decline its jurisdiction immediately.[72]

Other reason for staying cases

There are two other situations where a petition to stay may succeed. The first responds to evidentiary needs, when a party needs to take depositions of witnesses who are in another country and bringing them to Panama may be extremely expensive,[73] or when there is a need to practise inspections in places in other countries.[74] These conditions have frequently been compared to the forum non conveniens defence.[75] However, the Supreme Court of Justice of Panama, as well as the Court of Maritime Appeals, have emphasized the international service of justice provided by this jurisdiction,[76] and latterly petitions to staying under this rule are mostly dismissed.[77] New technologies also enable the taking of depositions online and there are also international agreements on judicial co-operation that make it possible to access evidence from abroad without the necessity of staying the claim. According to art 22.4 MPC another ground for a stay is when the case has previously been submitted to another court or to arbitration and a decision is pending. This is the lis pendens defence. In all cases, the court will retain the security provided for the release of the vessel or other property from arrest and set a period for starting proceedings in the new jurisdiction.

Dampskibsselskabet Vendborg, SCJ, 14 May 2007; *La Carambola SA v Crowley Liner Services Inc*, SCJ, 18 November 2008.

71 *Sunlight Marine Co Ltd v Sinotrans*, SCJ, 3 May 1999*; Flotilla Industries Inc v Latvian Shipping Co,* SCJ, 11 February 2000; *Nippon Yusen Kaisha v ER Hamburg Schiffahrtsgesellschaft Mbh & Co*, SCJ, 9 July 2003; *AIG Union y Desarrollo SA v Guangzhou Ocean Shipping Co*, SCJ, 11 October 2004; *AGF MAT Transportation & Liability Division Limited v MV Aconcagua*, SCJ, 20 December 2004; *Dos Valles SA & Comexa SA v Maersk Sealand, trading name of The AP Moller Group-Dampskibsselskabet Af 1912, Aktielselskabet Dampskibsselskabet Vendborg,* SCJ, 1 June 2005; *Caribbean Brokers & Charters v Capital Timber Group*, SCJ, 25 October 2008.

72 Article 22 MPC, final paragraph.

73 Article 22.1 MPC.

74 Article 22.2 MPC.

75 *Segundo Mero Velez v MV El Rey*, SCJ, 1 December 1998; *Luz Marina Reyes v Mitsui OSK Lines & Diamond Camellia SA*, SCJ, 21 May 2001; *Rosita Bisnar v Elite Rederi A/S*, SCJ, 2 February 2009.

76 *Pacific Star (Associated)(Ltda) v MV Berlice*, SCJ, 2 June 1998.

77 See *Transportes Modernos del Caribe SA v Zim Integrated Shipping Services Ltd or Zim American Integrated Shipping Company Inc*, SCJ, 26 August 2008; *Tyrone N Castillo Espinel v AP Moller Maersk A/S & Maersk Shipping Hong King Ltd*, CMA, 14 October 2016.

3.3 Composition

The maritime jurisdiction in Panama started with one Maritime Court, with appeals decided by the First Superior Civil Court.[78] Later, appeals were assigned to the Civil Branch of the Supreme Court of Justice of Panama acting as a Court of Appeals.[79] By 2001, the number of cases handled grew so rapidly that it was necessary to open a second court, which commenced business in 2002.[80] By 2009, the number of proceedings at the Civil Branch of the Supreme Court of Justice had grown so much that the handing down of appellate decisions became sluggish. Given the international character of this jurisdiction, the need for a specialized body to decide appeals became evident. In 2009 further amendments led to the creation of the Court of Maritime Appeals (CMA), composed of three justices.[81] According to art 484 of the MPC, this court has 60 days to decide appeals. It is a pre-condition for appointment that judges of the Maritime Court as well as the justices of the CMA must have studied maritime law.[82]

4 The Ship Arrest System

As previously mentioned, Panama has not ratified any of the international Arrest Conventions. The aim of these Conventions was, at first, to protect shipowners from abuse and, at the same time, assure access to credit upon the ship.[83] At the same time, the Conventions protect seafarers, ship suppliers, banks and other players in the maritime industry.[84] Law 8 of 1982 observes similar principles and pursues the same objectives. Chapter VI of the MPC contains a set of provisions related to precautionary measures, which includes the arrest of ships. As previously mentioned, most of these rules have their origin in the US Supplemental Rules for Admiralty and Maritime Claims. Unlike the United Kingdom

78 De Castro (n 17) 1374.
79 Introduced by art 46 of Law 11 May 1986, GO 20,560.
80 Created by art 102 of Law No 23 of 1 June 2001, GO 24,316.
81 Article 5 of Law 12 of 23 January 2009.
82 Article 7 and 8 MPC. They hold at least a Masters degree in maritime law from local or foreign universities.
83 V Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (OUP 2011) para 1.15.
84 Kouruklis (n 20) 7.

and Singapore, which do not admit arrest in actions in personam, but only in rem, [85] Panama allows the arrest of ships in both types of actions. Arrest of ships in each of these three jurisdictions is available against any vessel, regardless of its flag or registry.[86] The only exception is for those vessels granted immunity under art 32 of the UN Convention on Law of the Sea (UNCLOS). This extends to national or foreign warships, including those that are still under construction but intended to have the same use, and vessels owned by or in the service of a state, unless such ship is involved in commercial activities.[87] English and Singapore law prohibits in rem proceedings against the vessel belonging to the Crown, or belonging to the government.[88] The English State Immunity Act 1978 and the Singapore State Immunity Act 1978 prohibit the arrest of property of a foreign state, unless being used or intended for commercial purposes.[89]

4.1 Purpose of arrest

The 1952 and 1999 Arrest Conventions define arrest, in general terms, as the detention or restriction on removal of a ship by order of a court to secure a maritime claim.[90] Both Conventions exclude the seizure of a vessel in execution or satisfaction of a judgment or other enforceable instrument.[91] The MPC does not offer any definition of arrest, but implies the same meaning as the Conventions, without the restriction on the enforcement of final judgments by the seizure of ships. Nothing in the MPC deprives a claimant from arresting a vessel for the execution of a final decision or arbitral award. On the contrary, there is an entire section containing provisions on the execution of final judgments and arbitral awards issued by the same maritime courts as well as by foreign courts or local or international

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85 Ruiz Abou-Nigm (n 83) para 4.04; Jackson (n 41) para 15.76; Halsbury (n 31) para 220.0167. Singapore only accepts jurisdiction in claims in personam for collision or similar cases if they meet the requirements of s 5, related to the geographical connection with Singapore.

86 SCA s 20(7); HC(AJ)A, s 3(4)(a).

87 Article 180 MPC.

88 SCA s 24(2)(c); HCAJA s 8(2).

89 Jackson (n 41) para 15.76. State Immunity Act 1978 (UK), s 13(2) and s 13(4); in Singapore, the State Immunity Act, cap 313, s 12(2) and s 12(4).

90 Article 1(2) of each Convention.

91 The exact wording of the definition provided by the 1999 Arrest Convention provides that '"Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.'

arbitral courts.[92] This supposes the possibility of seizure of ships. The MPC also makes a distinction between arrest and seizure, the latter being for the enforcement of a final judgment.[93] However, there are rare cases of arrest of ships for enforcement of final judgments or arbitral awards. The vast majority of cases are for the same purposes set out in the Conventions.

As noted, the MPC does not provide a definition of arrest but provides for its purposes or functions. The arrest of a ship has three functions: a protective function, for attributing jurisdiction on the merits, and a security function of ensuring the availability of a judicial sale.[94] These functions seem to respond to three theories on the subject that appeared during the 19th century in England.[95] On the one side, the jurisdictional theory appealed to obtain jurisdiction over the defendant by arresting his property. The second, referred to as the personification theory, holds that the ship is the offender, making it possible to file proceedings directly against the vessel. The third theory, the procedural theory, refers to the most basic and fundamental function of obtaining security to satisfy a final judgment. The MPC, in art 166, embraces these three theories and makes maritime arrest practiced by the maritime courts substantially different from arrest practiced in the ordinary courts. The Supreme Court of Panama has remarked on the differences between the arrests in both jurisdictions. In particular, it has said that, apart from obtaining security, the nature of an arrest for a maritime claim involves the additional purposes of enforcement of maritime liens through actions in rem, the ascription of jurisdiction on the merits of the case, and the service of process on the defendant.[96]

4.1.1 Securing the maritime claim

The main reason for arresting a ship is to secure a maritime claim. In this regard, and as mentioned before, Panamanian law shares the internationally accepted concept of an arrest

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92 Article 410 ss MPC. Panama approved the New York Convention on the Recognition and Enforcement of Foreign Awards of 1958, by the Law No 5 of 25 October 1983. GO 20,079.

93 Kouruklis (n 20) 43-44.

94 Jackson (n 41) para 15.2; Ruiz Abou-Nigm (n 83) para 1.15.

95 Ruiz Abou-Nigm (n 83) para 2.36.

96 *Sea Anchor Shipping Co v Ranger Marine SA, Nestor Maritime SA, Evelina Marine Ltd, Skyridon Ranis, Philippos Rapsomanikis & Evangelos Bardakos*, SCJ, 26 December 2012.

as stated in the Arrest Conventions of 1952 and 1999, as well as other national laws. Article 166(1) establishes that the objective is to prevent the result of the process being ineffective such that a defendant sells or vanishes with the property. An arrest invoking this rule is exercised in personam against the defendant who is physically within the geographical jurisdiction of the court. The arrest is not exclusively for ships, as the defendant's other property can be arrested as well.[97] The arrest in a maritime court is, in this respect, comparable to an arrest in the civil courts and requires a larger amount of counter-security, as will be explained later.[98]

4.1.2 Ascribing jurisdiction and serving process

The second purpose for granting ship arrest under Panamanian law is to ascribe jurisdiction on the merits of the case in an action in personam.[99] Asserting jurisdiction by the arrest of a ship, and, at the same time, obtaining security, is a practice traceable back to the Middle Ages.[100] This is based on the Common-Law institution of the forum arresti earlier referred to, as inherited from the Federal Rules of Civil Procedure of the US. Article 166(2) replicates the same concept as is contained in Rule B of the Supplemental Rules for Admiralty or Maritime Claims of the United States, for the attachment of personal property of defendants not found within the court's jurisdiction.[101] The rule is not exclusive to the arrest of ships, but is available against any property, tangible or intangible, of the defendant, including the defendant's credits.[102] It has become very common practice to arrest vessel bunkers, especially in claims against cargo liners. Such claims are also quasi-in rem, as the jurisdiction is acquired by virtue of the res that is arrested. An arrest for this purpose depends on two prerequisites, namely, the absence of the defendant from the territory of Panama, and the presence of attachable property within the geographical jurisdiction of the maritime court.[103]

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97 Kouruklis (n 20), 43-44.

98 See part 6.3 below.

99 Article 16.2 MPC. See *Atlantic Mutual Companies Co v Maersk Sealand, trading name of The AP Moller Group-Dampskibsselskabet Af 1912, Aktielselskabet Dampskibsselskabet Vendborg*, SCJ May 14, 2007.

100 Ruiz Abou-Nigm (n 83) para 2.18. The arrest of ships appears in the Ordinances of King James (1213-1276), later compiled in the *Consolato del Mare* (1494).

101 Kouruklis (n 20) 45.

102 *Peninsula Petroleum Limited v Easy Street Ltd*, SCJ, 21 April 2014; Tetley (n 4) 1934-1935.

103 De Castro (n 17) 1380.

The same article clarifies that the mere fact that the defendant is a Panamanian corporation or a foreign corporation registered in Panama, or the vessel is of Panamanian registry, is not sufficient to bring the defendant within the jurisdiction of the court. The primary criterion is the effective domicile or real place of business to determine whether a defendant is within Panamanian jurisdiction or not. It is well-known that the registered owners of many vessels are Panamanian corporations. The incorporation of a company in the Public Registry of Panama does not assure that the process can be effectively served on that defendant. Such service of process is better asserted if his property is successfully arrested. Hence, in cases against legal persons registered in Panama but not having their real domicile and place of business in the country, an arrest invoking this rule is normally granted.

It is also irrelevant if the claim arose within Panamanian territory. The Maritime Courts have jurisdiction according to the first paragraph of art 19 MPC over claims arising in Panama. Hence, in these cases, no arrest would be needed for ascribing jurisdiction. The critical element, however, is the presence of the defendant and the capacity to serve process effectively. The original rule stated that the purpose of the arrest was to ascribe jurisdiction over claims arising in or outside the national territory. This allows, for example, a cargo claimant to arrest property of defendants not domiciled in Panama, even if the parties signed the contract in, and the cargo departed from, Panama, as occurred in *Las Vegas Nevada v Seaboard Marine Ltd*.[104] The situation, however, was not clear, and the question arose as to why an arrest to ascribe jurisdiction was necessary in a case in which the court already had jurisdiction based on the territorial factor. The 2009 amendment clarified the issue by determining that, in the case of claims arising in Panama, the purpose of the arrest under this paragraph is to serve process on the defendant who is physically not within the national territory. In any case, the arrest under this rule for ascribing jurisdiction will also serve process on the defendant. Once the defendant's property is arrested, the maritime court is entitled to decide the case upon its merits.

[104] SCJ, 22 July 2003.

4.1.3 Enforcing maritime liens and other credits in rem over the vessel

Article 166.3 MPC permits the enforcement of maritime liens through an action in rem against the vessel. This provision enshrines the same concept as Rule C of the Supplemental Rules for Admiralty or Maritime Claims of the United States. Under this rule, arrest perfects the lien, gives the claimant jurisdiction on the merits of the case, and assures security for the enforcement of a final judgment.[105] The action can be also directed against other property attachable as maritime liens, such as cargo or freight, provided they are within the jurisdiction of the court.[106] Initially, Law 8 of 1982 ruled that the action in rem was exclusively for the enforcement of maritime liens. It did not mention other types of claim that can be directed against the vessel, such as statutory rights of action in rem in English and Singaporean law. This is not surprising, having in mind the sources of the Panamanian code. US maritime law does not have statutory rights of action in rem, as most maritime claims are secured by a maritime lien.[107] Consequently, Panamanian maritime law also does not have statutory rights of action in rem, but a wide list of maritime liens.

Problems arose when some claimants filed actions in rem founded on English law to enforce statutory rights of action in rem. In a decision in 2005, the Supreme Court of Panama stated that, on the strict language of the MPC, the arrest of ships for claims against the vessel itself was established exclusively for the enforcement of maritime liens, not for statutory rights of action in rem.[108] The court accordingly dismissed the case but the result of the decision prompted some discussion. By an amendment introduced in Law 12 of 2009, the relevant provision now says that an arrest has as a purpose of 'materially apprehending property susceptible to arrest to make effective maritime liens or any credit that, according to the applicable law to the claim, allows directing the claim directly against them'. Claimants can, therefore, request the arrest of the vessel for executing a credit that, according to the applicable law, can be enforced directly over the ship, regardless of whether it is a maritime

105 Tetley (n 4) 1933.

106 Art 530 MPC. See *Cross Caribbean Services Ltd v The Cargo onboard the MV Nordfels*, SCJ, 14 May 1993 and 6 November 1997*; Pilot Oceanways Corporation v The Cargo onboard the MV Imilchil*, SCJ, 18 September 1995; *Lavinia Corporation v The cargo onboard MV Frio London*, First Maritime Court, Decree No 196 of 8 September 2003.

107 Tetley (n 4) 1929. Maritime liens in the United States have been codified in the Commercial Instruments and Maritime Liens Act 46 USC §§30101.

108 *Seaspan Cyprus Limited v M/V RHEA*, SCJ, 10 May 2005.

lien or not. Claims for supplies, repairs, shipbuilding, breach of charterparty, cargo loss or damage, towage, pilotage and general average, all of which under English law give rise to a statutory right of action in rem,[109] can now be enforced through an action in rem in Panama provided that such legislation is the applicable law of the claim.

In the United Kingdom and Singapore an action in rem can be initiated against a ship even if a maritime lien does not guarantee the claim, as long as certain conditions occur.[110] Thus, s 21(4) of the English Act and s 4(4) of the Singapore Act reproduce the same concept in practically the same words. An action in rem can be brought, even it is not grounded on a maritime lien, as long as such a claim: a) arises in connection with a ship; and, b) the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship. Provided that these two conditions are met, an action in rem can be directed against the ship or even a 'sister ship'. This also allows the arrest of a vessel when the relevant person is the owner of all the shares of the ships or the charterer under a charter by demise. In Singapore, this last possibility, arresting the vessels of the demise charterer, was introduced by an amendment to s 4(4) which entered into force in 2004.[111]

Though the MPC does not expressly state these conditions, such an action can be brought if English or Singaporean law applies as the substantive law to the claim. The article setting out the actions in rem in Panama now reads as follows:

> **Article 530.** The in rem action may be promoted to enforce or execute a maritime lien, when the applicable substantive law allows exercising a right of persecution and/or priority against the ship, cargo, freight or combination thereof, whether under the name of a maritime lien, statutory action in rem or any other denomination. It may sue in an action in rem ships other than those on which the claim originated when the applicable substantive law allows it.

109 Tetley (n 4) 1910.
110 Halsbury (n 31) para 220.0092; Tetley (n 4) 1910.
111 Ibid para 220.0157.

It is noteworthy that the maritime lien or right of action in rem against the vessel must be based on the substantive applicable law governing the obligation. This approach differs from art 3(1)(e) of the Arrest Convention 1999 which establishes the possibility of an arrest for a maritime lien, but only if such maritime lien is granted in the law of the State Party where the arrest is executed. This means that an arrest based on a claim that is not a maritime lien established in the law of the arresting forum will not be granted. English law reproduces the same criterion as it considers the maritime lien as procedural in character, and, consequently, the law of the forum must govern it.[112] Singapore also states, determines and ranks the maritime liens according to the lex fori.[113] Panama, however, recognizes and enforces maritime liens only if the substantive applicable law of the claim gives to that claim such a character. The substantive character acknowledged by the MPC is in character for a Civil Law system, and, in this particular case, is also reinforced by US influence, where maritime liens are regarded as a substantive right, rather than a procedural remedy.[114]

Unlike the United Kingdom and Singapore, which only grants the status of maritime lien to six types of claims,[115] Panama has a very comprehensive list of 13 maritime liens on the vessel, listed in art 244 of Law 55 of 2008 on Maritime Commerce. These will only apply, however, if substantive Panamanian law governs the conflict of laws. Nevertheless, as foreign law is generally applied in most cases, the claimant must prove that his claim gives rise to a maritime lien or a statutory right of action in rem under the applicable law. The approach followed by the MPC is to respect the choice of law clause in the contract or the law of the place where the obligation arises. It would be troubling for a shipowner if the obligation he entered into did not give rise to a maritime lien and to later find that his vessel is arrested for a lien that it was not supposed to bear. A worse scenario would be for a creditor whose credit was protected by a maritime lien, to later find that it was not recognized as such in the place where he can arrest the vessel. If there is not a law agreed by the parties, the MPC has a conflict of laws rule in art 566 MPC, which determines what

112 Jackson (n 41) para 26.169.

113 Halsbury (n 31) para 220.0151. See *Bankers Trust International Ltd v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221 (PC). The Privy Council, by a majority, did not recognize a maritime lien for ship repairs, recognized as necessaries under United States law, because this did not fall within the six maritime liens stated under English law, which are the same under the law of Singapore.

114 Tetley (n 4) 1929. Tetley points out that such conception comes from the 'civilian maritime law heritage' of the US.

115 Halsbury (n 31) para 220.0151. Both include bottomry and respondentia, which are not in use any longer.

the applicable law to the controversy is. A law selected outside this rule will not be acceptable and the ship arrest petition will be dismissed.

5 Requirements

Articles 167 and 168 of the MPC establish the requirements for an arrest.

5.1 Power of Attorney

Any party appearing before a judge must appoint a lawyer, who must provide a power of attorney (POA) duly notarized and legalized or apostilled to prove his capacity to act on his behalf. [116] Though not necessary in most Common Law states, this is a prerequisite in all the courts of the Republic of Panama, as it is in any Civil Law country. In cases when the arrest is urgent, and the claiming party is abroad or no power of attorney can be obtained before the arrest petition is submitted, the appointed lawyer can appear on his behalf providing security of a maximum amount of US$1,000 to act on behalf of the arresting party.[117] Such an attorney has two months to file the POA. Though there is no express consequence stated in the MPC, nor in the Judicial Code, the maritime courts have dismissed actions if the power of attorney is not submitted within this period. An extension of the period is possible if requested before its expiration and only for one additional month. Once the power of attorney is submitted, the security is refunded to the party.

5.2 Formal lawsuit with prima facie evidence

While under English and Singapore law the arrest petition must include a sworn declaration of facts[118] and an arrest affidavit,[119] arresting a ship in Panama requires the filing of a

116 This is required by art 624 MPC.

117 This amount varies from US$400 for claims up to US$1 million, to a maximum of US$1,000 for claims beyond that sum. These sums do not appear in the MPC but have been adopted by an agreement of the judges of the maritime courts amended recently on 16 August 2018.

118 Tsimplis (n 47) 510. Civil Procedure Rules 61.5(1) and PD para 61.5.3.

lawsuit,[120] but not an affidavit. The maritime judge must evaluate and confirm that his court has jurisdiction on the merits of the claim before ordering the arrest. The arrest petition must be included in the same writ as the lawsuit. In actions in personam, it is also possible to file the petition after the proceedings have started in a separate writ. In the case of a petition request of arrest under paras 2 and 3 of art 166,[121] submitting prima facie evidence of the claim is crucial. The SCJ referred to the required standard of proof as enough to convince the judge of the merits of the case, who will then evaluate such evidence at his discretion.[122] It is a circumstantial evidence standard of the existence of the claimant's rights.[123] Mere simple copies of the relevant documents proving the generalities of the claim are normally suficient. However, the Supreme Court has also emphasised the main elements that the arresting party must demonstrate, providing proof of: (1) the nature of the claim; (2) its legitimacy to claim: (3) the legitimacy of the defendant; (4) its ownership of the property to arrest.[124] The arresting party must also demonstrate the existence of the maritime lien, the applicable substantive law, and the amount claimed.[125] This is a sine qua non requirement. The Maritime Courts will not grant the arrest without prima facie evidence supporting the claim.[126]

By contrast, an English judge is not compelled to confirm that the arrest petition responds to a 'good arguable case', but that it is not 'hopeless'.[127] Before an amendment in 1986, the English courts demanded a 'full and frank' affidavit, which made the arrest a discretionary

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119 EJ Cheng, 'Fulfilling the duty of full and frank disclosure in arrest of ships: Identifying, consolidating and presenting material facts' (2017) 29 Singapore Ac of LJ 317.

120 Article 167 MPC. This follows similar requirements as in the US, where a detailed complaint must be filed when invoking Supplemental Rule B: see Tetley (n 4) 1936.

121 See parts 5.1.2 and 5.1.3 above.

122 See *Rafaela Murillo and Alberto Bonilla v MV L Star*, SCJ, 26 May 1997; *Dirección General de Minería, Secretaria de Estado de Industria y Comercio de la Republica Dominicada y Almacenes de Granos Dominicanos SA (Algradosa) v Thoresen Thai Agencies Public Co Ltd, Thoresen Shipping Singapore Pte Ltd, Thor Neptune Shipping Co Ltd,* SCJ, 17 October 2017.

123 *Marisol Betancourt Cadavit v M/V Caribe Tuna,* SCJ, 11 November 2009. For an explanation of the concept of prima facie evidence, see *Franklin Caole v MV Accord Express*, SCJ, 4 March 1999.

124 *Action for protection of constitutional rights of Castor Petroleum Ltd v The order of the Judge of the First Maritime Court,* SCJ (Pleno), 18 April 2011.

125 *Walton Navigation Inc v Baggerwerken De Cloudt En Zoon NV*, SCJ, 29 October 2012; *Comercializadora de Calidad SA (Quality Print) v AP Moller-Maersk A/S, formerly known as Maersk Sealand, Trading Name of The AP Moller Group Dampkibsselskabet Af 1912 Aktielselkabet Dampskibsselskabet Vendborg*, SCJ, 4 May 2009; *Geoffrey Moss v M/V Crowley Senator*, SCJ, 2 June 2003.

126 Action for protection of constitutional rights of *Castor Petroleum v The order of the Judge of the First Maritime Court,* SCJ (Pleno), 18 April 2011.

127 Eder (n 41) 121.

remedy.[128] The courts no longer require this, and, as long as all the formal requirements are met, the warrant for arrest will be granted.[129]

Singapore requires a writ of summons in the action in rem, accompanied by a warrant of arrest, and a request for a warrant of arrest.[130] In addition, and of paramount importance, an affidavit is required. This affidavit, according to the Singapore courts, requires 'full and frank disclosure' of all the material facts surrounding the case, as was the case under English law until 1986.[131] These material facts include the possible defences the arrested party may raise.[132] According to the case law, the pertinent material facts a court must know in order to grant a warrant of arrest concern: (1) the invocation of admiralty jurisdiction; (2) plausible defences; and (3) omissions, which would otherwise mislead the court or misrepresent the circumstances of the claim.[133] There is not a request for a high standard of evidence, nor to demonstrate that the claimant has a good arguable case, but this requirement of full and frank disclosure imposes a very demanding burden on the arresting party,[134] making the standard to access an arrest higher than in the United Kingdom or in Panama. In actions in rem, it is not necessary at the arrest stage to prove that the defendant is liable in an action in personam, as section 4(4)(b) suggests.[135] The Court of Appeal of Singapore in *The Bunga Melati 5* has outlined the main elements that must be proved in order to invoke the admiralty jurisdiction.[136] Thus, the claimant must prove, on a balance of probabilities, the elements described in section 4 of the HC(AJ)A: (1) the nature of the claim and that it relies on s 3(1)(d)-3(1)(q) of the HC(AJ)A; (2) that the claim arises in connection with a ship; (3) the person that would be liable in an action in personam, etc.[137]

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128 Ibid 122.

129 Ibid.

130 Halsbury (n 31) para 220.0182.

131 See supra note 128. *The Rainbow Spring* [2002] SGHC 255, [2003] 2 SLR(R) 117; [2003] SGCA 31, [2003] 3 SLR(R) 362; *The Vasiliy Golovnin* [2008] SGCA 39, [2008] 4 SLR(R) 994.

132 *The Vasiliy Golovnin* [2008] SGCA 39, [2008] 4 SRL(R) 994, [87]. Cheng (n 119) 319.

133 Cheng (n 119) 320.

134 Ibid, 321. See *The Bunga Melati 5* [2012] SGCA 46, [2012] 4 SLR 546, [113]; Halsbury (n 31) para 220.0155. Such duty has been so exigent that a local practitioner points out that these cases represented the 'beginning of a "pro-shipowner" trend in the formulation of arrest laws by the Singaporean courts': K Tan & J Pui, 'Key developments in Singapore ship arrest laws: practitioner's perspective' (2015) 1 Turkish Commercial Law Review 253, 259.

135 Halsbury (n 31) para 220.0155.

136 [2012] SGCA 46, [2012] 4 SLR 546, [111].

137 Tan & Pui (n 134) 262-263.

In both Singapore and Panama the lawsuit in rem must contain the name of the vessel,[138] as no action will be granted against an unidentified vessel.[139] While Panama allows mixed complaints, naming actions in rem and in personam in the same writ,[140] Singapore does not permit such a possibility.[141]

5.3 Counter-security

The Arrest Conventions do not, in general, impose on the claimant an obligation to provide counter-security for the possible damages the arrest may cause to the shipowner or charterers. The 1999 Conventions leaves open that possibility to the discretion of the arresting court.[142] In the United Kingdom and Singapore, as in most of the Common Law jurisdictions, no counter-security is required.[143] In Panama, however, the MPC requires the arresting party to post a cross-undertaking to secure possible damages resulting from the execution of the arrest. This is one of the consequences of a system in a Civil Law country, where, in return for being permitted to arrest the defendant's property in the general civil jurisdiction, counter-security is required. Though enforcing maritime claims by arrest of a ship presents some difficulties in comparison to the arrest of other property by the civil courts, no exception was extended to maritime claimants. However, as we will be evident from the discussion that follows, in most cases such counter-warranty is symbolic. The MPC contemplates two situations.

In the case of an arrest to secure defendants' assets to respond to a final judgment in actions in personam,[144] where the Panamanian forum has jurisdiction to decide the merits, and the defendant can be served process without the need for an arrest, the claimant must provide counter-security consisting of 20% to 30% of the value of the claim. This rule is harsh, as the amount required could be prohibitive for some claimants. As noted earlier,[145]

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138 Article 531(2) MPC.
139 Halsbury (n 31) para 220.0154.
140 Article 532 MPC.
141 Halsbury (n 31) paras 220.0092, 220.0168.
142 Article 6(1).
143 Jackson (n 41) para 15.50. There are some interesting arguments in favour of requiring a cross-undertaking from claimants: see Eder (n 41) 131.
144 Article 166(1).
145 See part 5.1.1 above.

the function of this arrest is treated in the same way as in the general civil jurisdiction and the MPC treats this type of arrest alike with similar standards of counter-security. This requirement puts local maritime creditors at a disadvantage if the claim does not fall within the category of a maritime lien or require an arrest to ascribe jurisdiction on the merits of the claim to the Panamanian maritime court. The constitutionality of this rule is therefore also questionable.

For claims based on the other two possibilities of arrest, namely, to ascribe jurisdiction on the merits of the case and to serve the process or in actions in rem,[146] the MPC makes an exception and requires providing the symbolic sum of US$1,000 as counter-security. This amount could doubtless be seen as ridiculous for arresting a ship, as detention, even for few hours, might cause serious economic damage to the shipowner, the charterer, and cargo interests. The reason for this low amount is that the arrest for these purposes is a sine qua non requirement for access to the jurisdiction.[147] Without arresting property of a defendant domiciled abroad or without the physical apprehension of the ship in an action in rem, in claims arisen outside Panama, no claimant would be able to have his claim decided by the maritime courts. Requiring higher counter-security would simply jeopardize the claimant's access to justice. The rule was introduced especially in order to facilitate seafarers having access to the Tribunals.[148] As the Panamanian constitution does not allow the provision of better conditions for certain citizens, the rule is extended to all kinds of claimant whose claims fall within these two situations.

It is submitted that this is one of the main aspects which deserves prompt attention from Panamanian lawmakers, in order to harmonize Panamanian law with international standards. The Panamanian maritime legal community has discussed the convenience of requiring counter-security that in some cases may be extremely prohibitive for claimants, especially local claimants. On the other hand, a symbolic counter-security of US$1,000 is

146 Article 166(2)(3).

147 See art 19; Kouruklis (n 20) 45.

148 The Law 8 of 12 January 1925 GO 4562 of 23 January 1925 that governed the ship registration in Panama when the MPC was drafted, established that 10% of the crew onboard ship registered in Panama had to be Panamanian citizens. Then, the drafters thought that setting such symbolic counter-security would facilitate their access to claim for their owed wages. This law was abolished by the Law 57 of 6 August 2008 GO 26100 of August 2008.

simply insignificant and of no real effect. Though the subject may still require further analysis, the best solution may perhaps be the final abrogation of this requirement.

5.4 Arrest expenses

Together with the petition for arrest, the claimant must provide the amount of US$2,500 for arrest expenses.[149] This amount must be effectively deposited. A mere undertaking to pay such expense, as under the English Practice Directive,[150] is not sufficient. The Singapore court also demands an undertaking in writing to pay the fees and expenses of the Sheriff incurred in the execution of the warrant of arrest.[151]

The Panamanian Marshal is responsible for taking care of all expenses incurred for the execution of the warrant of arrest and for maintenance and custody during the period that the vessel is under arrest. He has an obligation to require additional amounts when necessary.[152] Such expenses include expenditures strictly necessary for the maintenance and custody of the arrested property. In no case does the arrestor assume responsibility for the payments or the obligations of the shipowner or charterer.[153] The parties and the judge must ensure that there are no extraordinary or unnecessary expenditures. In case the Marshal requires the deposit of additional funds to cover arrest expenses and the arresting party does not provide them within a period of five days following the day after the request was communicated, the vessel will be immediately released.[154] Once the vessel is released, any remaining balance will be returned to the claimant.[155]

149 Article 168 MPC.
150 Tsimplis (n 47) 510. See PD para 61.5(1).
151 Halsbury (n 31) para 220.0182; RC O 70 r 9(3); Supreme Court Practice Direction 124(2).
152 Articles 169, 176 and 177 MPC.
153 Article 176 MPC.
154 Article 182 (3) MPC.
155 Article 186 MPC.

6 Procedure for arrest

It is noteworthy that for arrest purposes the Panamanian courts are accessible 24 hours a day, 365 days a year.[156] A lawsuit with an arrest petition can be filed at any time, depending on the moment the vessel arrives within Panamanian jurisdictional waters.[157] Once the lawsuit with the arrest petition is filed, together with the counter-security and the arrest expenses, the judge will proceed to evaluate the case. There is no need for a formal ex parte hearing, but in case of doubt, the judge can ask for clarification from the plaintiff's attorney. He may order the amendment of the lawsuit or the arrest petition or require further evidence if he deems that what is provided does not comply with the legal formalities or if there are substantial issues that impede him from ordering the arrest. If the judge is not convinced about the facts and legal basis for the claim or of the arrest petition, he will simply deny the arrest.

Once the petition is admitted, the judge will instruct the Marshal to enforce the arrest immediately if the vessel is in Panamanian waters. The latter will communicate with the Port Authority and the office of marine traffic of the Panama Canal that the vessel is under arrest. The Marshal will proceed to board the vessel to communicate the order to the person in charge or in custody of the vessel.[158] Usually, the master or an officer receives the communication that the ship is under arrest, though the rule only states 'being the person in charge of its management and custody', and fixes the order on the ship's bridge.[159] Under English law, the Admiralty Marshal will effect the arrest by fixing the warrant of the arrest outside the property or give notice to the person in charge of the property, usually the master.[160]

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156 Article 15 MPC. This does not mean, however, that a judge and court officers are permanently on duty at the court. Once a claimant has an arrest petition to be filed and executed outside the working hours, the court officials must appear at the court to analyze, order, and execute the arrest.

157 The lawsuit can be filed also electronically through the court web system. The court's software randomly assigns the case to one of the two courts and immediately communicates to the clerks and judge that a case has been filed and assigned to their court.

158 Article 170(1) MPC.

159 Article 170(2) MPC.

160 Tsimplis (n 47) 510. See PD para 61.5(5).

An important effect of the arrest is that this also constitutes service of process on the defendant.[161] From that moment, the defendant has 30 calendar days to submit an answer to the complaint.[162] If he fails to do so, such omission will be considered an acceptance of the statements of claim.[163] Whether the action is in rem or in personam, both follow the same rules of procedure as in the United Kingdom.[164]

The Marshal appoints a custodian on board the ship, who generally is a mariner. Throughout the period of detention, the vessel is under the responsibility of the Marshal and put out of trade.[165] The vessel is detained and cannot move or sail unless the court permits it to do so. Breaching this order will result in a fine or even imprisonment.[166] It has become a healthy practice that the arresting party commonly allows the ship to transit the Panama Canal, under arrest, at his own expense and risk, in order to prevent the vessel losing its turn for transiting. Owing to the constant congestion in the interoceanic way, rescheduling a transit may take several hours or even days and may cause some inconvenience to the vessel's trading timetable. The Panama Canal pilot will receive instructions to anchor or dock the vessel under arrest once it crosses the Canal, and it will remain detained there until its release. However, it commonly happens that, during the Canal transit, the vessel's P & I Club issues a letter of undertaking accepted by the plaintiff, enabling its release from arrest and allowing it to continue its voyage.

7 Suspension of the arrest order

If the defendant is aware of the arrest order before it is executed, he may request the suspension of the order by depositing security for the amount claimed and court expenses.[167] Suspension of arrest rarely occurs, because it depends on awareness of the

161 Article 166(3) and 193 MPC.
162 Article 499 MPC.
163 Article 70 MPC.
164 Tsimplis (n 47) 509; Articles 499 and 531 MPC.
165 Article 196 MPC.
166 Article 617 MPC.
167 Article 181 MPC.

vessels possible arrest. The arrest petition and executions is effected without previous notice to the defendant.[168]

8 Release of the vessel from arrest

Once the vessel is under arrest, the shipowner or charter will be under pressure to seek its release. Apart from the suspension of the arrest described above, the MPC provides seven possibilities by which an interested party can release the ship from arrest. Article 182 lists four of them while three other options are established in arts 179, 188 and 576.

8.1 Provision of security

8.1.1 Establishing the amount of security

Articles 5 and 4.2 of the 1952 and 1999 Conventions, respectively, make it possible for the parties to agree on the nature and amount of any security. Failing this, the court will determine the nature and amount of the security. The MPC contains similar provisions. In Panama, the parties are able to agree on the amount, type and conditions of the security for the release of the vessel.[169] If they do so, they can jointly request the judge to order the release from arrest while providing the agreed security at the same time. If there is no agreement, the defendant or a third party interested in the release of the vessel can request the court to determine this amount. The judge is, however, only entitled to fix the amount of the security, not its nature. The nature of the security is also laid down in the MPC, as we will see later.[170] The MPC also sets out the elements that the judge must take into account when establishing the amount of security. According to art 185, the court must fix an amount sufficient to cover the amount claimed, legal fees, expenses and three years of interest. The requirement as to three years' interest was introduced by the amendment of

168 Article 170 MPC.
169 Article 184 MPC.
170 See part 9.1.2 below.

2009 and is a response to the average length that proceedings may take until a final appeal and execution of final judgment.

In Singapore, where the parties do not agree on the amount, type and wording of the security, they may request the court to determine that at its discretion.[171] In the United Kingdom, the amount of the security is set by the courts.[172] In both jurisdictions, such amount must cover also the claimants 'reasonable arguable best case', with interest and costs.[173] In any case, in each of these jurisdictions, such amount cannot be higher than the ship's current market value.[174] In Panama, if necessary, an expert evaluator must fix the ship's value. Such expertise is not necessary if the arrested party accepts to secure the total amount fixed by the Maritime Court.

8.1.2 The type of security

In all three jurisdictions, payment in money, bail bonds, bank guarantees, and P & I Club letters of undertaking (LOUs) are acceptable.[175] Article 103 of the MPC establishes four types of security that are acceptable by the Maritime Court of Panama:

- Money in cash deposited in the Banco Nacional de Panama (National Bank);
- A certified cheque against authorized banks operating in Panama;
- Bonds issued by authorized companies in Panama;
- Any other warranty or security that the parties agree to.

Panamanian law does not expressly authorize P & I Club letters of undertaking. However, under the category 'any warranty that the parties agree', if the claimant accepts such an LOU, the court will proceed to release the vessel. Historically, P & I Club LOUs have been widely accepted and with no experience of lack of compliance. The Panamanian courts, however, do not have the power to oblige the plaintiff to accept such LOUs when they are

171 Halsbury (n 31) para 220.0184.

172 Tetley (n 4) 1915.

173 Tetley (n 4) 1915; Jackson (n 41) para 15.120; Halsbury (n 31) para 220.0184. See *The Piya Bum* [1993] SGHC 311, [1993] 3 SLR(R) 905; and *The Benja Bhum* [1993] SGHC 240, [1993] 3 SLR(R) 242.

174 Article 185 MPC. Halsbury (n 31) para 220.0184.

175 Tetley (n 4) 1914; Jackson (n 41) paras 15.128, 15.138; Halsbury (n 31) para 220.0184.

offered. It remains at the sole discretion of the claimant whether to accept the LOU or not. In a few cases, claimants have rejected such LOUs, requiring the defendant to provide one of the other forms of security, which may be quite burdensome for the arrested party. Once the arrested party has posted security, the court may order its replacement for another form of security at a party's request and with the knowledge of the other party.[176] This rarely happens but may occur when there is evidence that such security has become invalid, unenforceable, or the P & I Club cannot comply with such an undertaking. In such a case, the plaintiff can request the court to order the defendant to replace the security with a valid from of security.[177] However, in one case where there was a private agreement between the parties to replace such security for money in cash, the court maintained the same LOU as warranty.[178]

The possibility of releasing the vessel from arrest by providing security, or suspending the arrest, is excluded for claims related to the ship's ownership, possession, or right of employment.[179] The two international conventions contain the same exclusion, but provide that the person in possession of the ship may continue with its operations during the period of the arrest.[180] Although the MPC has the same exclusion, this does not provide what to do during that period, so the vessel will remain arrested unless other releasing possibilities are applied. This is certainly another shortcoming of the Panamanian law, which deserves attention.

In cases where a maritime lien or a right of action in rem against the vessel is enforced, a direct consequence of provision of security is the extinction of such lien or right.[181] The release of the arrest in these cases has the same effect as under art 5.1 of the 1999 Arrest Convention.

176 Article 104 MPC.
177 Article 194 MPC.
178 *Hector Bermudez v M/V ORINOCO II*, SCJ, 30 May 2016.
179 Article 183 MPC.
180 Articles 5 and 4.1, respectively, of the 1952 and 1999 Arrest Conventions.
181 Articles 185, 194 MPC.

8.2 Withdrawal of the arresting party

The claimant can request the release of the vessel at any time. In this case, the defendant is entitled to claim damages before the same court. In the case of maritime liens, such an action is considered a withdrawal of the proceedings, but not of the action.[182] The vessel may, therefore, be re-arrested for the same claim.

8.3 Request of the Marshall for lack of fund for maintenance

As mentioned before,[183] if the amount of US$2,500 deposited to face arrest expenses runs out, the Marshal is under an obligation to request additional funds. If the arresting party fails to deposit the amount within five days from the notification, the Court will proceed to release the ship.[184]

8.4 Parties' mutual agreement

Parties may mutually agree to request the release of the ship. In such a case, the arresting party is normally released from any liability arising from the arrest.

8.5 Challenging the arrest by the defendant or third party

Panamanian law offers the possibility of release the vessel from an arrest that is not found in the international Convention. The defendant or a third party can, without providing security, challenge the arrest order in three situations established by art 188:

- When the arrested vessel does not belong to the defendant;
- When there is a previous agreement not to arrest the vessel;
- If the arrest is based on an extinguished or inexistent maritime lien or right of action in rem.

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182 Article 195 MPC.

183 See part 6.4 above.

184 See *Baltic Sea Agency Inc v M/V International 4*, First Maritime Court, Decree No 407 of 30 September 2001.

In these cases, the defendant or interested party must submit a petition accompanied by full evidence that at least one of these three situations has occurred. This rule is not an open one and so challenge of the arrest must be grounded on one of these reasons.[185] The claimant must be informed of such a petition by the same petitioner before submitting it to the court.[186] If there is no proper evidence, the request must be dismissed. If, however, the evidence demonstrates one of the three situations, the court must call immediately both parties to a hearing, where the arresting party must submit further evidence justifying the legitimacy of his claim. If the arresting party fails to support his arrest, the vessel will be immediately released, and he must bear the legal fees and court expenses, as well as any damage caused by the arrest. Indeed, art 187 clearly states that arresting a ship, or any property in general, in these cases due to error, fault, negligence or bad faith will result in liability for wrongful arrest. The opportunity to practise this remedy does not apply once the arrested party has provided security and released the vessel from arrest. Release of the ship bars this remedy; indeed, it is arguable that this even implies the defendant's acceptance that the arrest was well-grounded,[187] although it does not amount to acceptance of the merits of the claim. The defendant or interested party must present this remedy before or simultaneously with the petition of release from arrest by posting security.[188]

The MPC also offers the possibility of challenging the arrest warrant by an appeal.[189] This recourse is, however, impractical as it does not cause the immediate release of the vessel. An appeal requires the arguments be heard and decided by the Court of Maritime Appeals, which may take some months, during which time the vessel will not be released. Such recourse could be useful for obtaining back the security posted for the ship's release.

185 *Oil Shipping (Hong Kong) Ltda v Precious Whishes Ltda*, SCJ, 29 September 1999; *Sea Anchor Shipping Co v Ranger Marine SA, Nestor Maritime SA, Evelina Marine Ltd, Skyridon Ranis, Philippos Rapsomanikis & Evangelos Bardakos*, SCJ, 28 September 2012.

186 Article 189 MPC.

187 *Matatag Shipping Corporation v Galehead Inc*, SCJ, 12 July 1996.

188 Article 189 MPC.

189 Article 485(1) MPC.

8.6 Judicial sale of the vessel

Another possibility stated in art 179 MPC is judicial sale, when the shipowner does not release the ship. A problem that the Panamanian courts faced for many years was the abandonment of some ships, causing the arresting party to bear an increasing amount of maintenance expenses for extended periods. Such expenditures were so burdensome that the claimant in many cases could not continue to afford them. The vessel was then released for lack of deposit for arrest expenses, according to art 182(3) MPC.[190] In other situations, even when a judicial sale was ordered, the amount of the sale was insufficient to cover the amount claimed plus arrest expenses. This was unfair to legitimate claimants. The vessel could not be sold at any stage of the proceedings, as is possible under English law, preventing the same problem.[191] The rule stated that the ship could be sold when there was evidence of deterioration or possible damages while under arrest. However, this condition was not always evident. When the vessel remained under arrest for long periods, the expenses increased substantially, to the detriment of the arresting party.

The amendments of 2009 partially resolved this problem. It expanded the possibility of ordering a ship sale to three more situations. In addition to the case where the arrested res may suffer severe damages or deteriorate under arrest, it now includes the case when the maintenance expenses increase to an amount that cannot be covered by the value of the ship or the result of its sale. These seem similar to the standards in Common Law countries for sale pendente lite.[192] But the MPC goes beyond this and presents two more cases: (1) if the ship remains under arrest for over 30 days; and, (2) if the defendant does not answer the complaint within 30 days after being notified of the action and the claimants so request. Notwithstanding these changes, it is still not an open possibility, as under English law, to sell the ship at any stage. At least one of the four requirements must occur. In the case of 30 days, this is a reasonable time in which the shipowner can obtain and provide security for the claim. The ship sale itself involves additional expenses that the arrestor must assume,

190 See part 9.3 and n 184 above.

191 Tsimplis (n 47) 511. See *The Myrto* [1978] 1 Lloyd's Rep 11.

192 Paul Myburgh, '"Satisfactory for its Own Purposes": Private Direct Arrangements and Judicial Vessel Sales' (2016) 22 JIML 355, 357. Also available at SSRN: <https://ssrn.com/abstract=2921700> accessed 10 August 2018.

such as the appraisal of the ship and publicity of the sale. Furthermore, a public auction, as it is currently established, may take some time and does not assure a fair price to cover the expenses and amounts of the claims.

There may be some difficulties with judicial sale in claims relating to ownership, co-ownership or possession of a ship. As mentioned previously, the MPC follows the same approach as the Arrest Conventions, prohibiting the release of the ship by the provision of security in such cases.[193] The Conventions, however, provide an option to the courts of allowing the person in possession of the ship to continue trading the ship where such a person furnishes sufficient security, or deals with the vessel's operation during the arrest. Panamanian law does not provide for these options. In such disputes, the defendant cannot release the ship by providing security.[194] However, for the sheriff to proceed with the judicial sale,[195] the previous judge's authorization with the parties' knowledge is required. That suggests that the judge must hear the parties and, depending on the specific situation, may not authorize the sale. This is, however, still speculative, as there is no case law reporting such a situation. In Singapore, the court has the same discretion. In cases relating to co-ownership, the judge may order the evaluation and sale of the vessel if it is in the interest of all the shareholders. If, however, the majority oppose, the judge may not make such an order unless the particular case justifies the sale of the ship.[196]

In Panama, after notifying the parties, the Marshal will proceed with the public auction of the ship. The result of the sale is deposited in the Banco Nacional and pays interest at the relevant bank rate. Such an amount must cover the result of the process once the merits of the claim are decided and subject to priorities if other possible claims occur.

8.7 Constitution of a fund for limitation of liability

The Republic of Panama has not ratified the International Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 or the Protocol of 1996. However, the MPC

193 Article 183 MPC and art 4.1 of the Arrest Convention 1999 and art 5 of the Arrest Convention 1952.
194 Article 183 MPC.
195 Article 179 MPC.
196 Halsbury (n 31) para 220.0109.

contains practically the same provisions of the Convention in its Title VIII. Hence, if the claim for which the ship is arrested falls within the list of claims that grant the shipowner the possibility of limiting his liability, he may start proceedings to limit his liability. Once a limitation fund is constituted and the court's decree is published in a newspaper in Panama, all executions against the shipowner's property will be suspended.[197] This will cause the release of any ship which is the subject of an arrest. Article 606 MPC, which corresponds to art 13 of the LLMC, provides that any property under arrest must be released after the fund has been constituted, even in ports outside the Republic of Panama, giving recognition to the limitation process in other jurisdictions. As Singapore has ratified the LLMC 1976 and the United Kingdom the 1996 Protocol, similar results are be found in each of these jurisdictions.

9 Re-arrest and multiple arrests

As is the case in the international Conventions,[198] and in English[199] and Singapore law,[200] Panamanian procedure allows the re-arrest of the vessel only if the security provided becomes insufficient or unenforceable.[201] The arrest of a ship does not prevent other creditors arresting the same vessel, as long as the new arrests are for the enforcement of maritime claims.[202]

10 Sister ship arrest

The 1952 Arrest Convention introduced sister ship arrest, a compromise between Civil Law countries, whose legislation allows the arrest of any property of the defendants, and Common Law countries, where arrest was only possible against the offending ship.[203] The United Kingdom adopted sister ship arrest in 1956, through the enactment of s 3(4) of the Administration of Justice Act 1956 (UK), which introduced the 1952 Arrest Convention

197 Article 524 MPC.
198 Article 5.1.
199 SCA 1981, s 21(8); Jackson (n 41) para 15.73.
200 Halsbury (n 31) para 220.0186.
201 Article 194 MPC.
202 Article 174 MPC.
203 Toh Kian Sing, *Admiralty Law and Practice* (3rd edn, LexisNexis 2017) 105.

statutorily.[204] Singapore introduced it through the Court Ordinance 1961.[205] Sister ship arrest was not, however, expressly contemplated in the original version of the MPC in 1982. The reason for this was that the MPC largely mirrors US Law, which does not provide for sister ship arrest. Indeed, Rule B provides for the attachment of the defendant's property in actions in personam, which may extend to the defendant's other ships as well. [206] For these reasons, therefore, there was no need for sister ship arrest, because the attachment remedy in art 166(2) had a similar affect.[207] The amendments of 2009 nevertheless introduced the arrest of sister ships in actions in rem. The MPC now permits the arrest of sister ships only if the applicable substantive law so permits. Article 530 states that 'it is possible to sue in an in rem action ships other than those on which the claim originated when the applicable substantive law so allows'. Therefore, when claims are grounded in English or Singapore law, or on any other legal regime that contemplates such a possibility, it is possible to arrest sister ships in Panama.

11 Wrongful arrest

There have been few cases of wrongful arrest in Panama. As explained, this is because of evaluation carried out by the judges prior to ordering the arrest. However, when the case is without merit or the arrested party is found to have no liability, the courts have ordered the arresting party to pay court expenses as long as they are duly proved. The annual amount paid to keep the security posted for the vessel release must be refunded to the arrested party.[208] In the United Kingdom, a claimant will be liable for wrongful arrest if the arrest was pursued in bad faith or gross negligence.[209] Singapore follows the English approach of making the arresting party liable if he acted with mala fides or crassa negligentia.[210]

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204 Ibid.

205 Ibid.

206 Tetley (n 4) 1935.

207 Ibid.

208 *Omar Salerno Guerrero y Transacciones Salerno SA v Alberto Rodríguez Solís y M/N TITO* I, SJC December 18, 2012; *Dirección General de Minería, Secretaria de Estado de Industria y Comercio de la Republica Dominicana y Almacenes de Granos Dominicanos SA v Thoresen Thai Agencies Public Co Ltd, Thorensen Shipping Singapore Pte Ltd, & Thor Neptune Shipping Co Ltd*, CMA, 7 November 2017.

209 Tetley (n 4) 1915.

210 Halsbury (n 31) para 220.0181.

12 Conclusion

Although Panama is a Civil Law country, it is evident that the ship arrest system is strongly influenced by the Anglo-American Common Law system. The presence of the US in Panama underpins its current maritime jurisdiction, created to maintain the tradition of the previous Canal Zone District Court as an international forum of maritime justice. Over a period of 36 years, the ship arrest system in the Republic of Panama has demonstrated that it is efficient and effective. Nevertheless, in order to respond to the increasing need for harmonization of the law relating to the subject, it may be necessary to consider further revision and amendments, for example in relation to the requirement for counter-security. As the international Conventions and the United Kingdom and Singapore do not require cross-undertakings, Panama should be reconsider whether its provisions should be aligned with international standards. The same might be said about the possibility of arresting sister ships, which is currently limited to cases where the substantive applicable law so allows. Ship arrest, as previously explained, is the only possiblity many maritime claimant may have to recover unpaid debts. The role of the law and the judicial system is to facilitate access to justice through the main instrument that the maritime industry has, since ancient times, provided to creditors for enforcing their claims. While a warrant of arrest should not be granted unscrupulously because of the harm that an unjustified detention of a ship may create, the success of the ship arrest system underpins the ability of claimants to enforce their debt. The ship arrest system of Panama is not far from the harmonized system which the international conventions promotes, although a few amendments will bring Panama closer to that overall goal.