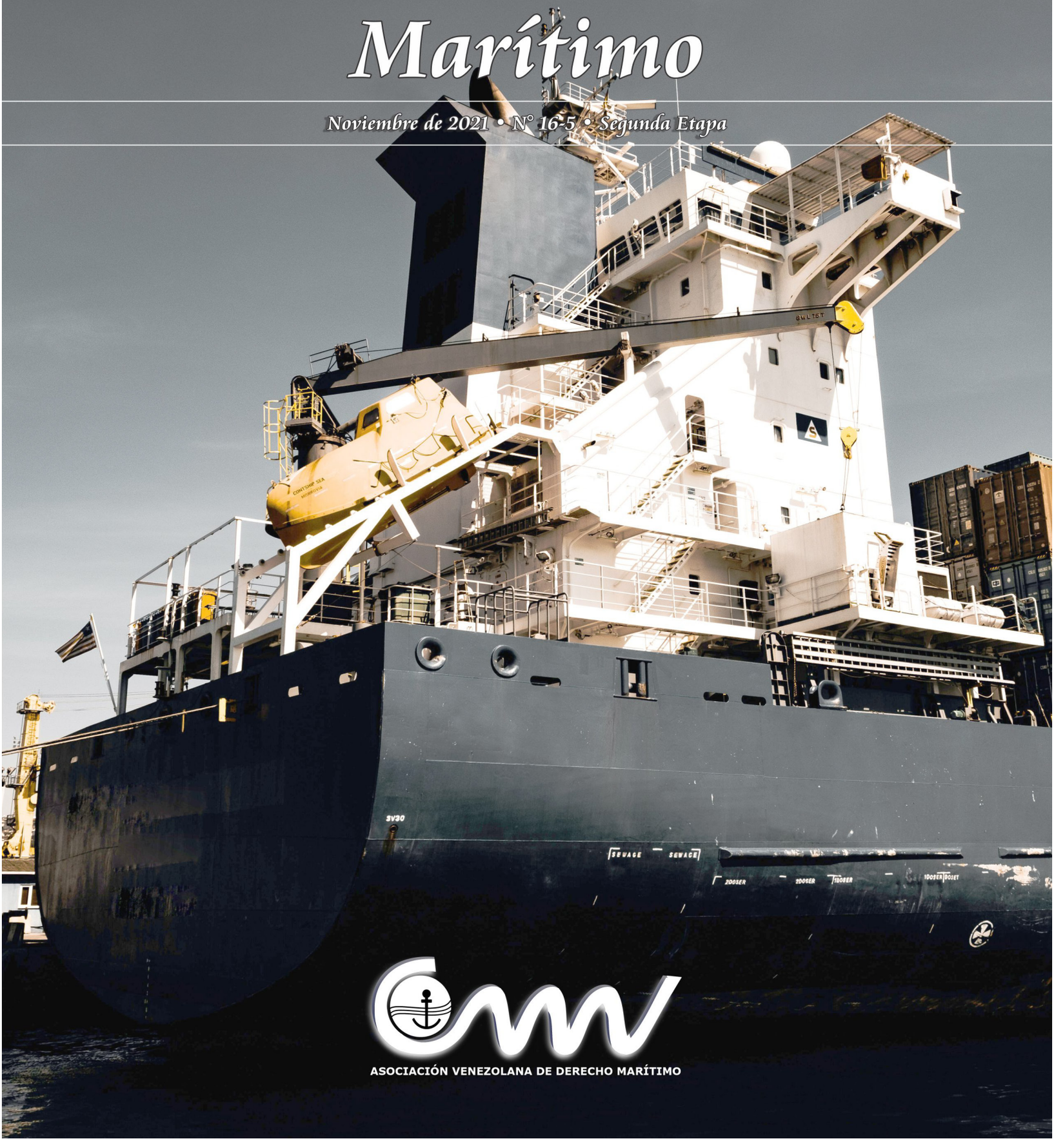
# Revista de la Asociación Venezolana de Derecho Marítimo

Noviembre de 2021 • N° 16-5 • Segunda Etapa




ASOCIACIÓN VENEZOLANA DE DERECHO MARÍTIMO

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# *REVISTA DE LA ASOCIACIÓN VENEZOLANA DE DERECHO MARÍTIMO*
# *NOVIEMBRE DE 2021 Nº 16-5 DE LA SEGUNDA ETAPA*

Revista de la Asociación Venezolana de Derecho Marítimo

ISSN: 2665009-6

Depósito Legal: MI2019000237

Portada: Fotografía por Efe Yagiz Soysal, en Unsplash

Diagramación: Miriam Ríos



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*REVISTA DE LA ASOCIACIÓN VENEZOLANA DE DERECHO MARÍTIMO*
*Noviembre de 2021 Nº 16-5 de la Segunda Etapa*

ASOCIACIÓN VENEZOLANA DE DERECHO MARÍTIMO

# CONTENIDO

# PRESENTACIÓN

Nos es grato presentarles –en nombre del Comité Ejecutivo y los Miembros en General de la Asociación Venezolana de Derecho Marítimo (AVDM)– una nueva edición de la Revista de la AVDM: la número 16-5 de la segunda etapa. Desde que reiniciamos la publicación en 2017, luego de varios años de paralización, hemos trabajado en mantener la anualidad de nuestra revista, siempre buscando la excelencia y poco a poco elevar los estándares, todo lo que esperamos perdure en el tiempo.

En esta edición, contamos con 15 artículos especializados, de los cuales 6 son de abogados jóvenes, cosa que nos llena de orgullo por diversas razones: (i) nuestra Corporación continúa apoyando y abriendo caminos a la generación de relevo, asegurando así el futuro de abogados maritimistas comprometidos con la academia; (ii) animamos a nuestros lectores a unirse a las filas de la Asociación, o en su defecto, a profundizar conocimientos en esta importante área del derecho; y (iii) nos permite analizar, aprender, o criticar distintos puntos de vista, que en oportunidades son (en el buen sentido de la palabra) irreverentes y/o cuestionan el *status quo*, cosa que nos llama a la reflexión e invita a continuarnos preparando, sobre todo en temas novedosos.

En la misma medida, continuamos aprendiendo de abogados con más experiencia, tanto nacionales como extranjeros, los cuales nos honran con su participación en esta edición de la Revista.

La Revista 16-5, cuenta con tres partes: doctrina, recensiones y memoria. En lo referente a la doctrina, tenemos el placer de contar con un Ex Presidente de la AVDM, dos invitados extranjeros, cuatro venezolanos radicados en el exterior y una muestra de la visión nacional mediante autores de varios sectores de nuestro país.

El Dr. Omar Franco Ottavi, Ex Presidente de la AVDM (1996-2000), analiza la importancia del concepto de navegabilidad y su influencia/consecuencia en los contratos de utilización del buque; cátedra que conoce y analiza con facilidad, tras haber sido Profesor de la misma por más de una década.

Tenemos el agrado de contar con el abogado americano Jeremy Herschaft, socio del departamento marítimo de la reconocida firma Blank Rome, quien realizó una detallada guía titulada (en traducción al español) *Arrestos y Embargos Marítimos: Lo que todo abogado extranjero debe saber,* en la cual hace un estudio detallado de las opciones y escenarios disponibles para el embargo de buques bajo las Reglas Suplementarias del Procedimiento Federal para Ciertos Reclamos Marítimos y de Almirantazgo de los Estados Unidos.

Un tema común que fue analizado en esta edición de la Revista, se centra en la llamada Constitución de los Océanos, la CONVEMAR. Sin concierto previo, varios de nuestros autores profundizaron, o se apoyaron en sus disposiciones para elaborar sus opiniones.

Primeramente, desde Panamá, la especialista, docente y asidua autora sobre la CONVEMAR, Rosa María Aguirre, trató el tema de los organismos internacionales competentes en ese cuerpo normativo y su importancia y/o necesidad.

De seguidas, la Joven Maritimista, Andreina Cruces Vivas –quien ha mostrado particular interés por los temas marítimo ambientales– debuta en nuestra revista, apoyándose entre otras en la CONVEMAR, para realizar un análisis sobre la licitud del acceso, o prohibición, a los lugares de refugio para buques en necesidad de asistencia, basado en razones de contaminación.

Luego, el especialista en Derecho Marítimo, y *blogger* en la materia, Argenis Rodríguez, quien junto a Andreina Cruces coordina la Comisión de Jóvenes Maritimistas AVDM, estudió la jurisdicción penal en cada una de las delimitaciones acuáticas que propone la CONVEMAR y que han sido adoptadas, en algunos casos con reservas, por los Estados como ley interna.

Así mismo, el Capitán de Altura, abogado y Doctorando en Leyes, Óscar Rodríguez Luna, desde la premisa del cambio climático por la contaminación de la industria marítima, analiza el tema bajo diversos convenios internacionales, incluida la Constitución de los Océanos, para intentar buscar una respuesta sobre la competencia, jurisdicción y el derecho aplicable para dichos casos de contaminación atmosférica.

Por otra parte, el especialista en Derecho Marítimo, y actual Director de Asuntos Navieros de la AVDM, Rubén Bolívar, analizó las consecuencias de los llamados «cuellos de botella» para la industria petrolera, todo a raíz del incidente en el Canal de Suez con el buque portacontenedores M/V Ever Given.

Luego, Adaelizabeth Guerrero, la joven abogada de Puerto La Cruz, realizó un estudio introductorio a las plataformas petrolíferas que es un buen punto de partida para iniciarse en el amplio, y técnico, mundo del área petrolera.

También contamos con artículos en el área del seguro marítimo. El primero de ellos por la Magíster en Gestión de Empresas Marítimo-Portuarias, Carola Rodríguez, quien realza la importancia del –si se quiere– rescate de la figura del pronto pago provisorio.

Por su parte nuestra Tesorera, y persona fundamental de nuestra AVDM en las últimas administraciones, la especialista Cristina Mujica, presentó el tema de las coberturas de seguro de guerra y huelga, tema que no es necesariamente de fácil y común comprensión, pero que logra la autora explicar en términos claros.

Desde el punto de vista procesal, el Maracucho Edwing Marval, propone una visión futurista respecto a la descentralización de los tribunales marítimos en las circunscripciones acuáticas estadales.

Por último, no faltaron artículos en lo que respecta a aplicaciones prácticas de casos, procedimientos, procesos, siniestros, etc. Entre ellos tenemos, en el plano nacional a la abogada de Cumaná, Ángeles Rodríguez quien realizo una necesaria actualización, de forma muy didáctica y ordenada, sobre un tema que se había escrito en nuestra revista en el pasado, como lo es el suministro de combustible para buques pesqueros de bandera venezolana.

Adicionalmente, Ricardo Maldonado, Magíster en Derecho del Transporte, mediante alusión a recientes casos, hizo un estudio de los –cada vez más comunes– fuegos a bordo de buques, su relación con la falsa declaración de la carga en contenedores, el derecho aplicable a estos

casos, la incidencia de los mismos, la posición de los Clubes de P&I, entre otros.

Laura Ugarte, especialista y magíster en el área, una vez más –así como lo hace regularmente con otros artículos y análisis de jurisprudencia para nuestra Asociación– ha realizado un estudio corto, conciso, pero importante y muy didáctico sobre como la libre plática se ha visto afectada, a raíz de la declaratoria de la pandemia del Covid-19, y el impacto que esto tiene en los tiempos de plancha y demoras.

Por último, el especialista John Prados, venezolano radicado en Qatar, hizo una disección por demás interesante y sin desperdicio del contrato de fletamento de gas natural licuado, que está fundamentado en una realidad práctica y que deja al lector ansioso de continuar ampliando sobre el tema.

En lo que respecta a las otras secciones de nuestra revista, por una parte, las recensiones, incluimos una reseña de –en nuestro conocimiento– la única obra impresa publicada en el año 2020, en merecido homenaje al Dr. Luis Cova Arria. En cuanto a la tradicional sección de memoria, vista las notorias circunstancias acaecidas en el 2020 y lo que va de 2021, no pudimos incluir por razones obvias la participación de venezolanos en eventos académicos dentro y fuera del país, pero nuevamente incluimos una reseña del esfuerzo realizado por la AVDM con el concierto de sus miembros, Comité Ejecutivo y colegas en el extranjero en realizar y mantener un alto estándar en lo que respecta a los ya conocidos «*webinars*».

Como siempre, agradecemos a todos nuestros Miembros y colaboradores quienes de alguna u otra forma nos han apoyado en este esfuerzo. Ha sido para quien suscribe un placer estar al frente de la Dirección de Publicaciones y Eventos de esta Asociación Venezolana de Derecho Marítimo, sobre todo en estos tiempos tan movidos. Esperamos que la impresión de esfuerzo, cariño y dedicación de parte de todos los que nos ayudaron en esta labor no haya pasado desapercibida y sea de utilidad para la comunidad marítima en general.

***Juan J. Itriago***
Caracas, 1 de octubre de 2021.

# MARITIME ATTACHMENTS AND ARRESTS IN UNITED STATES WATERS: WHAT EVERY FOREIGN SHIPPING LAWYER SHOULD KNOW

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## 1. INTRODUCTION

Regardless of sea, country, or port, admiralty lawyers are in many respects united through a common bond of various procedural devices that are unique to our trade's special brand of sea-borne litigation. Ships are by their nature transitory objects, and the fast-paced world of maritime commerce has inevitably led to interesting methods with respect to how courts around the world procedurally manage complex admiralty litigation disputes.

This article will build upon that theme as we navigate through United States waters and explore three special procedural devices set forth in the Federal Rules of Civil Procedure *Supplemental Rules for Certain Admiralty and Maritime Claims* (the "Supplemental Rules"): the "**Rule B**" maritime attachment, "**Rule C**" maritime arrest, and "**Rule D**" possessory action. These powerful mechanisms are the principal ways to restrain a wide variety of maritime-related property in the U.S. Accordingly, a firm understanding of these particular rules will hopefully assist foreign litigants in gaining a better appreciation of U.S. admiralty litigation.[1]

[1] The other Supplemental Rules are beyond the parameters of this article. However, for the sake of clarity and brevity, Supplemental Rule "A" deals with the scope of the rules in general. Supplemental Rule "F" deals with a vessel owner's statutory limitation of liability and the procedural mechanisms to be used for such actions. Finally, Supplemental Rule "G" deals with forfeiture actions *in rem*.

## 2. THE U.S. COURT SYSTEM

Before delving into the mechanics of the Supplemental Rules, it is helpful for foreign maritime attorneys to have a basic understanding of the dualistic "state" and "federal" court systems which exist throughout the United States.

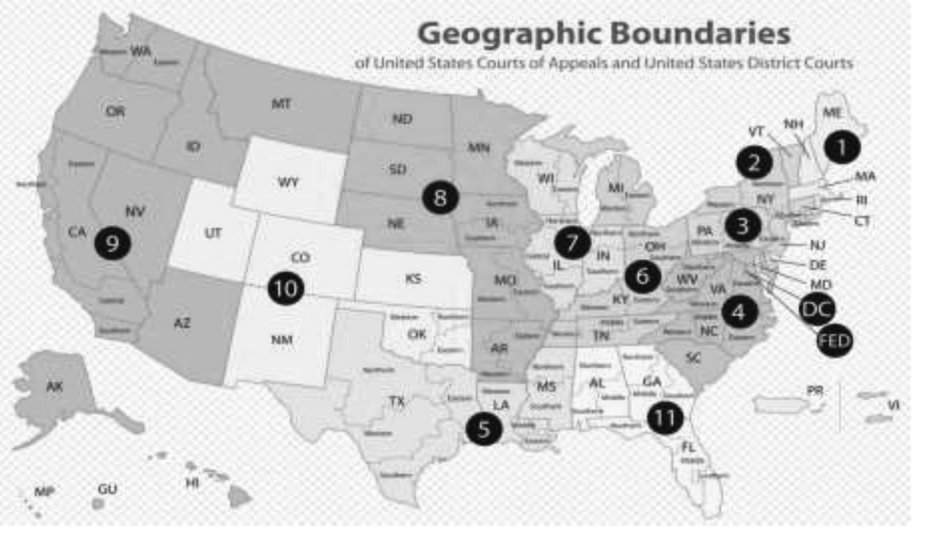
There are fifty separate states within the United States (New York, Texas, California, etc.), and in turn each individual state has established its own unique court structure to address legal issues which may arise under the laws of that state. Generally speaking, state courts are often separated into three tiers: a **primary court** where litigation is first initiated, an **appellate court** to address appeals from that primary court, and then a final **supreme court** which receives appeals from the state's appellate court and which serves as the highest court for that particular state. Thereafter, in certain instances, appeals may be taken from that state supreme court (for example, the Texas Supreme Court) up to the United States Supreme Court (located in Washington, D.C.), which is considered the highest court authority over all states and territories within the entire United States. A litigant's access to a particular state court is highly dependent upon the facts of each case, and will always involve an analysis as to whether that specific state court has the requisite jurisdiction over the matter and parties at issue.

In contrast to the state-court framework described above, the United States has established an independent federal court system to hear a wide variety of disputes separately arising under U.S. federal law, which in turn is distinct from the state laws generally referenced above.[2] The federal court system is comprised of ninety-four separate federal district courts, which each cover a specifically defined geographic area. For example, the United States District Court for the Southern District of Texas has jurisdiction over numerous Texas counties, including the cities of Houston, Galveston, Victoria, Laredo, Corpus Christi, McAllen, and Brownsville. In turn, there are thirteen United States Courts of Appeal, which will receive appeals from the lower federal district courts and administrative agencies within their defined geographic area. Thereafter, appeals from one of the thirteen federal appellate courts will be submitted to the United States Supreme Court, which is considered to be the "final" U.S. authority for all disputes arising under federal law. U.S. Const. Art. III, §1.

Federal courts are described as courts of "limited jurisdiction;" only certain types of cases may be litigated in their forum, depending on the subject matter of the dispute (which will be described in greater detail below for maritime matters). As with state courts, a litigant's access to a particular U.S. federal court will always involve a preliminary gatekeeping analysis as to whether that federal court has the requisite *subject matter jurisdiction* over the dispute and also whether it has *personal jurisdiction* over the parties at issue.

[2] Federal courts can also hear certain state-court disputes and apply state law in special instances, such as when there is a "diversity of citizenship" between the parties at issue. See generally 28 U.S.C. §1332.

The picture below illustrates the various U.S. federal district and appellate court jurisdictions throughout the United States:[3]




In addition to understanding the above, it is also important to appreciate the vital role of the United States Marshals Service (the "USMS"), which is the oldest U.S. law enforcement agency. The USMS "occupies a uniquely central position in the federal justice system" and "is the enforcement arm of the federal courts".[4] In this regard, USMS officers are specifically tasked with seizing property when ordered to do so by federal judges. As we will see below, the USMS is the specific federal law enforcement authority that is called upon by U.S. federal courts to issue warrants of attachment and arrest upon maritime property.

## 3. U.S. MARITIME JURISDICTION IN GENERAL

Maritime law is one of the few bodies of law that is expressly referenced in our U.S. Constitution, which at Art. III, Sec. 2. states that "*[t]he judicial Power shall extend. . . to all Cases of admiralty and maritime Jurisdiction...*"[5] By subsequent statute, Congress granted U.S. federal district courts original jurisdiction over "any civil case of admiralty or maritime jurisdiction". 28 U.S.C. §1333(1). "The purpose of a special grant of admiralty jurisdiction to the federal courts ... is to provide uniform rules of law for the business of shipping, to facilitate maritime commerce, [and] to apply uniform remedies for persons travelling or working on navigable waters in connection with these maritime activities". Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, § 1-2, Pg. 6 (3rd Ed., 2001). In connection with this grant of jurisdiction, suits may be filed *in personam* against a specific party or *in rem* against certain inanimate objects (such as vessels or cargo) if various legal predicates are met and the causes of action are deemed to be "maritime claims". In turn, U.S. maritime jurisdiction encompasses a wide variety of such

3 See https://en.wikipedia.org/wiki/United_States_federal_judicial_district#
4 https://www.justice.gov/jmd/organization-mission-and-functions-manual-united-states-marshals-service
5 The terms "admiralty" and "maritime" are often used interchangeably throughout U.S. jurisprudence.

claims, particularly with respect to tort actions and commercial disputes. A general summary of how such maritime jurisdiction arises is as follows.

To determine whether a federal court has admiralty jurisdiction over a particular tort claim, U.S. courts apply a two-part test set forth by the United States Supreme Court in *Grubart v. Great Lakes Dredge & Dock Co*., 513 U.S. 527 (1995), which requires a party to satisfy conditions of both maritime location and also a connection with maritime activity. The "location" portion of the *Grubart* test focuses on whether the tort at issue occurred on navigable waters or, alternatively, whether an injury suffered on land was caused by a vessel on navigable waters. The "connection" inquiry separately requires the court to address whether **(a)** the incident involved has a potentially disruptive impact on maritime commerce, and **(b)** whether the general character of the activity giving rise to the incident shows a substantial relationship to a traditional maritime activity.

Both the *Grubart* location test and connection test must be met for a U.S. court to have admiralty tort jurisdiction. Fortunately, the caselaw in the United States is very developed as to numerous types of tort-related claims which give rise to maritime jurisdiction, such as claims for personal injury, death, seamen-related claims, and casualty events (collisions, allisions, cargo loss, etc.).

Admiralty contract jurisdiction is equally nuanced. Over two centuries ago, Justice Story determined that admiralty contract jurisdiction "extends over all contracts... which relate to the navigation, business of commerce of the sea". *DeLovio v. Boit*, 7 Fed. Cas. 418 (C.C.D. Mass, 1815). Since that time, there have been many commercial agreements which have been deemed to be maritime contracts within the scope of U.S. admiralty jurisdiction, such as charter parties, contracts for towage and salvage, etc. Interestingly, not all contracts involving vessels will necessarily fall within admiralty contract jurisdiction. *See Kossick v. United Fruit Co.,* 365 U.S. 731, 735-36, 81 S. Ct. 886, 6 L.Ed.2d 56 (1961) (holding that "[a] contract to repair ... or insure a ship ... is maritime, but a contract to build a ship is not".) (internal citations omitted). Moreover, "contracts for the sale of vessels are not within admiralty jurisdiction. . . ." *Clem Perrin Marine Towing, Inc. v. Pan. Canal Co.,* 730 F.2d 186, 188 (5th Cir.1984).

The United States 5th Circuit Court of Appeals recently articulated the current admiralty contract jurisdiction test as follows: to be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract. See *Barrios v. Centaur, L.L.C.*, 942 F. 3d 670, 680 (5th Cir. 2019). This type of analysis will necessarily be performed on a case-by-case basis.

## 4. THE "RULE B" ATTACHMENT REMEDY

Maritime attachment was first approved by the United States Supreme Court in 1825 in the seminal case of *Manro v. Almeida*, 23 U.S. (10 Wheat) 473, (1825) and is now codified via Supplemental Rule B. Rule B is available in the unique instance when a plaintiff has a maritime

claim against a defendant who cannot be "found within the district" of a specific federal court. In such instances, the plaintiff will assert jurisdiction over the absent defendant by attaching the defendant's property that *is* coincidentally located within the boundaries of the federal district in which the action was commenced and in the possession of a third-party garnishee. The garnishee in control of the defendant's property will then be forced to turn it over to the Court, which will often cause the absent defendant to appear and defend against the Plaintiff's claims.

There are generally three reasons to attach property via Rule B: 1) to acquire jurisdiction in respect of maritime claims against an absent defendant; 2) to obtain security for a claim; and 3) to seize property in connection with the enforcement of a foreign judgment. ADMIRALTY AND MARITIME LAW, *supra* at § 19-2, Pg. 985. It is also common to use Rule B to secure maritime claims that are subject to foreign judicial proceedings, even after the litigation has been commenced. See*, e.g., Casper Marine Inc. v. Seatrans Shipping Corp.*, 969 F. Supp. 395 (E.D. La. 1997); *Liverpool & London S.S. Prof. & Indem. Ass'n v. Vapores,* No. 97-1837-CIV, 1997 U.S. Dist. LEXIS 24806, at *2 (S.D. Fla. Oct. 15, 1997);

Judge Francis succinctly summarized the rationale behind the Rule B concept as follows:

> Supplemental Rule B, which allows the attachment of property owned by the defendant in an admiralty claim, serve[s] the dual purpose of obtaining personal jurisdiction over an absent defendant and securing collateral for a potential judgment in plaintiff's favor. Because, historically, maritime parties are peripatetic and often have transitory assets, the traditional policy underlying maritime attachment has been to permit the attachments of assets wherever they can be found and not to require the plaintiff to scour the globe to find a proper forum for suit or property of the defendant sufficient to satisfy a judgment.[6]

As the Fifth Circuit further explained, "Under Rule B . . . [p]laintiff may take jurisdiction over a defendant not subject to service of process within the district on an admiralty or maritime claim by attaching property of the defendant. See *Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V.*, 249 F.3d 413, 421 (5th Cir. 2001) (citing *Great Prize, S.A. v. Mariner Shipping Pty., Ltd.*, 967 F.2d 157, 159 (5th Cir. 1992)). In this fashion, "[m]aritime attachment serves both to obtain jurisdiction over a defendant through her property and to assure satisfaction of the claim". ADMIRALTY AND MARITIME LAW, *supra* at §19-2, pg. 985, citing *Western Bulk Carriers*, 762 F. Supp. 1306. See also *Great Prize, S.A. v. Mariner Shipping Pty., Ltd.,* 967 F.2d 157, 159 (5th Cir.1992). As such, Rule B is often described as providing for *quasi in rem* jurisdiction, because personal jurisdiction over the absent defendant is obtained by compelling his appearance through the attachment of his property. See 2 BENEDICT ON ADMIRALTY§ 28, 2-33 (Aileen Jenner, Mary Cannon, Michael Rosenberg, Eds. 7th ed. 1994).

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[6] See *Golden Horn Shipping Co. Ltd. v. Voland Shipping Co. Ltd.,* 2015 WL 1344374 *4 (S.D. NY. Mar. 23, 2015) (internal citations omitted).

In order to secure a writ of maritime attachment under Rule B, four prerequisites must be met: (1) the plaintiff must have a valid *prima facie* maritime *in personam* claim against the defendant; (2) the defendant cannot be found within the district in which the action is commenced; (3) property belonging to the defendant is present or will soon be present in the district; and (4) there must be no statutory or general maritime law prohibition to the attachment. See *Icon Amazing L.L.C. v. Amazing Shipping Ltd.,* 951 F. Supp 29 909 (S.D. Tx. June 18, 2013). If all four conditions are satisfied, the plaintiff will file a verified *ex parte* complaint and motion for attachment with the court to attach the property at issue. Each of the latter three points merits additional discussion.

In the first instance, the issue of whether a defendant is present and "found within the district" is determined as of "the time the complaint is filed". *Heidmar, Inc. v. Anomina Ravennate Di Armanento Sp. A. of Ravenna*, 132 F.3d 264, 268 (5th Cir. 1998); see also *LaBanca v. Ostermunchner,* 664 F.2d 65, 68 (5th Cir.1981). With that moment in focus, the defendant is deemed to be present in the district if 1) the defendant can be found within the district in terms of jurisdiction, and 2) the defendant can be found within the district for service of process. *White Rosebay Shipping S.A. v. HNA Group Co. Ltd*., 2013 WL 441014 (S.D. Tx. Feb 5, 2013), citing *Heidmar, Inc.,* 132 F.3d at 268. For personal jurisdiction over a non-resident defendant, the Fifth Circuit requires 1) that defendant has 'minimum contacts with the forum state; and 2) the exercise of jurisdiction does not offend 'traditional notions of fair play and substantial justice.' See *Brown v. Slenker,* 220 F.3d 411, 417 (5th Cir. 2000). In terms of service of process, Rule B(1) does not permit *statewide* service of process, but requires that the defendant have an agent specifically present within the specific federal district where the Rule B action is filed. *LaBanca* 664 F.2d at 68.

In confirming the lack of a defendant's "presence," the plaintiff must submit an affidavit to the Court along with the Rule B complaint "stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district". Fed.R.Civ.P. Supp. R. B(1). The purpose of the affidavit is to "assure[ ] the district court that the plaintiff has been diligent in searching for the defendant within the district in which the action is filed". Submersible Sys., Inc. v. Perforadora Central, S.A. de C.V., 249 F.3d 413, 422 (5th Cir. 2001)". Due diligence merely requires reasonable efforts. It does not demand that plaintiff exhaust every conceivable source of information". West of England Ship Owners Mut. Ins. Ass'n (Luxembourg) v. McAllister Bros., Inc., 829 F. Supp. 122, 124 (E.D. Pa. 1993).

Turing to the issue of property, the type of "property" that may be attached via Rule B is very broad and includes "the defendant's tangible or intangible personal property –up to the amount sued for– in the hands of garnishes named in the process". Rule B. Obviously, this definition is expansive and can include a wide variety of objects and assets. However, the Second Circuit has cautioned that "for maritime attachments under Rule B…the question of ownership is critical. As a remedy *quasi in rem*, the validity of the Rule B attachment depends entirely on the determination that the *res* at issue is the property of the defendant at the moment the *res* is attached".

See *Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd*., 585 F. 3d 58, 69 (2nd Cir. 2009) (holding that electronic fund transfers being processed by an intermediary bank in New York were not subject to Rule B attachment).

In many instances, the issue of property ownership will be straightforward, such as when the absent defendant has tangible, physical property located in the target district (for example, drilling pipe in a warehouse). In other instances, the analysis may be more complex, particularly in terms of intangible property (such as a defendant's assets that might be held within a garnishee's bank account that itself is located within the district). In this latter example, the author has experienced numerous instances where a third-party garnishee located in a particular federal district owes freight to an absent defendant under a charter party; the freight payments held by the garnishee may be subject to attachment if the predicates of Rule B are met. See *Iran Express Lines v. Sumatrop AG,* 563 F. 2d 648 (4th Cir. 1977) (Rule B maritime attachment action that was asserted by plaintiff against freight owed from garnishee to defendant was allowed once cargo was partially loaded aboard vessel because contract deemed to be "executed"; the partial execution of the charter was sufficient to sustain the attachment even though the bills of lading had not yet been delivered and the debt was unmatured).

Finally, in terms of mechanics, the *ex parte* aspect of the Rule B filing is tactically significant; it places the complaint directly before the court on an expedited basis for its immediate attention without waiting on a response from the other side (i.e., the defendant owner of the property sought to be attached). The Court will review the complaint to determine if a *prima facie* allegation supporting the attachment exists, without ruling on the substantive merits of the action. In the event the Court grants the *ex parte* attachment, it will immediately issue an order to the USMS to promptly restrain the property at issue. The USMS will thereafter dispatch officers to the location of the property in order to officially restrain it from departing the district of the Court. Our federal courts and clerks are well accustomed in ruling on and processing these types of rare *ex parte* filings on an emergency basis, and it is often the case that such orders are issued after-hours, on the weekends, or over holidays.

Notably, the Rule B plaintiff will only be required to post minimal funds to cover the USMS' administrative costs in serving the attachment and thereafter maintaining the property; no pre-attachment "property bond" is required under Rule B in relation to the seized property itself. As of the date of this article, the initial amount that is required to cover the USMS' costs for a Rule B action in the Southern District of Texas is $10,000, which must be replenished in equal increments depending on the length of the action as funds are drawn down by the Marshal. All unused funds are eventually returned to the arresting party. The $10,000 deposit is also required for a Rule C arrest, discussed below.[7] If a lengthy litigation is anticipated, the parties will often

[7] To highlight the subtle differences between various U.S. federal district Courts, in the Southern District of New York the USMS requires an initial deposit of $2,000 for Rule B attachments and Rule C arrests. This initial fee covers the USMS' fee for the day and the fee for liability insurance, which must be replenished as the funds are drawn down. In addition, if the arresting/attaching party does not appoint a substitute custodian, the U.S. Marshal requires an additional deposit of $6,000 per week.

agree to a private substitute custodian to guard the property once it has first been restrained by the USMS. Alternatively, the parties can work together to agree on some form of substitute security for the dispute (which will be discussed in greater detail below).

Ultimately, any Rule B judgment is limited to the value of the attached property, unless the defendant appears in the action and submits to the *in personam* jurisdiction of the Court.

## 5. THE "RULE C" MARITIME ARREST REMEDY

In contrast to Rule B (which attaches an absent defendant's property in connection with a plaintiff's separate *in personam* claim against that defendant), a Rule C arrest action is directed against the maritime property itself *in rem* as the "offending thing". Pursuant to Supplemental Rule C(1)(a), a maritime lien on a vessel is a prerequisite to an action *in rem*. See *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla,* 776 F. Supp. 1558, 1560 (S.D. Fla. 1991), citing *Belcher Co. of Ala., Inc. v. M/V Maratha Mariner,* 724 F.2d 1161, 1163 (5th Cir. 1984). As such, it is important for foreign attorneys to understand the parameters of how the maritime lien device is construed in the U.S. The following explanation succinctly characterizes the genesis of this unusual security device:

> A ship is of necessity, a wanderer. She visits shores where her owners are not known or are inaccessible. The master is the fully authorized agent of the distant owners but is not usually of sufficient pecuniary ability to respond to unforeseen demands of the voyage. These and other kindred characteristics of maritime commerce underlie the development of the practice of finding in the ship itself as security, in many cases, for demands against the master or owners in their conduct of the ship as an instrumentality, whether commercial or not, or in their contracts made on account of the ship.[8]

A maritime lien is therefore a special property right in a vessel that "developed as a necessary incident of the operation of vessels". *Piedmont & Georges' Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1, 9 (1920).

In the U.S., maritime liens are created by statute or general maritime law. *Triton Container Intern. Ltd. v. Baltic Shipping Co., 1995 A.M.C. 2963*, (E.D. La. Oct. 12, 1995). When a maritime lien arises, it "confers ... upon its holder such a right in the thing he may subject it to condemnation and sale to satisfy his claim or damages". *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 424 F. 3d 852 (9th Cir. 2005) citing *The Rock Island Bridge,* 73 U.S. 213, 215 (1867). This is because "[t]he theoretical basis for the maritime lien rests on the legal fiction that the ship itself caused the loss and may be called into court to make good". *Ventura Packers,* 305 F.3d at 919; see also *United States v. Ten Thousand Dollars in U.S. Currency,* 860 F.2d 1511, 1513 (9th Cir.1988)

[8] BENEDICT, supra at § 21, at 2-1.

("Jurisdiction *in rem* is predicated on the fiction of convenience that an item of property is a person against whom suits can be filed and judgments entered".) (internal quotation marks and citations omitted). There are only a limited number of maritime claims which are recognized as creating a maritime lien under U.S. law, which are summarized by the respected U.S. maritime law Professor Thomas Schoenbaum as follows:

A. Wages of a ship's master crew;

B. Salvage operations;

C. General Average claims;

D. Claims for breach of a charter party;

E. Preferred ship mortgages;

F. Claims arising under maritime contracts pertaining to "necessaries";[9]

G. Claims for maritime torts, including personal injury, death, and collision / allision claims;

H. Claims for damage or loss of cargo;

I. Claims by a carrier for unpaid freight and demurrage; and

J. Pollution claims.[10]

The process for asserting the Rule C action is very similar to the Rule B description outlined above. The target property that is the subject of the maritime lien must be located in the federal district where the *in rem* Rule C action is to be filed (which can raise interesting timing issues in the case of an inbound vessel that is scheduled to be in –but has not yet arrived– within the district at issue). The plaintiff will file a verified *ex parte* complaint to the court in the district where the property is located, and as noted above will otherwise be required to post funds to cover the USMS' costs for arresting the property and thereafter maintaining custody of same.

In the event the Court grants the Order for arrest, "[*in rem*] jurisdiction is obtained by serving a warrant of arrest pursuant to Supplemental Rule C(3)". *United States v. Marunaka Maru No. 88,* 559 F. Supp. 1365, 1368 (D. Alaska 1983). The USMS will be ordered by the Court to serve the arrest order upon the property. In instances where the property is a Vessel, the Order is literally affixed within the Vessel's wheelhouse so that it is clear to all that the property is restrained from departing the port.

9 See the *Commercial Instruments and Maritime Lien Act,* 46 U.S.C. §§ 31301–31343.
10 ADMIRALTY AND MARITIME LAW, supra at §7-1, Pgs. 436-438 (internal citations omitted).

Upon arrest, the plaintiff and defendant will often work together to allow the Vessel to work around the port, take on bunkers, food, cargo etc., so as to not disrupt her regular operations, with the strict proviso that she never depart the federal district at issue. These types of allowances are often included as a matter of course in the initiating *ex parte* order prepared by the plaintiff so that if granted, the Vessel is immediately allowed some limited freedom of movement within the port of arrest.

An admiralty Court acquires jurisdiction over all third-party interests in the *res* at issue "and the decree *in rem* binds them all". BENEDICT ON ADMIRALTY, § 22, Pg. 2-17, citing *Pennsylvania R. R. Co. v. The S. S. Beatrice*, 161 F. Supp. 136 (S.D.N.Y. 1958), aff'd 275 F. 2d 209 (2nd Cir. 1960). Upon a vessel's court-ordered sale to enforce a maritime lien on that vessel, all pre-existing claims in the *res* are terminated and attach in accordance with their priorities to the sale proceeds. *See* 46 U.S.C. § 31326. The ranking and priorities of competing maritime liens varies, depending on the federal district where the suit is filed. However, the following general classification is often applied in descending order, as follows:

A. Custodia legis expenses;

B. Seamen's liens for wages;

C. Salvage and general average liens;

D. Tort liens;

E. Preferred ship mortgage liens;

F. Liens for necessaries under the Commercial Instruments and Maritime Lien Act;

G. State-created liens that are maritime in nature;

H. Maritime liens for penalty/forfeiture for violation of federal statutes;

I. Perfected non-maritime liens;

J. Attachment liens;

K. Maritime liens in bankruptcy.[11]

## 6. THE "RULE D" POSSESSORY, PETITORY AND PARTITION ACTION

"[A]dmiralty has jurisdiction in a possessory suit by the legal owner of a vessel who has been wrongfully deprived of possession". *Gallagher v. Unenrolled Motor Vessel River Queen,* 475

[11] *Triton Container Intern. Ltd. v. Baltic Shipping Co.,* 1995 A.M.C. 2963, (E.D. La. Oct. 12, 1995), citing *United States v. (One) 1 254 Ft. Freighter, M/V ANDORIA,* 570 F. Supp. 413, 415 (E.D. La. 1983) (McNamara, J.), *aff'd,* 768 F.2d 597, 1986 A.M.C. 1915 (5th Cir. 1985).

F.2d 117, 119 (5th Cir.1973) (internal citations omitted). Under the circumstances, Rule D is designed to assist maritime plaintiffs in instances where they seek the return of, or security for their *own* property (such as a vessel or cargo held by a non-owning defendant). Specifically, the Rule states as follows:

> **Possessory, Petitory, and Partition Actions:** In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.

A petitory action (to try title) under Rule D "requires [a] plaintiff to assert a legal title to the vessel; mere assertion of an equitable interest is insufficient". *Silver v. Sloop Silver Cloud,* 259 F. Supp._187, 191 (S.D.N.Y. 1966). Similarly, a party seeking possession of a vessel under Rule D "must have legal title or a legal claim to possession". *Cary Marine, Inc. v. M/V Papillon,* 701 F. Supp._604, 606 (N.D. Ohio 1988), *aff'd,* 872 F.2d 751 (6th Cir.1989). A Rule D claim asserting only equitable interests, with no separate basis for admiralty jurisdiction, is not cognizable in admiralty. *See Privilege Yachting, Inc. v. Teed,* 849 F. Supp. 298, 301 (D. Del.1994); *United States v. Cornell Steamboat Co.,* 202 U.S. 184, 194.

As outlined above, in instances where Rule D applies, the party will default and refer to the filing mechanics of Rule B to initiate action.

## 7. THE ADMINISTRATIVE PROVISIONS OF "RULE E"

Rule E of the Supplemental Rules can be best described as administrative in nature, and serves as the general provision for managing a Supplemental Rule B, C or D maritime action. Rule E contains numerous important provisions, as follows.

Rule E(2)(a) requires a plaintiff to "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading". This requirement is often characterized as a "heightened pleading" standard by U.S. federal courts, and serves as a key predicate given the extraordinary *ex parte* nature of the complaint. The requirement allows the court to carefully consider the claim in the first instance; reciprocally, the defendant whose property has been attached or arrested "by surprise" will have an opportunity to quickly evaluate the granular details of the complaint to prepare a prompt response to same.

The Defendant's response to a Rule B, C or D complaint is initiated pursuant to Rule E(8), which allows it to file a "restricted appearance" solely to defend against the plaintiff's claim and thereby protect itself from exposure to the Court's general jurisdiction. Thereafter, the defendant will request an emergency hearing with the Court via Rule E(4)(f), which states that "*[w]henever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated*". These types of emergency hearings are often considered by the Courts on an expedited basis, given the extraordinary nature of the maritime property attachment / arrest devices and the significant potential commercial impact associated with the restraint of the defendant's property.

During the Rule E(4)(f) hearing, the court will afford both sides the opportunity to demonstrate why the attachment or arrest should –or should not– be maintained. If the court is persuaded that the case should proceed forward, then the property will remain under attachment / arrest; if not, the court can authorize the immediate release of the property.

The issue of substitute security often surfaces within the first 48-hours after the attachment or arrest. In a nutshell, Rule E(5)(a) authorizes the parties to coordinate the posting of other security to stand in place of the restrained property during the pendency of the action so that the actual property itself can return to the stream of commerce. In many instances, the security is in the form of cash, a bond issued by an approved surety company, or (perhaps most commonly) a "Letter of Undertaking" issued by a vessel's Protection & Indemnity Club for claims within the scope of such coverage. Regardless of the security chosen, the defendant must stipulate that the security will ultimately "answer the judgment of the court or of any appellate court". Rule E(5)(a). The stipulation for value, bond or other security is then substituted for the property as the "new" *res* subject to the court's jurisdiction. *J.K. Welding Co. v. Gotham Marine Corp.,* 47 F.2d 332 (S.D.N.Y.1931). In the event the parties are unable to reach an agreement on substitute security, the Court "shall" fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim as stated (with interest and costs), but the principal sum cannot exceed wither (i) twice the amount of the plaintiff's claim, or (ii) the value of the property on due appraisement, whichever is smaller. Rule E(5).

## 8. THE POSSIBILITY OF OBTAINING COUNTER-SECURITY

The word "counter-security" has different meanings throughout the maritime legal world which may cause confusion to foreign counsel and clients when appreciating the *U.S.* meaning of that term in the context of a maritime arrest / attachment. In some foreign jurisdictions, counter-security is understood to mean a deposit of funds that the plaintiff must provide to the court *before* the arrest occurs to cover *potential* liabilities for a wrongful arrest. However, as noted above U.S. courts do not require the arresting plaintiff to post pre-attachment or pre-arrest funds to cover against a potential wrongful attachment / arrest claim that may later be asserted by the defendant (as described in greater detail below). Instead, the plaintiff is only required to cover

the U.S. Marshal's administrative fees until such time as a substitute custodian can be appointed or the matter is resolved.

But the possibility of counter-security remains. In instances where the defendant has a "separate but related" cause of action against the attaching / arresting plaintiff, the defendant may assert a counterclaim against the plaintiff in its answer to the plaintiff's complaint. Under Supplemental Rule E(7), if the defendant's counterclaim arises out of the same "transaction or occurrence" as the original claim, the plaintiff can potentially be ordered to post counter-security for the damages demanded in the defendant's counterclaim. In sum, this procedural illustration demonstrates that the U.S. version of counter-security is unique; it speaks to the defendant's separate counterclaim against the plaintiff and is posted by the plaintiff (if at all) *after* the arrest / attachment occurs in response to the defendant's counterclaim. Ultimately, the Court has discretion to order the plaintiff to post counter-security, depending on the facts of the claim.

## 9. A DEFENDANT'S POTENTIAL ACTION AGAINST THE PLAINTIFF FOR "WRONGFUL ATTACHMENT" OR "WRONGFUL ARREST"

A claim for wrongful arrest or attachment was succinctly outlined in the landmark Fifth Circuit Court of Appeals decision of *Frontera Fruit Co., v. Dowling*.[12] In that case, plaintiff acted on the (incorrect) advice of counsel and arrested a vessel based upon an alleged maritime lien. The suit was dismissed by the Court for various reasons, and the plaintiff later arrested the vessel for a second time (again upon the advice of counsel), where it was subsequently determined that the plaintiff did *not* have a maritime lien on the ship. The defendant vessel interests sued the arresting plaintiff for wrongful arrest.

Upon review of the case, the Fifth Circuit held "the gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice, or gross negligence of the offending party".[13] The Court said the rationale for awarding damages in such cases was "analogous to those in cases of malicious prosecution". Indeed, the *Frontera* Court recognized that even though plaintiff counsel's advice had proven to be erroneous, the arrest action itself was not asserted against the defendant in bad faith and (with emphasis added) *"*the advice of competent counsel, honestly sought and acted upon in good faith is alone a **complete defense** to an action for malicious prosecution*"*.[14]

Thus, the bar for asserting a successful wrongful arrest claim in the U.S. was set very high by the *Frontera* Court: a defendant's legitimate commercial annoyance with the arrest or sincere

12 91 F. 2d 293, 297 (5th Cir. 1937); *see also Result Shipping Co. v. Ferruzzi Trading USA, Inc.*, 56 F.3d 394, 402 n.5 (2d Cir. 1995) (citing *Frontera Fruit Co., v. Dowling* with approval); *see also Sea Trade Mar. Corp. v. Coutsodontis*, 2011 U.S. Dist. LEXIS 80668 (S.D.N.Y. July 25, 2011).

13 Id. at 297.

14 Id.; see Sea Trade Mar. Corp., 2011 U.S. Dist. LEXIS 80668 at *29 citing Markowski v. S.E.C., 34 F.3d 99, 105 (2d Cir. 1994) ("To invoke an advice of counsel defense in the Second Circuit, a party must 'show that he made a complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith'").

frustration *ex post facto* that its property has been seized will not rise to the level of a "wrongful" attachment or arrest without corollary evidence of bad faith, malice or gross negligence on the part of the arresting party.[15] Stated another way, a plaintiff does not wrongfully restrain maritime property in the U.S. by asserting a *bona fide* claim "to protect its interest".[16]

Numerous courts, including courts in the Second and Fifth Circuits, have interpreted and applied the *Frontera* rationale, and the current state of U.S. maritime law provides for a claim of wrongful arrest / attachment in only limited instances upon the heightened showing of bad faith, malice or gross negligence, with corresponding damages, which may include a claim for attorneys' fees.[17] The burden of proof in asserting a wrongful arrest claim is very high, and lies with the party alleging the wrongful arrest, i.e. the defendant.[18] If proven, a wrongful arrest or attachment will be vacated by the court and provable damages may be awarded to the defendant whose properly has been wrongfully restrained. Courts will specifically infer bad faith where there is a total lack of probable cause for a plaintiff's arrest, although the "probable cause" standard itself has not been defined with perfect clarity.[19] As such, legitimate disputes between the parties about the underlying maritime claim will probably not be enough to pass over the heightened "wrongful" arrest threshold, but it is important to highlight that counter-security for such claims may be authorized if sufficient facts are demonstrated to the court.

## 10. CONCLUSION

Supplemental Rules B, C, and D illustrate the dynamic procedural environment that can quickly result once maritime litigation is filed in the United States. A firm understanding of these unique procedural devices will assist all parties as they carefully consider their legal options and strategies in U.S. waters.

15 See, e.g., Parsons, Inc. v. Wales Shipping Co., 1986 U.S. Dist. LEXIS 20710, 1986 WL 10282, at *3 (S.D.N.Y. Sept. 9, 1986) (dismissing a counterclaim for wrongful attachment due to counterclaimant's failure to demonstrate bad faith).

16 Cardinal Shipping Corp., v. M/S Seisho Maru, 744 F. 2d 461, 475 (5th Cir. 1984); see also Yachts for All Seasons, Inc. v. La Morte, 1988 U.S. Dist. LEXIS 15399 (E.D.N.Y. Dec. 30, 1988) ("In order to collect attorneys' fees, the party must prove that the seizing party acted in bad faith, with malice or with a wanton disregard." citing Cardinal Shipping Corp., 744 F.2d 461 at 474.

17 Cardinal Shipping Corp., 744 F.2d at 474; see Allied Mar., Inc. v. Rice Corp., 2004 U.S. Dist. LEXIS 20353 (S.D.N.Y. 2004) (court denied request for attorney's fees because there has been no showing that plaintiff acted in "bad faith").

18 Id.; see Result Shipping Co. v. Ferruzzi Trading USA, Inc., 56 F.3d 394, 402 n.5 (2d Cir. 1995).

19 See El Paso Prod. Gov., Inc. v. Smith, 2009 WL 2990494 (E.D. La. Apr. 30, 2009).