

# SHIP ARREST IN GERMANY



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## 1. Please give an overview of ship arrest practice in your country.

Germany has not only well-known international sea-ports at the North- and the Baltic-Sea but also a long history in maritime law. Although it is said that German law is generally rather restrictive in allowing conservatory and provisional measures, no doubt an arrest can be achieved within a day and with reasonable costs involved.

In order to have an arrest lifted the ship-owners may put up security; security may given by a bank-guarantee, however, as practice shows, P+I-Club letters of first-class P+I-Clubs ("International Group") are widely accepted. Simultaneously the ship-owners will file an appeal ("Widerspruch") against the arrest-order and an immediate hearing on the merits of the arrest-order will follow.

## 2. Which International Convention applies to arrest of ships in your country?

Germany is since April 1973 member of the Brussels Arrest-Convention of 1952, but due to the leading opinions – although not undisputed - in Germany the provisions of the German Code of Civil Procedures ("Zivilprozeßordnung, ZPO") should prevail. This does, however, not lead to major differences except of one restriction. German courts will only grant an arrest if the creditor is able to demonstrate a good reason for an arrest.

## 3. Is there any other way to arrest a ship in your jurisdiction?

No.

## 4. Are these alternatives e.g. saisie conservatoire or freezing order?

No.

## 5. For which types of claims can you arrest a ship?

Generally speaking an arrest may be applied for if the creditor's claim is for payment or may become a claim for payment, which is generally broader than the claims admitted under the Brussels Arrest Convention 1952, however, that does not lead to major differences because – as practice shows – those claims cover the vast majority of claims against ship-owners.

The arrest can only be applied for if the shipowner is personally liable for the creditor's claim. If for example the creditor has supplied bunker to a chartered ship and has not been paid for he has to demonstrate to the court that the managers of the ship or the master acted on behalf of the ship-owners rather than for the charterers.

However, due to the German Procedural Law ("Zivilprozeßordnung, ZPO") an arrest will only be granted, if there is a "good reason" for the arrest ("Arrestgrund"). Although there are serious opinions in Germany arguing that the Brussels Arrest Convention, which does not refer to any "good reason" should prevail, however, as the German courts still do not follow this opinion creditors have still to consider this precondition. The basic rule is lined out in § 917 sub. 1 ZPO and defines "the good reason" in general: if the enforcement of the judgment would be rendered impossible or substantially more difficult.

Therefore an arrest against a ship flying the German flag will hardly be granted, as a judgement may be executed in Germany. To cope with § 917 ZPO it is not sufficient simply to show that the shipowners are in financial difficulties, as this is regarded as a sole commercial risk. German law does not protect the creditor against possible or imminent deterioration of the financial situation of his debtor, but will secure the creditor only in situations where the debtor has no assets within the jurisdiction or

where he is hiding or selling off his assets, or moving them abroad, i.e. where he is trying to escape from his obligations.

In order to clarify what might be a “good reason” § 917 sub. 2 ZPO in its amended version with effect as of April 1st 2004 states: “It is sufficient to create an “Arrestgrund” if the judgement has to be enforced abroad and the reciprocity is not guaranteed”.

This of course might not be as helpful as the old version which considered it sufficient if the judgement had to be enforced outside the EU, but gives another good reason to let the Brussels Arrest Convention 1952 prevail. However, where an arrest is really needed, i.e. against ships flying a flag of convenience the reciprocity will probably not be guaranteed. And finally: This restriction does not prevent any creditor to submit to the court good arguments why even where reciprocity is granted “the enforcement of a judgment would be rendered impossible or substantially more difficult”

#### 6. Can you arrest a ship irrespectively of her flag?

An arrest may be applied for irrespectively of the flag, but as already said an arrest against a ship flying the German flag will hardly be granted, as a judgement may be executed in Germany against all assets of the shipowners and therefore there is no “Arrestgrund”.

#### 7. Can you arrest a ship irrespectively of the debtor?

As already said an arrest will only be granted if the shipowner is the debtor of the claim. Please note in Germany the IoC (=Identity of Carrier)-Clause is held not valid!

#### 8. What is the position as regards sister ships and ships in associated ownership?

Yes. Provided that sister ship is owned by the person/company against the claim is made.

#### 9. What is the position as regards Bareboat and Time-Chartered vessels?

If a claim is not based on a maritime lien the vessel may not be arrested for claims against bareboat-charterers and/or time-charterers as it does not affect the owner of the vessel. However, if the property of the charterer is concerned – i.e. bunkers – that property may be arrested.

#### 10. Do your Courts require counter-security in order to arrest a ship?

The judge may grant the arrest but allow the execution only if the creditor provides for counter-security. This is mainly because German law is rather strict on compensation for wrongful arrests. The counter-security should safeguard the ship-owners’ claim for compensation and therefore the amount of such guarantee is not related to the creditor’s claim but to the damage the ship owners may suffer by his ship being arrested. The actual amount is in the discretion of the judge, but the ship’s charter-rate for the off-hire period may be a reasonable guideline. A counter-security of the creditor will be ordered in cash or – if so requested in the application - may be given by a bank guarantee of a 1st class European bank. Therefore the creditors’ bankers should be involved in due course before the application.

#### 11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

Yes, for a maritime lien the vessel may be arrested irrespectively of the owner, while for a maritime claim the debtor must be the owner.

#### 12. Does your country recognise maritime liens? Under which International Convention, if any?

The applicant may have to consider maritime liens and mortgages. Germany is neither a member to the International Convention on Maritime Liens and Mortgages 1967 nor 1993, but has transformed the 1967 Convention into the Commercial Code (Handelsgesetzbuch); however, cargo claims arising out of charter-parties or other contracts have been deleted. Liens are accepted for crew wages, port- and pilots-charges, claims for personal injury and death or damage to property, GA-contributions and salvage-remuneration and claims of the social-security-authorities. Maritime liens prevail over all other liens on the ship, also over the ships’ mortgages but they all can destroy the value of the ship for any creditor not being so secured.

#### 13. What lapse of time is required in order to arrest a ship since the moment the file arrives in your law firm?

That very much depends on how fast the creditor may arrange for a possible counter-security. If all documents are at hand in the morning an arrest may be done in a day.

The time limits are then as follows: The arrest order may only be executed within one month from its delivery to the applicant. The execution will be done by the court's bailiff ("Gerichtsvollzieher") on a special order of the applicant, not by the court. The applicant also has to make sure that service of the arrest-order to the ship's owners is effected or at least applied for within one week after the ship has been arrested and within the one-month-time-limit mentioned before. If one of these time-limits has not been observed the arrest will be lifted if the ship-owners so applies to the court. The execution may only be done as long as the ship has not started her voyage and is still within a German port.

#### 14. Do you need to provide a POA, or any other documents of the claim to the Court?

The arrest procedure is simple and starts with an application filed by a lawyer, although this is not compulsory. No PoA is required but advisable to avoid delay if so requested. The application must be in the German language and supported by prima facie evidence ("Glaubhaftmachung") as to the claim and the "Good reason" ("Arrestgrund"). This is usually been done by a sworn affidavit of a competent manager of the creditor confirming that the facts stated in the application are true.

However, no legalisation is required. Very rarely the attached documents have to be translated into German as well because the Courts in the main seaports of Hamburg and Bremen are well familiar with the English language.

#### 15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

No special documents are required and thus no originals are needed. In Germany very few courts accept an electronically filed motion, but only by fax. No notarisation, no Apostille.

#### 16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

German Courts generally accept jurisdiction clauses; only for claims under the 1952 Arrestconvention the arrest may lead to jurisdiction.

#### 17. Which period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

As to the legal action there is no automatism, however, on an application of shipowners the court will file an order giving the applicants reasonably time, which is in the discretion of the court, mostly about a month. If the applicants fail to comply with this order the arrest will be lifted.

#### 18. Do the Courts of your country acknowledge wrongful arrest?

German law is rather strict on compensation for wrongful arrests. § 945 ZPO stipulates a strict liability which arises irrespective of illegality or fault on the part of the applicant for arrest but is only due to the decision of the judge that the arrest was unjustified from the very beginning.

#### 19. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Under German law it is rather rare that the corporate veil may be lifted; only in cases of clear misconduct of the managers or the shareholders there might be a direct claim against them.

#### 20. Is it possible to have a ship sold pendente lite; if so how long does it take?

During pending proceedings the owners are not entitled to sell their vessel.



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