

SHIP ARREST IN AUSTRIA

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

Since 1918 Austria, is a landlocked country. Ship arrest is limited to inland waterways, in particular the Austrian stretch of the Rhine-Main-Danube, Europe's most important waterway connecting the Atlantic with the Black Sea. The Austrian ports are as follows: Enns, Ennsdorf, Krems, Linz, Linz Ind. Hafen, Ybbs, and Vienna. There is no developed maritime law practice in the courts. The arrest of inland waterway vessels follows the general rules of the Enforcement Code. The arrest takes the form of a court order for taking the vessel in the custody of the court. Vessels ready to sail must not be arrested. The Enforcement Code provides for the attachment of a debtor's assets in circumstances where

- (i) either a final judgment or an arbitral award are to be enforced or
- (ii) there is a risk that the debtor removes, destroys, depletes or hides assets with a view to prevent the enforcement of a future judgment or arbitral award.

In the latter case, such a risk is assumed in case the claim is against a non-resident debtor and any future enforcement of a judgment or award would have to be carried out abroad. An inland waterway vessel sailing under a non-Austrian flag owned or chartered by a non-resident debtor would meet these criteria.

An application for the enforcement of a judgment or an award has to be filed with the court in whose district the vessel is currently staying. The same applies for arresting a vessel for securing the payment of a future judgment or award.

The arrest of a vessel for securing payment of future judgments or awards takes place in the form of a temporary injunction. It requires prima facie evidence of the existence of a claim as well as prima facie evidence of the risk that a future judgment or award may not be able to be enforced due to actions of the debtor to remove, destroy, deplete or hide the assets with the intention to frustrate the creditor. The mere possibility that the debtor may become insolvent, prior to a judgment or arbitral award becomes enforceable, is not sufficient for meeting this requirement. Prima facie evidence has to be submitted in the form of documentation written statements of witnesses or oral statements before the judge.

Their contact details have to be included in case the judge wishes to verify written statements. All documentary evidence which is not in German language has to be submitted in translations certified by Austrian court interpreters. It is advisable to offer together with the application payment of a counter-security for any damages the debtor may suffer as a result of an unjustified arrest.

Together with the application for an arrest, by temporary injunction, a filing fee of approximately 0.7% of the value of the claim has to be paid to the court. The application together with all supporting documentation has to be filed electronically within the special electronic mail system between courts and Austrian lawyers.

If the judge has been pre-warned by the applicant lawyer of the incoming application and the judge is satisfied with the prima facie evidence submitted, the temporary arrest order may be issued on the day of application. As Austrian judges are dealing very infrequently with ship arrests this result may not be achieved easily.

As a general rule, applications for temporary injunctions for ship arrest are *ex parte* proceedings. The debtor is served with the arrest order by the bailiff together with a copy of the application. The debtor may file within a non-extendible period of 14 days objections or an appeal against the court order. Objections are filed in case of the court order being based on factual errors and will result in a hearing before the court having issued the order. An appeal will deal with errors in law and procedure. The appeal will be decided by the appeal court. It is advisable to combine both remedies. In case the judge dealing with an application for ship arrest is not fully satisfied about the merits and the *prima facie* evidence submitted, he or she may serve the application on the debtor giving the debtor an opportunity to provide comments or objections within a short period of time. At the judge's discretion a hearing may be ordered. While this would result in a delay of time, there is a risk that the vessel leaves the Austrian stretch of the inland waterway. However, an unscheduled departure or readiness to sail may persuade a judge that there is *prima facie* evidence of an intention by the debtor to remove the vessel from the jurisdiction of the Austrian court with a result of frustrating the enforcement of a future judgment or award.

Together with the order for a temporary injunction, the court will set an extendible time limit for filing a court action or a request for arbitration for justifying the temporary injunction. If no action is filed by the creditor, the order will elapse and the arrest lifted. At any time the debtor may deposit with the court a security for lifting the arrest. The security has to cover the claim plus interest and costs. The security is either a payment into court or placing with the court a guarantee by a prime Austrian bank. Guarantees of foreign banks or P&I Clubs will only be accepted as sufficient security in case the creditor does not object.

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

Austria is not a member of any arrest conventions.

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

No, unless the lien holder has the vessel under control and refuses to release the vessel.

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

No. The temporary injunction for taking the vessel into the custody of the court is a *saisie conservatoire* or freezing order.

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

Arrests can be made for any types of claims including payment of debt, ownership of vessel or cargo, rights under charter party, damage caused by the vessel, unpaid bunker bills, etc.

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

The flag does not matter when applying for arrest.

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

A ship can be arrested irrespective of the debtor, always provided the vessel is in the possession of the debtor. It is then up to the third party ship owner to prove title of ownership. Arrests against immune or sovereign debtors (e.g. police boats or UN-vessels) will not be allowed by the court.

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

An arrest of a sister ship is possible provided she is in the possession of the same debtor.

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

Bareboat and time-chartered vessels may be arrested for claims against bareboat charterers and/or time-charterers with a view either to have the charter party carried out under the supervision of a court or to obtain security from the charterer.

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

While there is no legal precondition for obtaining an arrest to provide a counter-security, the judge may be more easily persuaded to grant the order when the applicant is offering a counter-security. The judge may also make the arrest conditional of payment of a counter-security.

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

There is no difference whether an arrest is for a claim or a lien.

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

Maritime liens properly established will be recognized irrespective that Austria is not a member of any international conventions.

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

On the assumption that all documents are in the file together with the court filing fee, an arrest order may be obtained on the same day. However, if the necessary documents are not in German, a few days may be required for obtaining certified translations into German by a court sworn interpreter. The arrest order will be executed by the court's bailiff under an order issued by the court. We usually liaise with the bailiff to expedite the immediate enforcement.

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

A POA is not required as it is sufficient for an Austrian lawyer to state in the application that he has been properly authorized by the client. As a matter of legal practice the lawyer is likely to ask for a POA for his own files. But a submission of the POA is not required for filing the application.

Together with the application, documents have to be filed which provide prima facie evidence of the identity of the debtor and the vessel to be attached, the existence of the claim and the actions or behavior of the debtor to frustrate the collection of a future judgment or award. Documents should be available in originals. If this is not feasible, copies can be submitted. While there is no legal requirement of copies of documents to be certified as conforming and apostilled, it is advisable to do it in order to avoid the risk that the judge queries their authenticity.

Statements of witnesses should be signed but do not have to be notarized. However, they should indicate addresses and telephone numbers in case the judge wishes to contact the witness directly. Documents in languages other than German have to be submitted together with a certified translation. For the sake of speed it is sufficient to translate the parts which may be relevant for the judge to grant the order. Also documents in English have to be translated irrespective a judge's knowledge of English as the court file has to be kept in the German language. For the sake of speed, we sometimes submit together with the application English documents together with the undertaking to deliver certified translations a few days later.

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

The documents required, as set out in Section 14 above, have to be filed online with the electronic document archive of the court. The number allocated by the archive to the document file will be

quoted in the application. As a result, the judge deciding on the application has online access to the document supporting the application.

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

The arrest of a vessel does not result in the Austrian court assuming jurisdiction over the substantive claim. The Austrian court will only have jurisdiction if there is jurisdiction according to the Austrian and EU rules on jurisdiction in civil procedure. Arbitration clauses deprive Austrian courts of their jurisdiction but not of their power to issue arrest orders.

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

Upon application of the debtor/ship owner a ship will be released from arrest provided the security or bank guarantee is deposited with the court is sufficient to cover the claim together with interest and cost.

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

The best form of security is payment of cash into the court as this would not result in any further queries by the court. The same applies to an abstract and unconditional bank guarantee issued by a leading Austrian bank. Guarantees issued by other banks might raise queries on part of the judge or objections by the applicant. The same applies for P & O Club letters. In case the applicant is agreeable with these types of security, the court will accept that as well.

19. Does security need to cover interest and costs?

Yes, the security should also cover interest and costs incurred in case the creditor-applicant is successful in the litigation or arbitration on the merits of the case.

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

The judge will not accept P&I LOUs as a sufficient security to lift the arrest unless the creditor-applicant agrees to it.

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

The court practice is to structure a release order in such a manner that the release is contingent on proving the deposit of the security. Once the condition is met the ship will be released immediately.

22. Is there a procedure to contest the arrest?

The debtor/ship owner has the following procedures available to contest the arrest:

- (i) Objections stating that the facts on which the arrest order has been based are incorrect or incomplete. The debtor/ship owner will submit, with his objections, documentation as a prima facie evidence and/or witness statements together with their contact details and apply for a hearing, if he deems a hearing to be useful.
- (ii) Appeal to a higher court on the basis that the order is based on errors in law and/or procedure.
- (iii) Combining objections and appeal which may be the preferred way to have the arrest order removed depending on the circumstances.

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

The usual court practice is to grant a period of 6 (six) months for taking legal action on the merits. Depending on the circumstances, the court might grant a longer or shorter time limit. If legal action on the merits has already, initiated, a copy of the claim filed with the court or the request for

arbitration should be included amongst the documents filed together with the application for an arrest. This would serve as an additional prima facie evidence of the existence of the claim. In case the arrest court is also the court of jurisdiction over the substantive claim, it is advisable to combine the application for arrest with the substantive claim for saving court filing fees.

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

In case the arrest proves to be wrongful, the defendant can claim compensation for all damages resulting from the wrongful arrest whereby payment can be made from the claimant's counter security deposited with the court.

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

Austrian courts acknowledge the piercing and lifting of the corporate veil in special circumstances such as in insolvency situations where the application for insolvency has been unduly delayed or where special circumstances are present such as fraud. There is a court practice of enhanced liability of directors in case of their misconduct or negligence in management of the company.

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

With the consent of all parties concerned, in particular creditor, debtor and ship owner, it is possible to sell the ship pendente lite. The agreement would involve the requirement that the proceeds of the sale are paid by the buyer directly to the court and thereby replace the arrested ship. At the same time an order from the court could be sought to lift the arrest whereby such order becomes operative once the payment of the proceeds of the sale into the court has been effected and duly acknowledged.

**Dr. Friedrich Schwank is the senior partner of Law Offices Dr. F. Schwank established in 1986 and situated in the Vienna Stock Exchange Building. The firm is dedicated to providing commercial and financial law services for international clients. Dr. Schwank has contributed to the law firm his experience from working with a London City firm of solicitors and with the legal secretariat of the International Court of Arbitration of the International Chamber of Commerce, Paris. In his career he has focused on international transport law, letters of credit, bank guarantees, international trade and aviation. He is the Austrian contributor to the European Transport Law, Antwerp. He is also the author of leading publications relating to aviation, secured transactions, enforcement of judgments and related areas. As a lecturer he taught a course on international transport law at the University of Economics Vienna. He is frequently acting as an arbitrator and is a Fellow of the Chartered Institute of Arbitrators, London.*