

SHIP ARREST IN *THE NETHERLANDS*

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

The Netherlands remains a convenient jurisdiction for ship arrests. The procedure for obtaining leave for arrest starts with the submission of an arrest petition to the court in the respective jurisdiction where the ship is located or is expected to arrive shortly. In 2017 the process for filing an arrest petition became more streamlined in that persons filing a petition were afforded the option of submitting their arrest petition to the Court of Rotterdam irrespective of where in the Netherlands the ship is located. Further, the Court of Rotterdam has been established to have exclusive jurisdiction for certain types of shipping claims given the special expertise of the Rotterdam Maritime Chamber. These arrest proceedings are *ex parte*, meaning they can be filed without notice being granted to the subject of the arrest. These petitions can additionally be filed after office hours or on weekends.

The arrest petition should contain *inter alia* a full description of both the creditor and debtor, the grounds for the arrest, the nature and monetary value of the claim, details of the ship, and whether the claim is contested by the (alleged) debtor and if so, on what grounds. Further, any supporting documentation (such as underlying contract, invoices, an overview of outstanding invoices, summoning letters) should be included.

Once an arrest petition is granted, the bailiff enforces an arrest by serving the court order to the master and the port authority. The port authority will subsequently bar the ship from leaving the port. The claim amount for which the arrest is permitted is raised with a certain percentage along a sliding scale between 10 and 30% over the capital claim amount to cover future interest and costs while proceedings are pending.

A time limit is established within which the merits for the underlying claim used as the basis for the arrest must be filed before the competent court or arbitration centre, which will usually be abroad. Failure to initiate proceedings that result in adjudication on the merits within the allotted time will result in the lapse of an arrest order and the ship will be released from arrest.

The arrest must be lifted immediately once the claim is settled or in the event that the debtor provides sufficient alternative security. This is usually done by providing a bank guarantee from a first class (reputable) Dutch bank or a letter of undertaking by P&I Clubs in good standing. An arrest can then be lifted without the intervention of the court by a simple phone call to the bailiff.

The ship owner may apply for an injunction whereby the arrested ship will be released. Injunction proceedings can be initiated on short notice, and a decision is generally rendered relatively quickly thereafter. In these injunction proceedings the court assesses whether the creditor's claim has sufficient merit to justify maintaining the arrest. In practice, deference is given to the creditor and it is generally difficult to convince the court that a creditor's claim is clearly without merit on a preliminary basis. Nonetheless, it is the creditors job to ensure that its arrest petition is proper.

It should be noted, the Court of Rotterdam has a specialized Maritime Chamber that is well versed in maritime matters. As a result of this specialization, the Chamber is given exclusive authority to deal with most maritime cases. Further, due to the international character of these cases, parties are given the option of litigating in the English language.

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

The Netherlands is a party to the 1952 Brussels Arrest Convention as of 1983. The provisions of this Treaty are not incorporated into the Dutch Civil Code (like in some other countries) and the 1952 Brussels Arrest Convention only applies when the arrest is sought against a ship that is flying the flag of a country that is a signatory 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 prohibited under the 1952 Brussels Arrest Convention).

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

A distinction must 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.

4. Are there 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).

A conservatory arrest is indeed possible in the Netherlands, as described under the overview above.

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

If the Brussels Arrest Convention 1952 is applicable, said ship can only be arrested for maritime claims as defined in article 1 of the convention.

If Dutch law applies, and not the Brussels Convention, the ship can be arrested for any type of claim.

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

Yes, however if the ship is flying a flag of a Contracting State to the Brussels Arrest Convention of 1952, the ship can only be arrested for a maritime claim as defined in that treaty.

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

A ship may in principle 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.

However, there are various exceptions to this rule. Subject to certain requirements, 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 (such claims for unpaid bunkers, supplies) may be grounds for an arrest of a ship that is not owned by whom the claims are against.

Certain claims can be attached to the ship directly itself for claims related to unpaid crew wages, salvage, general average, mortgage 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 which cannot be considered as 'owners', like a time-charterer, an option could be to place an attachment on the ship's bunkers/fuel reserve (rather than a ship itself). 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 mentioned earlier, any asset of a debtor may be arrested in order to obtain security (or may be used to satisfy an existing judgment or award), a sister ship may therefore 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 the "associated" owners.

In an important decision rendered in 2014, the Supreme Court widely interpreted the sister ship / bare boat charterer - clause of Article 3(4) last paragraph Brussels Arrest Convention 1952 ("*a person*

other than the registered owner”) in favour of the claimant seeking security. An arrest on a sister ship based on Article 3(4) need not necessarily be on a bare boat charter.

9. 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. There is however a shifting trend where courts are more receptive to such requests.

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 not recognized 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 from the moment the file arrives to your law firm?

Generally between 3 and 8 hours depending on the complexity of the case. The petition will be dealt with by the court immediately. Once the arrest is permitted, the bailiff, if put on stand-by beforehand, can then execute the arrest forthwith.

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

A Power of Attorney is not required when filing the arrest petition. An attorney-at-law is assumed by law to duly represent his client.

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 requirement of submitting *original* documents is under Dutch law very rare, i.e. only when the opposing party contests the authenticity of the document. Original documents are not required when applying for arrest petition, nor is notarisation and/or apostille.

In case of utmost dispatch, an arrest petition can even be filed electronically.

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 has ratified provide otherwise. If the parties had agreed on another jurisdiction or arbitration, Dutch courts must step aside.

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

By serving a writ of summons in summary proceedings on the arresting party, the ship owner can demand immediate release of the ship from arrest. The court (where the ship is located) will set a date for a hearing on very short notice. The more urgent, the quicker the hearing. At the hearing both parties’ lawyers will plead their case orally. A decision will be issued within a few days, if not already immediately after the hearing. The court will lift or maintain the arrest by court order. The ship is then virtually released. To effectuate the court order, the arrestor’s lawyer is supposed to instruct the bailiff to call the harbour authorities that the ship is free to go.

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

The type of security to be provided by the ship owner to the arresting party in release from arrest is up to the discretionary powers of the court. But in practice this varies from a (reputable Dutch) bank guarantee, a deposit in an escrow account or a letter of undertaking given by a reputable and financially solvent P&I Club ("Club letter"). Standard forms are in use on the basis of which a bank guarantee or Club letter is given.

19. Does security need to cover interest and costs?

Yes, the arresting party may add 30% (the "raise") over the capital claim (which claim is not exceeding an amount of €300,000) for covering (future) interest and (procedural) costs. To claims exceeding €300,000 applies a sliding scale, i.e. the higher the amount the more limited the raise for covering interest and costs (still 20% for claims up to €1 mil).

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

Although case law is divided, technically, a court may reject a request for lifting an arrest despite the presence of a P&I LOU offered by the ship owner if the arresting party refuses to accept the P&I LOU and demands a bank guarantee instead.

However, in practice P&I LOUs are very often accepted by the arresting party in release from arrest, which means the court usually need not to decide whether P&I LOUs are considered sufficient alternative security.

P&I LOUs are only acceptable when provided by a reputable and financially solvent P&I Club.

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

If the court order lifting the arrest is in place or the parties have made an agreement (settlement or alternative security), the arrest can be lifted within 5 minutes. There is no need for the court's intervention, the lawyer acting for the arresting party simply calls the bailiff who enforced the arrest. The bailiff subsequently calls the harbour authorities that the ship is free to leave again.

22. Is there a procedure to contest the arrest?

The arrest can be contested/challenged in summary proceedings as described in the answer to question 17. Usually, the ship owner's lawyer holds the arresting party liable for wrongful arrest and demands immediate release and if refused the ship owner can turn to the court with the request to issue a court order to lift the arrest.

23. What 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.

24. 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. The arresting party will be strictly liable for all damages suffered by the ship owner due to the wrongful arrest.

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.

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

Dutch law is rather strict in the definition of “ownership” and in acknowledging company structures. As a result, Dutch courts are not easily inclined to “*pierce the corporate veil*”, i.e. treat companies as one in the sense that claims on the one can be recovered from the other company. Hence, courts do not quickly allow a ship arrest for a claim against a third party although having close links to the ship owner. If the corporate structure is used to actively mislead creditors in order to avoid payment however, the courts could under exceptional circumstances be inclined to rule differently. The corporate veil may also be pierced if (foreign) law applicable to the question of law provides grounds for piercing the corporate veil or for “identifying” two or more companies as one and the same company.

26. 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 partner of Conway Advocaten. 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.*