
**RAMIFICATION OF BALCO JUDGEMENT ON
SHIP ARREST IN INDIA**

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Conclusion

A vessel cannot be ordered to be arrested under Section 9 of Arbitration and Conciliation Act, 1996; aggrieved parties would necessarily have to approach the High Court of competent Admiralty jurisdiction to seek such relief. To this extent, the decision in BALCO does not impact the right to arrest a vessel in order to secure an arbitration claim being adjudicated in a foreign seat..

Vessel arrest being an action in rem under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 while section 9 application under the Arbitration and Conciliation Act, 1996 (Arbitration Act) is an action in personam. Section 9 of the Arbitration Act has no bearing whatsoever upon admiralty proceedings, which are *prosecuted in rem*. The two actions are different. Section 9 of the Arbitration Act does not include a right to allow an arrest of a vessel as a remedy.

It is settled law that a consolidating act forms a Code complete in itself and is exhaustive of matters dealt with therein (Innoventive Industries). The Admiralty Act operates in a completely different sphere but is nonetheless a special act vesting Admiralty Jurisdiction in certain High Courts.

As can be seen from the preamble and the provisions of the Admiralty Act, it is a complete Code in itself as regards legal proceedings in connection with vessels (otherwise called actions in rem), their arrest, detention, sale and determination of priorities in respect of the sale proceeds of the vessels that were ordered to be arrested. Once the jurisdiction under the Admiralty Act is invoked by an action in rem, the machinery of the act is set in motion. The arrest of the vessel leads to a sale of the vessel which leads to determination of priorities in respect of sale proceeds and payment to the successful Claimants from out of sale proceeds in the order of priorities as determined. This process is only halted by the appearance of the owner and provision of security or bail for release of the ship from arrest. If this happens and until this happens, the action continues as an action in rem with the consequences as provided in the act.

The purpose of the Admiralty Act is to vest certain very valuable rights in respect of identified maritime claims. These are called rights in rem and a mechanism is provided in the Admiralty Act as to the manner of enforcement of such rights by arrest of a ship. Under the Admiralty Act, jurisdiction is conferred on certain specified High Courts and impliedly, no other High Court has or is entitled to exercise Admiralty jurisdiction under the Admiralty Act.

Therefore, admiralty jurisdiction in respect of maritime claims shall vest in respective High Courts, subject to provisions of section 4 and section 5 of the Act. It will extend up to and including the territorial waters limits of India within their respective jurisdiction. The Central Government may notify any other High Court in line with limits defined in section 2 of the Admiralty Act.

Action in rem is against the ship and not the owner. A ship or a vessel as commonly referred to is a legal entity that can be sued without reference to its owner. The purpose of an action in rem against the vessel is to enforce the maritime claim against the vessel and to recover the amount of the claim from the vessel by an admiralty sale of the vessel and for payment out of the sale proceeds. It is the vessel that is liable to pay the claim. This is the fundamental basis of an action in rem. The Claimant is not concerned with the owner and neither is the owner a necessary or proper party. The presence of the owner is not required for adjudication of Plaintiff's claim. That is why no writ of summons is required to be served on the owner of the vessel. The service of the warrant of arrest on the vessel is considered sufficient.

For the purpose of an action in rem under the Admiralty Act, the ship is treated as "a separate juridical personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner)" - (M.V. Elisabeth and Ors. V/s. Harwan Investments and Trading Pvt. Ltd).

The fundamental legal nature of an action in rem as distinct from its eventual object is that it is a proceeding against res. Thus, when a ship represents such res as is frequently the case, the action in rem is an action against the ship itself. The action is a remedy against the corpus of the offending ship. It is distinct from an action in personam which is a proceeding inter-partes founded on personal service on Defendant within jurisdiction, leading to a judgment against the person of the Defendant. In an action in rem no direct demand is made against the owner of the res personally. The fundamental legal nature of an action in rem is that it is against the res and not the owner of the res.

Section 9 of Arbitration Act does not permit arrest of a vessel; aggrieved parties would necessarily have to approach the High Court of competent admiralty jurisdiction to seek such relief. To this extent, the decision in BALCO may not impact the right to arrest a vessel in order to secure an arbitration claim being adjudicated in a foreign seat.

The Supreme Court of India in BALCO had held that the judgment would apply only prospectively and therefore the present dispute had to be resolved as per the law as laid down in the Bhatia International v. Bulk Trading [“Bhatia”] judgment. Under the Bhatia regime, all the provisions of Part I of the Indian Arbitration & Conciliation Act, 1996 [“Act”] were to be applicable to all arbitration whether domestic or foreign-seated unless the parties by agreement, express or implied, had excluded wholly or partly, the provisions of Part I of the Act. The Supreme Court in BALCO clarified that a reference to a seat or a specified law governing the arbitration is enough to impliedly exclude part I of the Arbitration and Conciliation Act, 1996.

