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 particular after the revision of the German Maritime Trade Law ("Das deutsche Seehandelsrecht"), which entered into force on April 25th, 2013. The much disputed requirement of "the good reason" for an arrest ("Arrestgrund") has been deleted. Therefore the merits of an arrest now depend on a thoroughly prepared application by the arresting party only.

The competent court is the local court ("Amtsgericht") for the port in which the ship is berthing or any inland court having jurisdiction to hear the case on the merits.

Mostly the courts decide the application without a hearing. If the presiding judge believes the application may be without merits, he usually will inform the creditor's lawyer before dismissing it and allow him to complete his arguments or to withdraw the application.

Counter-Security may be ordered, but there are arguments to oppose to such a request.

As to the service of an arrest order it has been clarified that such order may be served on the master onboard the vessel.

In order to have an arrest lifted the ship-owners may put up security in an amount ordered by the court ("Lösungssumme"); such 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.

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.

However, it should be noted that although the requirement of the "Good reason" for an Arrest ("Arrestgrund") has been deleted this deletion is limited to an arrest of the seagoing and inland-waterway vessel only, and not for the arrest of the debtor's other assets (i.e. for an arrest into bunkers): Therefore an arrest-application for "other" assets of the debtor should clearly be separated from an arrest of a vessel, as for such application the creditor still has to demonstrate that without such an arrest the enforcement of a (later) judgement 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.

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.

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

An arrest into a sister-ship is possible, 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?

A vessel may be arrested if the claim against the bareboat or demise charterer is covered by a maritime lien. It is also well arguable that for any other claim against the bareboat and demise charterer the vessel can be arrested. This, by contrast, does not apply to time charterers. If other property of charterers is concerned – i.e. bunkers – that property may of course also be arrested.

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

Although it was the clear intention of the government when reforming the German Maritime Trade Code to make arrests into ships easier and less risky it is still uncertain whether the court may ask for counter-security. Some commentators, pointing to the government's intention, favour such an abolishment, however, the law of civil procedure ("Zivilprozessordnung") remains unchanged and due to § 921 it is still in the discretion of the judge to order counter-security. It is therefore wise to argue within the application that such discretion no longer exists and that no counter-security may be requested any longer, but of course, as time is of the essence, the applicant should be ready to present security, if so ordered.

The reason that an order for counter-security may still be made is that 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 due to his ship being arrested for a while. The actual amount is in the discretion of the judge, but as a general rule 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?

No, there are no differences.

12. Does your country recognize maritime lien? 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 to your law firm?

That very much depends on how fast the creditor may arrange for a possible counter-security. When 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-timelimit 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. 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. As said it is also wise to argue that no counter-security may be requested any longer, but if so ordered by the court, the creditor may be apply to provide for security by a 1st class European bank. Very rarely the attached documents have to be translated into German; in the main seaports of Germany such as Hamburg and Bremen the courts 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 the vessel has been arrested?

As German Courts generally accept jurisdiction clauses, only for claims under the 1952 Arrest-Convention the arrest may lead to jurisdiction.

17. What is the procedure to release a ship from arrest?

There are in general two possibilities: The shipowners may either file a motion/appeal against the arrest order (§ 924 German Procedural Code) or – as every arrest order has to include the amount of security against the arrest may be lifted – pay such amount into the court's cashier.

18. What type of security needs to be placed for the release?

In general security has to be provided in cash or by providing an unconditional bank guarantee issued by a first class bank located in the EU. Of course, if the parties to an arrest so agree, a vessel may be released against a P+I-Club-Letter, preferably from a P+I-Club of the International Group. However, a German court will not accept a P+I-Club-Letter, if the arresting party does not agree.

19. Does security need to cover interest and costs?

The court may consider interest and costs, but in the end the shipowners have to provide such amount as determined by the court in the arrest order. If the parties agree on a P+I-Club-Letter interest and cost will of course be an issue.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

As stated, that depends on an agreement of the parties; a court will not accept a P+I-Club-Letter as sufficient security.

21. How long does it take to release the ship?

As stated in No.17 there are two possibilities: Contest the arrest by an appeal (i) or pay what is ordered as security (ii). It is obvious that (ii) is fast and efficient as a prompt release only depends on providing security and therefore it is advisable to have your preparations ready to pay cash or provide for a guarantee and then appeal. If cash or security may not be provided for whatever reason and the appeal is the only option it depends on the counter-arguments the shipowners may present. The court will in any case set a date for a hearing immediately after the counter-arguments have been lodged. German Courts will in general decide at the end of that hearing. So generally speaking – depending on the merits of the counter-arguments – the arrest order may be lifted within a couple of days.

22. Is there a procedure to contest the arrest?

Look at No.17!

23. Which period of time will be granted by the Courts in order for the claimants to take legal actions 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.

24. 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. However, as all parties under German law also the shipowner has an obligation to mitigate damage and should provide for a guarantee i.e. a P+I-Club without delay.

25. 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.

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

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

Note as to the revised German Maritime Trade Code ("Deutsches Seehandelsrecht")

On April 25th 2013 the revision of the German Maritime Trade Code entered into force; the main changes are:

1. The excuses for error in navigation and fire are deleted; the carrier may (re-)include this excuse by implementing a specific Standard Business (bill of lading-) term, however, he is not entitled to rely on such term if he acted with intend or recklessly with the knowledge that damage would probably occur.
2. Arrest proceedings are much easier as a special requirement of the German Civil Code, the good reason for an arrest ("Arrestgrund") has been deleted.
3. The liability of and direct claims against the "actual carrier" have been established; cargo interests may therefore sue the actual carrier and the contracting carrier.
4. The new maritime code is mandatory and the parties may not deviate from it by standard business (bill of lading) terms but only by individual agreement, except for the limits of the liability and the excuses for error in navigation and fire.
5. The liability of the carrier for death or injuries to passengers has been formed in line with The Athens Convention of 2002.
6. Germany remains a Hague-State having the Hague-Visby-Rules implemented into the national Commercial, therefore the limits of liability for cargo claims (2 SDR/kg or 666,67 SDR/unit).

*Thomas Wanckel is a Partner and Head of Shipping department at Segelken & Suchopar, Hamburg and Berlin. Born in 1953, he studied in Hamburg and Providence/Rhode Island, and was admitted to the Hamburg Bar in 1984 and also to all German Appeal Courts. In his career of more than 25 years in shipping and marine insurance law, Thomas specialized in subrogated cargo underwriters work, charter party disputes, collisions and GA. He advises major German and international Cargo Underwriters. He has been Lecturer at underwriters' in-house seminars and at the International Cargo Recovery Conferences in New York 2008 and London 2010, as well as at other Conferences in Istanbul, Odessa and St. Petersburg. Moreover, Thomas is Arbitrator, Member of the German Maritime Arbitration Association, the German Maritime Law Association, the Shiparrested.com network and the German Association for Transport Law.