

SHIP ARREST IN BELGIUM

By Steven D'Hoine*
D'HOINE & MACKAY ADVOCATEN
steven.dhoine@dm-law.be
www.dm-law.be
Grote Steenweg 633, B-2600 Antwerp
Tel: +32-3/470.23.00
Fax: +32-3/470.23.10



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

Belgium, and most specifically the port Antwerp, has with reason a favorable reputation of being a convenient place to arrest ships. The fact that Antwerp is one of the biggest and busiest ports of the world is not the only reason. The arrest of a ship and the accomplishment of the required formalities are well-organized: a simple, fast and short procedure, an experienced Antwerp Maritime bar, local representation of all P&I Clubs of the world, excellent shipping signaling services and, last but not least, several Judges of Seizure who are at the disposal of the parties at every moment 24 hours a day, 7 days a week for all urgent matters related to the arrest of a ship. A vessel can be arrested within a few hours after having received instructions. No power of attorney or original documents are required.

The owner of a ship may demand immediate release of the ship upon issuing an acceptable Bank or P&I Club Letter of Guarantee, covering the amount of the claim plus 30% as a retainer for costs and interests. The formalities to lift the arrest are minimal, and can be fulfilled within the hour. The owner of a ship may also request for the withdrawal of the judgment, granting authorisation to arrest the ship. This request has to be filed before the same Judge of Seizure who granted the authorisation. This request is heard on a contradictory basis in summary proceedings.

Moreover, in Belgium some rather unique possibilities with respect to arrest of a ship are available. For instance, a vessel can be arrested for certain maritime claims, even if the owner of the vessel is not the debtor of this claim (see further under n° 7).

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

All arrests of sea-going ships are subject to the Brussels Convention 1952 relating to the Arrest of Sea-Going Ships, as enacted in the Belgian legislation.

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

No.

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

Not applicable.

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

A sea-going ship can be arrested in Belgian territorial waters as a security for a maritime claim, as specified in letter a to q of art. 1.1 of the Brussels Convention 1952.

It is generally accepted that the claimant only has to present an allegation of right or claim. As soon as the claimant proves that his maritime claim is 'sufficiently probable', i.e. when the judge accepts 'prima facie' evidence presented to him on an ex parte basis, his request for authorisation to arrest a ship will be granted.

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

A sea-going ship can be arrested in Belgian territorial waters, whatever the flag it is flying.

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

The ship, in respect of which the maritime claim arose, can be arrested, even if it is not the owner but another person who is liable for the maritime claim, such as a bareboat charterer, voyage or time charterer or any other third party.

The owner of the ship shall, in order to have his ship released from the arrest, have to give security that guarantees the payment of the claim of the arrestor. In other words, the owner of the ship will have to guarantee the payment of the claim, even if a third person is the debtor towards the arresting party.

The only restriction is that the ship to which the maritime claim relates may not be arrested if it changed ownership between the moment the claim arose and the moment of arrest, unless the claim is secured by a maritime lien or mortgage. The transfer/change of ownership of the vessel is however only opposable against the seizing party when such transfer is opposable to third parties in accordance with the applicable law. If the conditions for the opposability of the transfer against third parties are not fulfilled at the time of the arrest, the arrest shall be allowed.

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

If the owner is liable for the maritime claim not only the ship, in respect of which the maritime claim arose, may be arrested but also all other ships in the same ownership. Ships will be deemed to be in the same ownership when all the shares therein are owned by the same person or persons (see also under n° 25).

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

The ship in respect of which the maritime claim arose can be arrested, irrespective whether the vessel is Bareboat – or Time Chartered. See above under n° 7.

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

The counter-security has fallen into disuse in Belgian law. It is therefore uncommon that Belgian courts impose a counter-security on the arrestor.

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

There is no procedural difference.

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

Belgium incorporated the Brussels Convention on Maritime Liens and Mortgages of 10 April 1926 in its internal law through Articles 19 to 45 of the Maritime Code. The maritime liens or privileges are listed in Article 23 of the Maritime Code.

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

Upon receipt of the instructions to arrest the ship, the arrest of the ship can be effected within approx. 4 hours. The unilateral request to obtain authorisation to arrest a sea-going ship can be submitted at any moment of the day, even out of office hours and during the weekend or holidays.

A ship under arrest will not obtain the services of a pilot. More specifically in the port of Antwerp an arrested ship will not be able to leave the port since also the lock keepers are informed.

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

No POA is needed. Belgian counsels represent the client without needing to present power of attorney.

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 original documents are required. It is not required either to have documents notarised or apostilled. Furthermore, in practice, no complete file of documents of evidence on the merits of the claim is needed in order to obtain an authorisation to arrest a ship. A claimant, requesting authorisation, only has to make his allegation of the existence of the maritime claim reasonably certain. Given the fact that at the time of the request the claim often just arose, the Judges of Seizure do grant authorisations for claims only scarcely documented.

It is advisable – but therefore not always necessary - to have a copy of the Bill of Lading, an invoice, a (general) protest and/or an interim report of a surveyor available.

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

Art. 7 of the Brussels Arrest Convention 1952 provides that the Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits in certain circumstances. This article has not been incorporated in the Belgian Code on Civil Procedure, but is applicable in Belgium as it is Belgian Private International Law as a result of the ratification of the Brussels Arrest Convention 1952. This implies that the Belgian Commercial Courts will in principle not refuse jurisdiction. In practice however, claimants rarely make use of the possibility of 'Arresto fundatur jurisdictio'.

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

The arrest may be lifted by putting up a security (see question 18) or after obtaining order of the Judge of Seizures deciding to set aside the original order for arrest (see also question 22).

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

A cash deposit and/or a bank guarantee are accepted to obtain the release of the ship. In practice an undertaking of a first class P&I Club is also mostly accepted (although the claimant may refuse such undertaking and ask for a cash deposit or bank guarantee). In case of disagreement, the Judge of Seizures may settle any dispute related to the nature of security.

19. Does security need to cover interest and costs?

Yes, the security should cover the principal amount of the claim, costs and interest. The global amount of interest and costs is normally determined at 30 or 40 per cent of the principal amount. In case of disagreement, the Judge of Seizures may determine the amount of the security.

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

See question 18.

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

If the parties agree upon the lifting of the arrest, the court bailiff may release the ship within the hour as from the instructions by the arresting party. In case proceedings are initiated to have the ship released, the release will take longer as such proceedings are often slowed down by the desire of the parties to develop their arguments in written submissions.

22. Is there a procedure to contest the arrest?

The ship owner (or a third party) may file opposition proceedings with the Judge of Seizures within one month of service of the order of arrest for such order to be set aside or varied; if such application fails, appeal is possible before the Court of Appeal.

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

- a) The arrest is valid during three years. The arrest can be renewed for a second period of three years.
- b) The arrest of a ship does not impose upon the arrestor the necessity to start legal proceedings on the merits of the case; nor does Belgian law impose Belgian Jurisdiction for the claim on the merits after an arrest in Belgium.

Obviously, since an allegation of a maritime claim has to be shown, it is necessary to start legal proceedings on the merits before the competent court within the time bar limits related to the claim itself.

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

Although the Belgian courts acknowledge wrongful arrest, they are rather reluctant to grant such claims. An unjustified arrest is not sufficient. Proof of a fault/bad faith on behalf of the arrestor is required. A claimant will only be considered as having acted at fault by arresting the vessel if he obtained and put the arrest in a thoughtless and reckless way knowing that he would cause damages (e.g. when the arrestor consciously hid important information from the Judge of Seizures).

If the arrestor loses the contradictory summary proceedings or the case on the merits, this does not automatically result in the arrest being wrongful.

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

On several occasions Belgian courts have accepted the piercing and lifting of the corporate veil within the frame of conservative arrest proceedings. If the owner is liable for the maritime claim not only the ship in respect of which the maritime claim arose, may be arrested but also all other ships in the same ownership (see our reply to question 8). This rule can be circumvented easily by creating 'single ship companies'. In this respect Belgian Courts occasionally authorized the arrest of a ship owned by another company than the debtor of the claim. The courts thus lifted the corporate veil and treated ships owned by different companies as if they were in the same ownership as soon as it was sufficiently evidenced that the separate corporate personality is only an artificial screen that does not correspond to reality.

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

Belgian case law accepts that a ship under arrest may be sold as soon as the claimant disposes of an enforceable title. This will also be the case if the judgment is not rendered against the owner of the ship but against another person who is debtor of the claim.

***Steven D'Hoine** read law at the University of Leuven. He joined the Antwerp Bar Association in 1990. In 2004, he founded the law firm D'Hoine & Mackay. D'Hoine & Mackay is a specialised law firm based in Antwerp offering the full range of legal services in the commercial area, with a focus on maritime and transport law, other port related areas and specie and fine art insurance. D'Hoine & Mackay primarily renders services to insurance companies, P&I Clubs, carriers, freight forwarders, logistics providers and trading companies. D'Hoine & Mackay also acts as correspondent on behalf of many law firms abroad for services in Belgium, as well as for Belgian law firms searching for specific services in their specialised field. Steven D'Hoine has been appointed as a recognized mediator. He is a member of the Belgian Maritime Law Association, the Royal Belgian Association of Maritime Insurers and various transport related organisations..