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**MARITIME ARREST AND ATTACHMENT
PROCEDURES IN THE UNITED STATES**

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Vortrag

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MARITIME ARREST AND ATTACHMENT PROCEDURES IN THE UNITED STATES

I. ARREST

A. INTRODUCTION

A procedure unique to American admiralty practice is an action in rem against a vessel or other maritime property. In an in rem action, a vessel or other property is arrested only when a maritime lien is being foreclosed. Thus, in rem action may be brought only by a plaintiff who possesses a maritime lien and may be asserted only against the specific property that is the subject of the lien.

In an in rem action against a vessel, the vessel is the defendant and can be liable even though the owner has no in personam liability.

B. MARITIME LIENS

1. Characteristics of Maritime Lien

A maritime lien is a privileged claim upon maritime property that arises out of services rendered to or injuries caused by that property. The lien attaches simultaneously with the cause of action and adheres to the maritime property even through changes of ownership.

2. Sources of Maritime Liens

- a. Federal Maritime Lien Act ("FMLA")- 46 U.S.C.
§§ 31301-31343;

- b. Ship Mortgage Act -- 46 U.S.C. §§ 31341 - 31343; and
- c. General Maritime Law.

3. **FMLA**

The current codification of the FMLA, 46 U.S.C. § 31342, provides that "a person providing necessities to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel" that may be enforced by a civil action in rem.

Thus, a maritime lien arises in favor of those who supply goods or services to ships if the following requirements are met:

- (a) the supplier must supply "necessaries";
- (b) the "necessaries" must be "furnished" to the vessel;
- (c) the supplier must rely on the credit of the vessel;
- (d) the "necessaries" must be procured by the owner of the vessel or a person authorized to procure the necessities.

a. **Definition of Necessaries**

The FMLA defines necessities as "repairs, supplies, towage, and the use of a drydock or marine

railway." 46 U.S.C. § 31301(4). "Necessaries" is broadly construed by the courts to mean any goods or services that "are useful to the vessel, keep her out of danger, and enable her to perform her particular function." Equilease v. M/V SAMPSON, 793 F.2d 598 (5th Cir. 1986). Some examples courts have considered necessities under the FMLA include:

1. Pilotage Services;
2. Wharfage and Dockage;
3. Stevedoring Services;
4. Special Agents' Services;
5. Bunkers;
6. Insurance.

b. "Furnished to a Vessel"

The FMLA, recodified in 1988, uses the term "providing" whereas the old statute used the term "furnishing." The change in terms was not meant to have any substantive effect and the term "furnishing" is still used in court opinions.

The term "furnishing" has been construed by courts to mean the actual delivery of a necessary to a particular vessel or, at a minimum, delivery to the owner but earmarked for a particular vessel.

RECENT DEVELOPMENT: There is currently a controversy in the U.S. with respect to whether the FMLA recognizes maritime liens for containers which are typically leased and furnished in bulk to a shipowner or charterer. To date, only three circuit courts, (2d, 4th and 9th) have ruled on this issue. Itel Containers Intern., Corp. v. Atlanttrafik Exp. Service, Ltd., 982 F.2d 765 (2d Cir. 1992); Redcliffe Americas Limited v. M/V TYSON LYKES, 996 F.2d 47 (4th Cir. 1993); Foss Launch & Tug Co. v. Char Ching Shipping USA, Ltd., 808 F.2d 697 (9th Cir. 1987). These courts have determined that the furnishing requirement is not met when containers are leased and furnished in bulk because the containers, instead of being supplied to a particular vessel, are leased in bulk for unrestricted use in an entire fleet. Prior to the Second and Fourth Circuit holdings, district courts in Florida had held that for purposes of creating a maritime lien, it is not necessary that a container be earmarked for a particular vessel. Triton Container Intern. Ltd. v. M/S ITAPAGE, 774 F. Supp. 1349 (M.D. Fla. 1990); Transamerica ICS, Inc. v. M/V PANATLANTIC, 1984 AMC 489 (S.D. Fla 1983). Recently, however, a district court in Florida indicated in dicta that if presented with the issue

it would follow the Second Circuit's holding. Specifically, it stated that it would hold that goods furnished in bulk to a charterer with assignment to particular ships being made at charterer's discretion would not give rise to a maritime lien. Electra Intermodal Services, Inc. v. M/V NAN KOU, 1993 AMC 1735 (S.D. Fla. 1993), The Eleventh Circuit has not yet ruled on this issue. Nevertheless, the current trend in decisions in the area of container leasing clearly restricts the container lessor's ability to assert maritime liens for outstanding rental payments.

c. On the Credit of the Vessel

Once a party establishes that goods or services qualify as a maritime lien, a presumption is created that there was reliance on the credit of the vessel. A claimant, therefore, does not have to allege or prove this fact. Instead, the party opposing the lien has the burden to negate this presumption by establishing that the personal credit of the owner or charterer was solely relied upon. (i.e., evidence that the supplier of goods or services explicitly waived his maritime lien).

d. Person Authorized to Procure Necessaries

Goods or services must be ordered by a person with "authority" to procure necessities.

(1) Section 31341(a) of the FMLA provides that the following persons are presumed to have authority to procure necessities for a vessel:

- (a) the owner;
- (b) the master;
- (c) a person entrusted with the management of the vessel at the port of supply; or
- (d) an officer or agent appointed by -
 - i) the owner;
 - ii) a charterer;
 - iii) an owner pro hac vice; or
 - iv) an agreed buyer in possession of the vessel.

(2) Effect of No Lien Clause

Under Section 31341(a)(4)(B), a charterer or person acting for him will be presumed to have authority to create a lien. A question then arises as to what effect a prohibition of lien clause in a charter party will have on the charterer's ability to create liens against the vessel. U.S. courts have uniformly found

that no lien clauses in charters will not bar a lien in favor of suppliers, unless it is proved that at the time the contract was entered into, the supplier had "actual knowledge" of the prohibition of lien clause. See Gulf Oil Trading Co. v. M/V CARIBE MAR, 757 F.2d 743 (5th Cir. 1985). "Reasonable diligence" to inquire and determine whether the person ordering supplies was without authority to bind the vessel is not required.

e. RECENT DEVELOPMENT: Oil Shipping B.V. v. Sonmez Denizcilik, 10 F.3d 176 (3d Cir. 1993).

Held: Bunkers supplied to vessel at the master's request while vessel was under arrest did not create maritime lien. The bunker supplier was ignorant of the arrest of a vessel, despite the notice of arrest having been posted in the wheelhouse. The bunker supplier argued that it did not have a duty to ascertain the status of the ship receiving supplies and could provide service with impunity, absent actual notice of the arrest. The court disagreed. The court distinguished between a supplier dealing with an arrested vessel and a supplier dealing with a vessel under charter. Once a vessel is arrested, no lien can be created

without court permission. While the FMLA allows a lien in favor of a supplier who does not inquire about the operator's authority, the FMLA does not give a supplier the right to rely on the authority of the master of the vessel once the arrest of the vessel terminated the authority of the owner, operator, charterer or anyone else to impose a lien on the vessel absent court approval.

4. Ship Mortgage Act

a. Ship Mortgage Act, 46 U.S.C. §§ 31322 and 31325, provides for a preferred ship mortgage that creates a maritime lien against the mortgaged vessel. In order to gain preferred status, the ship mortgage must be validly recorded in accordance with the Ship Mortgage Act.

b. **Foreign Vessels:** The Ship Mortgage Act recognizes mortgages on foreign vessels executed under the laws of a foreign country. A preferred mortgage lien on a foreign vessel is, however, subordinate to a maritime lien for necessities supplied in the U.S.

5. Other Liens

Non-statutory general maritime law recognizes that maritime liens may arise from the following:

- a. seaman's wages;
- b. personal injury;
- c. collision;
- d. salvage;
- e. cargo damage;
- f. claims for breach of a charter party;
- g. General Average claims;
- h. Claims by the carrier of cargo for unpaid freight and demurrage. (Note: Vessel's lien on cargo is possessory and lost by the unconditional delivery of the cargo to the consignee).

C. Choice of Law

U.S. courts view maritime liens as a substantive rather than a procedural right. Accordingly, U.S. courts will not necessarily apply U.S. law in all in rem proceedings.

- 1. Choice of law in contracts are generally upheld. (i.e., where choice of law in contract was Singapore, Fifth Circuit denied lien to a Singapore ship repairer because the repairer was not entitled to a lien under Singapore law. Sembawang Shipyard v. Charger Inc., 955 F.2d 983 (5th Cir. 1992)).

2. In absence of a choice of law clause, courts look to "the points of contact between the transaction and the sovereign legal systems touched and affected by it." Gulf Trading & Transport Co. v. M/V TENTO, 694 F.2d 1191, 1193 (9th Cir. 1982).

RECENT DEVELOPMENT: Agenzia Marittima Saidelli SRL v. M/V DEXTERITY, 1993 AMC 2900 (E.D.La. 1993).

Held: Italian law applied where the only relation claim had to U.S. was that the vessel was found and arrested in the U.S. Here, plaintiff arranged for and supplied bunkers, pilotage, and other services and goods to a vessel. The contracts involved parties that were not U.S. corporations and were, for the most part, negotiated, entered into and performed in Italy.

D. PROCEDURE

1. Action in rem under Rule C of the Federal Rules of Civil Procedure may be brought against the following:

- a. vessel: may only arrest vessel involved with the event that gave rise to the maritime lien.
- b. cargo: a shipowner has a lien on cargo for freight and other charges owing under a contract of carriage.
- c. freights/subfreights: there is no automatic lien on behalf of a shipowner on subfreights due a charterer. U.S. courts will, however, enforce

provisions in charter parties that provide for such liens.

d. RECENT DEVELOPMENT: In the Matter of Topgallant Lines, Inc., 154 B.R. 368 (S.D.Ga. 1993).

It is well-established that a maritime lien on a vessel extends to its freights. However, the issue of whether such a lien is automatically extinguished upon release of the lien on the vessel was recently addressed for the first time by a federal court in Georgia. The court held that claimants could not assert maritime liens against freights of two vessels because the earlier release of the vessels in exchange for letters of undertaking discharged the liens asserted against both the vessels and its freights.

2. Procedure

a. Papers presented to judge. Complaint and supporting papers are presented to a Judge for review and must show that plaintiff has a prima facie right to the arrest.

(1) Complaint must be verified under oath or solemn affirmation;

(2) Complaint must describe with reasonable particularity the property that is subject of the action and state that the property is

within the district or will be during the pendency of the action.

b. Order issued to Clerk. When Judge is satisfied that conditions exist for an in rem action, an order authorizing a warrant for arrest of the vessel or other property is issued to the clerk who prepares the warrant.

c. Warrant delivered for service. If the property to be arrested is a vessel, a warrant is delivered to the U.S. Marshal for service. If the property to be arrested is other maritime property, a warrant is delivered by the clerk to a person authorized to enforce it. (i.e., a U.S. Marshal, a person appointed by the court, or if the action is brought by the United States, any employee or officer of the U.S.). Rule C(3).

d. Exigent circumstances. If plaintiff or its attorney certify that exigent circumstances exist (i.e., ship is about to sail), the clerk shall issue the summons and warrant for the arrest and the plaintiff will have the burden at the post-arrest hearing to show exigent circumstances existed.

e. Deposit required. Before seizing a vessel, the U.S. Marshal requires a deposit (28 U.S.C. § 1921). Typically, the deposit is several thousand dollars

and is intended to cover the expense of keeping the vessel under arrest. The precise amount varies from port to port. If it is unlikely that a vessel will be released promptly, the plaintiff is likely to seek the appointment of a substitute guardian for the vessel which is typically less costly than having the marshal keep the vessel under arrest.

f. Prompt hearing. Any person claiming interest in arrested property is entitled to a prompt hearing to show why the arrest should not be vacated.

g. Posting security to release property. If a defendant is unsuccessful in convincing a court to dissolve the arrest, the defendant can only obtain release of the property by posting security. Parties may stipulate to the nature and amount of such security.

h. Security for counterclaim. Plaintiff may be required to post security if defendant asserts a counterclaim in action. (Not for wrongful arrest, but for a substantive claim).

i. Effect of filing a bond for release of the property. The effect of filing a bond or stipulation for the release of the property is to transfer any lien from the ship or other property to the fund represented by the bond or stipulation. Once the arrested property is released, the lien is

discharged and the property cannot be re-arrested in respect of that claim. See In the Matter of Topgallant Lines, Inc., 154 B.R. 368 (S.D.Ga. 1993).

j. Interlocutory sales. If property that has been arrested is subject to deterioration, decay or injury by being detained, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of the property, the court, on application of any party or of the marshal or other person having the warrant, may order the property or any portion thereof to be sold. Once the sale takes place, the proceeds are paid into the registry of the court until final judgment of the case.

k. Foreclosure and Priority of Claims

- (1) Foreclosure. If judgment in favor of the original or any intervening claimant becomes final and the vessel is not released by the posting of security, the vessel will be sold on order of the court. Any such judicial sale results in the vessel being sold free of all claims and liens.

(2) Priority of Claims.

(a) No Ship Mortgage Involved. If no ship mortgage is involved, there is no statutory ranking of maritime liens. Priorities are based upon case law and are typically observed as follows:

- i) Expenses while vessel is in custodia legis;
- ii) Seaman's liens for wages, maintenance and cure;
- iii) Salvage and general average liens;
- iv) Maritime tort liens;
- v) Contract liens;
- vi) state created liens of a maritime nature, liens for forfeiture, perfected non-maritime liens (including tax liens);
- vii) general creditors.

Within each class of claim, the liens later in time prime earlier ones ("inverse order rule"). Special rule re: contract claims, all claims for supplies and services share equal priority with respect to each voyage of the

vessel, but liens from later voyages prime earlier ones.

(b) Ship Mortgage Involved. When a preferred ship mortgage is involved, the Ship Mortgage Act, 46 U.S.C. § 31326(b)(1) sets forth the following order of priorities:

i) costs and expenses in custodia legis;

ii) preferred maritime liens (preferred maritime liens are defined under the statute as a maritime lien on a vessel -

a) arising before a preferred mortgage was filed under section 31321 of the Ship Mortgage Act;

b) for damage arising out of maritime tort;

c) for wages of a stevedore;

d) for wages of the crew;

e) for general average; or

f) for salvage, including contract salvage).

iii) preferred mortgage (however, a preferred mortgage lien on a foreign

vessel is subordinate to a maritime lien for necessities supplied in the United States), and
iv) other maritime liens.

E. SPECIAL ISSUES

1. Foreign Sovereign Immunity. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1922, governs actions against foreign sovereigns. Section 1609 of the Act provides that property of a foreign state and agencies and instrumentalities of a foreign state are immune from arrest.

2. Wrongful Arrest. In order for a defendant to recover damages for wrongful arrest, the defendant must establish that the plaintiff acted in bad faith or with malice. Ocean Ship Supply v. Leah, 729 F.2d 971 (4th Cir. 1984). Damages may include cost of any release bond, attorneys' fees incurred in defending the arrest, extra wharfage and similar extra seizure expenses.

II. ATTACHMENT

A. INTRODUCTION

Maritime pre-judgment attachment under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims allows a plaintiff who has an in personam admiralty or

maritime claim to seize property belonging to the defendant.

B. PURPOSE

1. to obtain jurisdiction over the defendant through the defendant's property; and
2. to obtain security for satisfaction of a claim.

C. PREREQUISITES UNDER RULE B

In order to secure a writ of maritime attachment under Rule B, four (4) prerequisites must be met (see, Western Bulk Carriers v. P.S. Intern., 762 F. Supp. 1302 (S.D. Ohio 1991)):

1. Admiralty Claim. The plaintiff must have an in personam claim against the defendant which is cognizable in admiralty. That is, the claim must be one which will support a finding of admiralty jurisdiction under 28 U.S.C. § 1333.

2. Defendant Cannot Be Found Within the District. Another important prerequisite to maritime attachment is that the defendant cannot be found within the district. U.S. courts have determined that a defendant will be considered "found within the district" within the meaning of Rule B if:

- a. the defendant is subject to in personam jurisdiction (i.e., has sufficient contacts with the district to subject it to jurisdiction) and

b. the defendant can be served process in the district (i.e., the defendant must have an authorized agent or office within the district that can accept process).

c. **Due Diligence:** Many courts and commentators have concluded that a defendant's presence within a district for purposes of service of process will not enable a defendant to set aside an attachment if plaintiff would not have uncovered defendant's presence through the exercise of due diligence.

(1) **RECENT DEVELOPMENT:** West of England Shipowners Mutual Insurance Association v. McAllister Brothers, 829 F. Supp. 122 (E.D. Pa. 1993). **Held:** The presence of an officer of defendant with a home address within a district did not preclude a Rule B Attachment because plaintiff had exercised due diligence to attempt to find the defendant. Here, plaintiff, West of England, sued defendant for unpaid calls and attached two of defendant's tugs in Philadelphia. Although defendant was a Delaware corporation with offices in New York and New Jersey, it claimed that it could be "found within the district" for purposes of Rule B because its Assistant Vice President, an officer for the purpose of service of

process, resided in the district. The court held that the officer's presence did not preclude the attachment because the plaintiff exercised due diligence to attempt to find the defendant. Specifically, the plaintiff checked in the Philadelphia Port Directory, the telephone book for the Port of Philadelphia, the Philadelphia Maritime Exchange and the Corporation Bureau of the Pennsylvania Department of State, and was advised that the defendant had not had an office in Philadelphia for years. The court further found that it was not necessary for the plaintiff to consult all telephone books in the district for individuals that might be an officer or director of defendant and that might live in the district.

3. Location of Property. Plaintiff must demonstrate that property belonging to the defendant is present or soon will be present in the district in which plaintiff files the action.

a. Property subject to attachment. All goods, chattels, credits or effects belonging to the defendant may be attached under Rule B. This includes tangible as well as intangible property (i.e., debts) in the hands of third parties.

b. **Property transferred.** If the defendant has abandoned property or transferred it to a third party in a non-fraudulent transaction, property is not subject to attachment. See Lambros Seaplane Base, Inc. v. Batory, 215 F.2d 228 (2d Cir. 1954).

4. **No statutory or general maritime law prohibition to attachment.** Rule B may not be used when specifically prohibited. The Suits in Admiralty Act, 46 U.S.C. § 741, for example, prohibits a plaintiff from starting its action by a seizure of government property.

D. **PROCEDURE.**

1. **Papers presented to judge.** A complaint and supporting papers are presented to a judge and must show that plaintiff has a maritime claim and that the defendant is not present in the district.

a. **Affidavit.** Rule B requires that an affidavit stating that the defendant cannot be found within the district accompany the complaint. The affidavit should set forth the steps plaintiff's attorney took in attempting to locate the defendant.

2. **Order issued.** When the judge is satisfied that proper grounds exist for issuing a Rule B attachment, the judge will sign an Order for Process and an Order Appointing Persons to Serve Process, if requested. The

Order Appointing Persons to Serve Process permits the plaintiff to have persons other than the marshal serve the process. By using persons other than the marshal, plaintiff will avoid paying the marshal's fees for service.

3. Process delivered. After receipt of the Order for Process, the court clerk issues a writ of attachment to the marshal or person appointed for service. Plaintiff is entitled to serve process, including interrogatories, on garnishees who may be holding property of the defendant. The garnishee must inform the plaintiff within twenty days whether it holds any of defendant's property.

a. After-acquired property. At least one court held that where a garnishee is not holding defendant's property at the time it receives the process, but comes into possession of such property within the twenty days, such property is not subject to attachment. Reibor International Ltd. v Cargo Carriers (Kacz-Co.) Ltd., 759 F.2d 262 (2d Cir. 1985) (at the time it was served, garnishee bank did not possess funds belonging to defendant).

b. After-identified property. If the garnishee is unsure whether it is holding property belonging to the defendant at the time process is served, but later determines that it is holding such property,

the attachment is valid. DK Mfg. Co. v S/S Titan,
1964 AMC 78 (S.D.N.Y. 1963).

4. Exigent circumstances. As with in rem procedures, plaintiff may certify that exigent circumstances exist such that the clerk may issue a summons and process without an order from a judge.

5. Deposit required. As with in rem procedures, the U.S. Marshal requires a deposit before attaching a vessel to cover the expense of keeping the vessel under attachment.

6. Prompt hearing. As with in rem procedures, the defendant claiming an interest in the attached property is entitled to a prompt hearing at which the plaintiff must show why the attachment should not be vacated.

7. Posting security to release property. If the defendant cannot convince a court to vacate the attachment, it can only be released by the posting of security. Parties may stipulate to the nature and amount of security.

8. Security for counterclaim. If the defendant tendered security to release the attached property, the defendant is entitled to demand security on any counterclaim against the plaintiff. This does not include the right to security for a wrongful attachment claim.

9. Interlocutory sales. The same circumstances that prompt an interlocutory sale when a vessel is arrested

will prompt a prejudgment sale. Where property is subject to deterioration or if there is unreasonable delay in securing the release of property, such a sale may be ordered by the court.

E. SPECIAL ISSUES

1. Arbitration. Rule B may be used even if the plaintiff's claim is subject to a valid arbitration clause. 9 U.S.C. § 8.

a. RECENT DEVELOPMENTS. Issues arise with respect to whether attachment is precluded by the prior commencement of arbitration. At least one court has held that if the plaintiff first initiates arbitration proceedings and then files a suit seeking attachment, the right to use pre-judgment attachment procedures is lost. Continental Chartering & Brokerage, Inc. v. T.J. Stevenson & Co., 678 F. Supp. 58 (S.D.N.Y. 1987). Recently, however, two courts have found that pre-judgment attachment is not precluded by the prior commencement of arbitration.

(1) Unitramp Ltd. v. Mediterranean Brokerage and Agents, S.A., 1994 AMC 476 (E.D. La. 1993). In this case, plaintiff claimed that defendant owed it freight, demurrage and other expenses and commenced arbitration proceedings

in London under its charter party with defendant. Thereafter, plaintiff commenced an action in federal court in Louisiana seeking attachment of defendant's assets. The court held that the attachment was not precluded by the prior commencement of arbitration proceedings, reasoning that the Federal Arbitration Act specifically allows for the seizure of vessels in the ordinary course of admiralty proceedings as a means of obtaining security and as a means of establishing the court's jurisdiction so as to allow the court to order arbitration.

(2) The West of England Shipowners Mutual Insurance Association v. McAllister Brothers, 829 F. Supp. 125 (E.D. Pa. 1993). In this case, claimant commenced arbitration of certain disputes relating to payment of P&I calls. It later obtained a Rule B attachment on two of respondents tugs. Although the matter was decided on other grounds, in dicta, the court stated that a pending arbitration would not preclude the maritime attachment.

b. Arbitrators awarding security. While the existence of arbitration agreements are not an impediment to obtaining Rule B attachments, some

U.S. courts are nevertheless permitting arbitrators to order the posting of pre-award security. See Konkar Mar. Ent. v. Compagnie Belge D'Affretement, 668 F. Supp. 267 (S.D.N.Y. 1987).

2. Foreign Sovereigns. While Section 1609 of the Foreign Sovereign Immunities Act provides that foreign states and instrumentalities and agencies of foreign states are immune from attachment, Section 1610 sets forth exceptions to the foreign state's immunity to attachment. Under Section 1610(d), if the property of a foreign state is used for a commercial activity in the U.S., it shall not be immune from attachment prior to the entry of judgment if:

- a. the foreign state has explicitly waived its immunity from attachment; and
- b. the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

While Section 1610(d) sets forth exceptions to the foreign state's immunity to attachment, at least one court has interpreted the statute (in dicta) to allow a government owned steamship line to waive its immunity from in rem arrest. Triton Container International Ltd. v. M/S ITAPAGE, 774 F. Supp. 1349 (M.D. Fla. 1990).

III. STATE ATTACHMENT

A. Introduction

Rule B specifically preserves a plaintiff's right to use state pre-judgment attachment procedures in addition to, or alternatively with, maritime attachment procedures. Rule B(1). State procedure cannot, however, include in rem arrest.

B. New York Attachment Procedures.

1. Actions in which pre-judgment attachment available.

An attachment is available in any action, except a matrimonial action, wherein the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants. CPLR § 6201. Thus, attachment is available in cases where forms of relief in addition to a money judgment are sought.

2. Grounds for pre-judgment attachment.

- a. defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or
- b. defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
- c. defendant, with intent to defraud creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, assigned,

disposed of, encumbered or secreted property, or removed it from the state or is about to so; or

d. action is brought by victim of a crime against the person or the legal representative or assignee of the person convicted of committing such crime; or

e. cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in New York.

CPLR § 6201.

3. Procedure for obtaining attachment order.

a. Notice. A motion for attachment may be made on notice or without notice. CPLR §§ 6210 and 6211.

(1) Attachment on Notice. A plaintiff who seeks an attachment on notice is permitted to seek a temporary restraining order prohibiting the garnishee (and defendant according to the 1977 Judicial Conference Report 252) from transferring the assets during the interval between the service of the notice of motion and the court's decision on the motion. CPLR § 6210. Typically, the plaintiff will bring his motion for an attachment with an order to show cause that includes a temporary

restraining order. Practice Commentaries to CPLR § 6210.

(2) Ex Parte Attachment. A plaintiff may seek an order of attachment without notice. Such order, however, must be judicially confirmed. CPLR § 6211.

(a) order granted on grounds b through e. Where attachment order is granted on grounds b through e above, the plaintiff must move for an order confirming the order of attachment no later than five days after the levy.

(b) order granted on ground a. Where an attachment order is granted on the ground that the defendant is a nondomiciliary or a foreign corporation not qualified to do business in the state, the garnishee's statement must be served within five days and the plaintiff must move within ten days after the levy for an order confirming the order of attachment. CPLR § 6211(b).

b. Application for order.

Attachment is obtained by motion and such motion must be supported by affidavit and other written evidence as may be submitted. Plaintiff must show

- (1) that there is a cause of action;
- (2) that it is probable plaintiff will succeed on the merits;
- (3) that one or more grounds for attachment exist; and
- (4) the amount demanded from defendant exceeds all counterclaims known to the plaintiff.

c. Plaintiff's Undertaking. On a motion for an order of attachment, the plaintiff must give an undertaking. CPLR § 6212(b). The amount of the undertaking is fixed by the court and a specified part of the undertaking is to be conditioned that the plaintiff pay to the defendant all costs and damages, including reasonable attorneys' fees, which may be sustained by reason of the attachment if it decided that the plaintiff was not entitled to the attachment.

4. Property subject to attachment. Any debt or property against which a money judgment may be enforced

is subject to attachment. CPLR § 6202. Such property includes:

a. **Debts.** Any debt which is past due or which is yet to become due, whether it was incurred within or without the state, to or from a resident or non-resident. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state. CPLR § 5201.

b. **Property.** Any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested. CPLR § 5201.

5. **Discharge of property.** Property may be discharged from attachment by the substitution of security. CPLR § 6222. The defendant must give an undertaking in an amount equal to the value of the property or debt sought to be discharged.

6. **Attachment in aid of arbitration.** CPLR § 7502(c) permits a party to seek an order of attachment in aid of arbitration.

a. **Grounds for attachment.** The only ground for attachment in aid of arbitration is that the award to which the applicant may be entitled may be rendered ineffectual without the order of attachment.

b. Application for attachment made before commencement of arbitration. Where the application for attachment in aid of arbitration is made before the arbitration is formally commenced, the arbitration must be commenced within 60 days after the order of attachment is signed or else the attachment becomes void. CPLR § 6213.

c. Procedure. The procedures for pre-judgment attachment, except the grounds required for pre-judgment attachment, are applicable to attachments in aid of arbitration. The provisions relating to notice and undertakings are likewise applicable.

IV. INTERNATIONAL CONVENTIONS

A. Introduction. The U.S. is not a party to the international convention on arrest of ships or any international convention on maritime liens. As a result, there is a lack of uniformity between the law of the United States and that of other countries.

B. International Convention Relating to the Arrest of Seagoing Ships, 1952.

1. Maritime Claims. The 1952 Arrest Convention does not distinguish between maritime liens and statutory rights in rem. Instead, it defines maritime claims very

broadly and provides that all maritime claims give rise to the right of arrest. Arts. 1(1)(a) to (q), 3(1).

2. **Person Authorized to Bind Ship.** There is no limitation under the Convention as to who must be in charge of the ship at the time a maritime claim accrues. Indeed, the Convention authorizes the arrest of a ship in a case where someone other than the registered owner is liable for the maritime claim. Thus, time and voyage charterers as well as demise charterers may be liable for a maritime claim which can result in the arrest of a ship.

a. **Effect in US.** U.S. courts have held that the arrest of a vessel in a nation which is a signatory to the Convention cannot be equated to an in rem Rule C arrest in the U.S. because claims under the Convention are in personam claims. Perez & Compania S.A. v. M/V MEXICO I, 826 F.2d 1449 (5th Cir. 1987).

3. **Sister Ship Arrest.** The Convention confines the arrest of a ship to enforce a maritime claim to only one ship. Art. 3. Where the registered owner is liable for the maritime claim, either the offending ship or any other ship owned by the registered owner may be arrested. Where the registered owner is not liable, either the offending ship or any other ship owned by the person who is liable on the maritime claim may be arrested.

4. Procedures. The rules of procedure for the arrest of a ship are governed by the law of the Contracting State in which the arrest was made. Art. 6.

5. Priorities. The Convention does not grant rights with respect to priorities but leaves that issue to the laws of the Contracting States. See Art. 9.

C. INTERNATIONAL CONVENTIONS ON LIENS AND MORTGAGES.

1. INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO MARITIME LIENS AND MORTGAGES, 1926 AND 1967.

The Liens and Mortgages Convention of 1926 has been in force since 1931. A new Convention on Maritime Liens was agreed to in 1967 but never came into force.

a. Ranking of Liens.

(1) 1926 Convention. (arts. 2,3,5,6).

(a) Costs due the State and expenses incurred in the common interest of the creditors to preserve the vessel or procure its sale, tonnage dues, light or harbor dues, pilotage dues, etc.;

(b) Claims arising out of the contract of engagement of the master, crew, and other persons hired on board;

(c) Remuneration for assistance and salvage, and contribution of the vessel in general average;

(d) Indemnities for collision or other accidents of navigation, damage caused to harbors, docks and navigable ways, personal injury to passengers or crew and for loss or damage to cargo or baggage;

(e) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is owner of the vessel and whether the claim is his own or that of ship-chandlers, repairers, lenders, or other contractual creditors;

(f) Mortgages, hypothecations, and other charges on vessels;

(g) Additional liens granted under the Contracting State's laws.

- Claims included under any one category share concurrently and rateably in the event a fund is unavailable to pay all claims in full.

- Claims for salvage and general average and for contract claims rank, within each category, in the inverse order of the dates on which they came into existence.

- Claims secured by a lien that arise under the last voyage of the vessel have priority over those that arise under the previous voyage.

(Arts. 5,6)

(2) 1967 Convention. (Arts. 4,5,6). The 1967 Convention attempted to limit the number of liens ranked ahead of mortgages.

(a) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;

(b) port, canal and other waterway dues and pilotage dues;

(c) claims against the owner for loss of life or personal injury occurring;

(d) claims against the owner, based on tort and not capable of being based on contract;

(e) claims for salvage, wreck removal and contribution in general average;

(f) registered mortgages and hypothèques;

(g) Additional liens granted under the Contracting State's Laws.

- If a lien is granted under the Contracting State's Laws to a shipbuilder or ship repairer, such lien will be ranked after all maritime liens set forth in the Convention but may be preferred to registered mortgages. However, such liens shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or repairer.

2. INTERNATIONAL CONVENTION ON MARITIME LIENS AND MORTGAGES, 1993.

In an effort to encourage ship financing by giving mortgage lenders improved security on their investment, a new international convention on maritime liens and mortgages was adopted in 1993 by a plenipotentiary conference in Geneva. This Convention was open for signature on September 1993 and has not yet come into force.

a. Ranking. The aim of the Convention is to ensure that those lenders that provide financing for vessels receive adequate security for their investment by limiting the number of maritime liens that can take priority over registered mortgages. Under the Convention, only five types of maritime

liens will be entitled to have priority over registered mortgages:

- (1) claims due to the master and crew;
 - (2) loss of life and personal injury;
 - (3) salvage rewards;
 - (4) port, canal, waterway and pilotage dues;
- and
- (5) claims for physical loss or damage caused by the operation of the vessel other than damage to cargo, containers, and passengers' effects.

- Additional liens granted by Contracting States shall rank below registered mortgages.

b. Temporary change of flag. The Convention provides for the temporary change of flag in cases of bareboat charter registration. The Convention requires a vessel seeking such a temporary change to have either satisfied its mortgages or obtained the consent of all holders of such mortgages prior to any temporary change.