

SHIP ARREST IN NETHERLANDS



By Peter van der Velden*
KIVELD INTERNATIONAL LAWYERS
pv@kiveld.nl
www.kiveld.nl
Parkstraat 83
2514 JG The Hague, The Netherlands
Tel: +31 [0]88 254 83 53
Fax: +31 [0]88 254 83 83

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

The procedure for obtaining permission to arrest starts with submitting an arrest petition to the court in whose jurisdiction the ship is located or is expected to arrive shortly. These proceedings are ex parte. The arrest petition can be filed even after office hours or on weekends. The petition should contain the full style of the claimant and debtor, the grounds for the arrest and the amount of claim. The court's decision is placed on the arrest petition. The bailiff enforces the arrest by handing the court order to the master. The port authorities will be informed about the arrest and will not allow the ship to order for a pilot without which the ship can/may not leave the port. If the ship leaves anyway, the master commits a crime under the Dutch Criminal Code. When granting the arrest, the court determines a time limit within which the arrestor must file his claim in main proceedings before the proper court or arbitrators, failing which the arrest expires. The proper court or arbitrators can be located in the Netherlands or elsewhere. The claim amount is raised with 30% over the capital claim amount to cover future interest and costs while proceedings are pending. The arrest must be lifted immediately once the claim has been settled or in case sufficient alternative security is offered. The latter can be done either in the form of a first class Dutch bank guarantee or letter of undertaking by P&I Clubs of good standing. An arrest can be lifted without the intervention of the court. The ship owner may also apply for an injunction ordering release. Such proceedings can take place on a very short notice. A decision will follow shortly as well. The court decides whether the claim has sufficient merit to justify maintaining the arrest of the ship. In practice, it is an uphill battle to convince the court that the claim is clearly without merit. Re- or multiple arrests, if the claimant has not yet obtained full security for his claim, are generally allowed. If however the Brussels Arrest Convention of 1952 applies, a re-arrest is allowed only under exceptional circumstances. Practice reveals that in most cases repeated arrests on a ship for the same claim are maintained.

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

The Netherlands is a party to the 1952 Brussels Arrest Convention since 1983. The provisions of this Treaty are not incorporated into the Dutch Civil Code (like in some other countries), with the effect that the 1952 Brussels Arrest Convention only applies when the arrest is sought of a ship flying the flag of a country being a party to this convention. Therefore, in cases where the 1952 Brussels Arrest Convention is not applicable, an arrest on a ship is allowed for any, i.e. also non-maritime, claims against the debtor on any vessel (or other asset for that matter) owned by him. In such case the vessel can be arrested more than once for the same claim (which is not allowed under the 1952 Brussels Arrest Convention).

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

A distinction can be made between conservatory and executory arrests on a ship. Executory arrests are a means of enforcing a judgment (or arbitral award). For such enforceable/executory arrest, the arrest is allowed based on a judgment rendered by a Dutch court. Express permission for such arrest is then not needed.

The execution of an arbitration award (either rendered in domestic or foreign/international arbitration proceedings) requires court permission.

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

An executory arrest can be followed by public sale if the debtor is, despite the arrest, not willing or able to comply with the judgment or award. (see further in answer to question 20).

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

It depends on which law applies. In case the Brussels Arrest Convention 1952 applies, the ship can only be arrested for maritime claims as defined in article 1 of the convention. If Dutch law applies, the ship can be arrested for any type of claim.

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

Yes, but with one exception: Russian state owned ships related to the use of subject ship for trade may not be arrested. There exists a Bilateral Shipping Treaty between The USSR and the Kingdom of the Netherlands ratified in 1969, which prohibits arrests in Dutch waters on Russian state owned ships (or of Dutch state-owned ships in Russian waters) related to the use of subject ship for trade. This treaty is continued by Russia and some other former USSR countries. However, due to the privatization of state owned shipping companies, this treaty has mostly lost its function.

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

In principle, a ship may be arrested only for a claim against the (legal) owner of the ship and not for claims against any other party involved in the operation of the ship. There are though a few exceptions to this rule. Subject to certain requirements, such as claims against the bareboat charterer of the subject ship, cargo claims and also claims against the time-charterer for services rendered to the ship in order to keep into operation (claims for unpaid bunkers, supplies). Certain claims can attach to the ship such as a claim for crew wages, salvage, general average, and the like. For these claims, the ship may be arrested, even if it was sold to another after the claim arose.

State-owned ships may enjoy immunity, provided such ships are not commercially used. Where the claim is against debtors who can not be considered as 'owners', like a time-charterer, an option could be an attachment on the ship's bunkers/fuel reserve (rather than a ship's arrest). This so-called 'bunker-attachment' can be a useful tool to enforce payment for delivered bunkers ordered, for example, by the time charterer of the ship. Under Dutch law, it is presumed bunkers are owned by the time-charterer.

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

As any asset of a debtor may be arrested in order to obtain security (or for that matter in enforcement of a judgment or award), a sister ship may be arrested. Ships not owned by the debtor cannot be arrested, i.e. only under extra-ordinary circumstances whereby the court "pierces the corporate veil". If a ship is owned by more than one owner, the ship can still be arrested for a claim against one of these "associated" owners.

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

See the answer under question 7.

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

Dutch courts have discretionary power to demand counter security but in practice this rarely happens.

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

The common law concept of "maritime lien" is unknown in Dutch law. However, if a maritime lien means that a certain claim is attached to the ship, i.e. even if the debtor is not the legal owner of the ship, a ship may be arrested for such claim/lien.

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

The Netherlands is not a party to any conventions on maritime liens. However, claims based on a maritime lien, having the legal status of being attached to the ship, may qualify for an arrest.

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

Provided it concerns a straight forward matter, it may take no more than 3 hours to have a ship arrested. The petition will be dealt with by the court immediately. After the arrest is permitted, the bailiff, if put on stand-by, will execute the arrest forthwith.

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

Neither a Power of Attorney nor supporting documents are required when filing the arrest petition. The court assumes and trusts that the lawyer acting for the creditor is in the possession of claim supporting documents. In case the ship owner applies for release in an injunction, the claimant must be able to show his claim documentation. Documents in a language other than English, French or German may have to be translated.

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

Although the Dutch Code of Civil Procedure does not require that supporting documents, including original documents, be submitted with the arrest petition, submitting such documents with the arrest petition may be helpful to convince the court to allow the arrest. Generally speaking, the requirement of submitting original documents is under Dutch law very rare, i.e. only when the opposing party contests the authenticity of the document. As original documents are not required when applying for arrest permission, nor are notarisation and/or apostille. Although some communications can, an arrest petition cannot be filed electronically. Sending the petition to the Court by fax, however, is allowed.

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

The arrest creates jurisdiction unless international conventions to which the Netherlands is affiliated provide otherwise. If the parties had agreed on another jurisdiction or arbitration, Dutch courts must step aside.

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

The time limit for filing suit after the arrest has been enforced must be at least eight (8) days after the arrest was enforced. Usually a time limit for filing suit of one to two months is granted when it concerns a foreign ship. Courts are free to determine this time frame. In case the creditor needs more time for filing suit, or in case the parties are still negotiating a settlement, the creditor can submit a request for an extension of the initial time limit to the Court. The grounds for the extension of the time limit need to be mentioned in the request otherwise it will be rejected by the Court.

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

Yes. If the claim on which the arrest is based appears not to exist or appears to be unfounded (because it has been rejected later on in proceedings on the merits), the arrest is deemed to be wrongful/illegal. In such a case the arresting party is liable for all damages suffered by the ship owner due to the wrongful arrest. In a case of wrongful arrest, strict liability applies. This means the (wrongful) arrestor is by definition obliged to reimburse the ship owner for all his damages and losses, like port dues, but even consequential damages, such as loss of hire (all amounts to be increased with statutory interest). This is premised on the condition that the ship owner renders sufficient evidence of the damages and losses incurred. Furthermore, the ship owner has a duty to mitigate its damages, such as by way of offering alternative security in the form of a (bank or Club) guarantee, thus avoiding unnecessary detention.

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

Dutch law is very strict in the definition of "ownership" and in acknowledging company structures. As a result, Dutch courts are hardly inclined to "pierce the corporate veil" and in principle do not allow a ship arrest for a claim against a third party which has close links to the ship owner. Even in cases that concern a claim on a ship owner that is operating a fleet of separately owned single-ship companies or a ship owner is holding all the shares in another ship owning company, an arrestor must be able to substantiate that the company structure is mainly created and/or used with the purpose to frustrate creditors. There is very limited case law on this subject applying to ships.

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

If a ship has been arrested and the arrest is not lifted in injunction proceedings or by way of alternative security, the arrest will be maintained until the creditor has obtained a title (judgment or arbitration award). Once such title is obtained, the conservatory arrest will automatically be transformed into an executory arrest. This may be followed by a judicial/public sale of the vessel

before the court, if so requested, in which case the court will determine the pre-conditions for such auction. Auctioning of a foreign seagoing vessel is subject to a detailed time frame and scheme of requirements to be fulfilled prior to the day on which the ship is actually auctioned. These procedural requirements and the bidding system aim at securing proper and fair auction proceedings with the purpose to obtain the highest price for the vessel to be auctioned. The auction notice must be published in the newspapers as designated by the court at least thirty (30) days prior to the day of the auction. An auction can be organized between 30 and 40 days after the title is obtained in which the creditor's claim was adjudicated.



** Peter van der Velden is a founder and partner of Kiveld International Lawyers. His expertise, a result of 25 years of experience, includes Commodity Trade, Distribution/Agency/Franchising, Shipping/Aviation, Letters of Credit, International Arbitration, Complex Commercial Litigation and Business Law. His strength lies in combining these specialized areas, which is illustrated in his ability to draft highly protective, yet commercially viable, business contracts and his repeated success in handling disputes in international arbitration and other types of litigation. Additionally, Mr. van der Velden has unique knowledge about ship arrest/release and steel trade disputes. He is an author of several published trade, shipping and banking law articles and regularly speaks at seminars about his legal experiences.*