

1. Introduction

- 1.1 This paper gives a general introduction to the Danish rules and procedures regarding arrest of vessels in Denmark.
- 1.2 First, this paper describes the two statutory sets of rules that apply to the arrest of vessels in Denmark.
- 1.3 Second, this paper deals with the substantive requirements for arrest in general. This paper further describes the more specific substantive requirements relating to the arrest of vessels and it will be examined to what extent the general arrest requirements apply to arrest in vessels.
- 1.4 When Denmark joined the Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Vessels, 1952 (the "Arrest Convention 1952"), some reservations were made and, as a result, the Danish rules impose some limitations on what generally applies according to the Arrest Convention 1952. These significant exemptions will be elaborated further below.
- 1.5 Finally, the formal procedural requirements for arrest in vessels and the legal effects of an arrest will be described.

2. Sources of law

- 2.1 Denmark ratified the Arrest Convention 1952 on 24 April 1989. The purpose was to secure Danish jurisdiction when arresting a vessel in Denmark for maritime claims¹ in cases that are governed by the EC Judgments Convention² (1968) as it follows from article 57 that this Convention does not govern jurisdiction matters that are comprised by other international conventions.

¹ The rules regarding jurisdiction will not be dealt with in this paper.

² Also called the Brussels Convention.

- 2.2 The Danish Administration of Justice Act (the "AJA")³ contains the general provisions regarding arrest for all sorts of claims and not only maritime claims.
- 2.3 The specific provisions regarding arrest for maritime claims are found in the Danish Merchant Shipping Act (the "MSA")⁴. These specific provisions were amended in the MSA and came into force on 1 November 1990 as a result of Denmark's ratification of the Arrest Convention 1952.
- 2.4 In general, the balance between the AJA and the MSA provides that the arrest provisions of the AJA apply to arrest of ships to the extent that the provisions of the MSA do not apply. In principal, the AJA provisions regarding the legal effects of an arrest and the procedural rules regarding the arrest, e.g. the rules that a lawsuit must be filed within a week after the arrest in order to confirm and justify the arrest, are of significance in this matter. However, the different fields of application of the AJA and MSA, respectively, as regards the arrest conditions are not entirely clear on all issues, which will be elaborated further under section 5 below.

3. Substantive requirements for arrest in general

- 3.1 The enforcement courts of Denmark grant arrest orders if certain substantive as well as formal procedural requirements⁵ are deemed to have been met.
- 3.2 As a general principle, arrest may be granted for a pecuniary claim in all types of assets; e.g. arrest of vessels. These general rules are found in the AJA as mentioned above.
- 3.3 *Levying of execution is not possible*
- 3.3.1 As regards the substantive requirements according to the AJA, it must first be proved that the claim cannot be secured by the levying of execution⁶.
- 3.4 *The avoidance requirement*
- 3.4.1 Secondly, it must be proved that there is a need for the arrest, i.e. the claimant must provide documentation in order to convince the enforcement court that the claimant's possibility of securing his claim subsequently will be substantially reduced if an arrest

³ Act No. 90 of 11 April 1916 as amended, Part 56, sections 627 – 640.

⁴ Act No. 170 of 16 March 1994, Part 4, sections 91 – 96.

⁵ See section 6.

⁶ E.g. because there is no fundament for execution yet, or if the bailiff court has stayed the execution of seizure pursuant to section 502(1) of the AJA. Moreover, an arrest order cannot be granted if the claim is already sufficiently secured prior to the arrest, e.g. by a lien or guaranties, see section 627(1).

order is not granted due to a risk of avoidance of enforcement of the claim or the concealing of the assets⁷ (the "avoidance requirement"). Thus, in order to satisfy the avoidance requirement, the claimant must establish an assumption that the defendant is about to move his assets out of the country or is acting suspiciously to avoid enforcement of the claim or other kinds of legal proceedings against his assets.

3.5 *The claim is due*

3.5.1 As a third substantive requirement according to the AJA, the claim must be due and it must be presumed that the claim does in fact exist⁸.

4. **Substantive requirements for arrest of vessels**

4.1 *Maritime claims*

4.2 Section 91 of the MSA lists the seventeen different causes from which a claim must arise in order to be characterised as a 'maritime claim'. Section 91 corresponds with article 1, (1), (a)-(q) of the Arrest Convention 1952.

4.3 The MSA only applies when the purpose of the arrest proceedings is to secure a maritime claim. Arrest of vessels regarding maritime claims pursuant to the MSA means retention of the ship; i.e. the ship is prohibited from sailing⁹.

4.4 *Levying of execution is not possible*

4.4.1 The MSA provides that arrest of a vessel cannot be made if the maritime claim in question could not have been secured by the levying of execution¹⁰. This provision is significant to Denmark and is a result of Denmark's reservation when joining the Arrest Convention 1952. Thus, the rule forms an exemption to article 3(4) of the Arrest Convention 1952 according to which an arrest can be made although the owner of the ship is not personally liable for the alleged claim. The Danish exception rule applies regardless of the domicile of the creditor. Therefore, a creditor who is domiciled in a country which has joined the Arrest Convention 1952 without similar reservations is nevertheless bound by the Danish exception rule that narrows the scope of arresting vessels.

4.4.2 The claim must be secured by a maritime lien in order to carry out an arrest in vessels in Denmark in situations where the owner of the vessel is not personally liable for the

⁷ See section 627(2) of the AJA.

⁸ See section 628(2). In practice this requirement will be met unless the debtor proves that the claim does not exist. However, the scale of demonstration of evidence in front of the enforcement court is rather limited, see section 501 of the AJA.

⁹ See section 92 of the MSA.

¹⁰ See section 93(4).

claim in question¹¹. Consequently, an arrest cannot be made in a vessel for a claim against a demise charterer or time charterer, unless the claim is secured by a maritime lien on the vessel.

4.5 *Arrest of a sister ship*

4.6 Moreover, it follows from the MSA¹² that arrest can be made in a sister ship, i.e. a ship owned by the same defendant of the arrest who is also the owner of the vessel to which the maritime claim relates at the time of the arrest. The ships are deemed to be owned by the same owner when all of the shares in the ships are owned by the exact same owner. However, it should be noted that in cases where the arrest regards maritime claims relating to disputes over title to or ownership of a ship or the mortgage or hypothecation of a ship¹³, arrest of a sister ship must not be granted.

5. **Application of the general requirements of arrest when arresting vessels**

5.1 The AJA expressly provides that if a claim is to be characterised as a 'maritime claim' and the claim is to be secured by an arrest of a vessel with the purpose of prohibiting the vessel from sailing, the particular provisions governing arrest for such claims are found in the MSA¹⁴. The MSA corresponds with this provision by expressly providing that the AJA applies to arrest of ships that are not prohibited from sailing¹⁵.

5.2 As the purpose of obtaining an order of arrest of a vessel by the enforcement court mostly is to prohibit the vessel from sailing in order to secure a maritime claim, especially as regards arrest in foreign vessels, the MSA¹⁶ provides the most relevant and often used provisions regarding arrest of vessels.

5.3 Whilst it is obvious that the AJA rules regarding the legal effects of the arrest¹⁷, the procedural rules regarding the practical procedure of the arrest¹⁸, and the requirement that the claim must be due and presumed existing¹⁹ apply generally and complement the specific rules in the MSA, it is more uncertain whether the avoidance requirement should apply generally.

¹¹ The rules regarding maritime liens will not be further examined.

¹² See section 93(1) and (2).

¹³ I.e. section 91(15)-(17) of the MSA.

¹⁴ See section 628(3).

¹⁵ See section 92(2).

¹⁶ Part 4.

¹⁷ See section 7 of this paper.

¹⁸ See section 6 of this paper.

¹⁹ See section 3.5 of this paper.

5.4 *Does the avoidance requirement apply to arrest of vessels?*

- 5.4.1 Unlike the AJA, the MSA does not expressly provide for an avoidance requirement. Thus, it has been discussed and is still an unclarified issue in theory²⁰ as in practice whether the avoidance requirement applies as a general requirement when the arrest is governed by the MSA rules, i.e. the claim in question is a maritime claim that falls within the scope of maritime claims listed in the MSA²¹, and the purpose of the arrest is to prohibit the vessel from sailing²².
- 5.5 The High Court of Western Denmark made a decision on 21 June 1996 in the cases B-0962-96, B-0977-96 and B-0978-96²³, ruling that the avoidance requirement of the AJA²⁴ must have been met when petitioning for an arrest pursuant to the MSA²⁵ due to section 96 of the MSA²⁶.
- 5.6 The case regarded an application for arrest of a fishing vessel pursuant to the MSA in order to secure claims of hire wages as the owner of the ship was in financial difficulties and had sold the fishing vessel. The enforcement court had refused to grant an arrest order reasoning that the purpose of the arrest was solely to observe and suspend time limitations. The High Court of Western Denmark concurred in that the avoidance requirement had to be met when arresting vessels pursuant to the MSA. However, the High Court found that the application for arrest implied that the claimants could not have their claims covered by the prior owner of the fishing vessel, who was the debtor of the claims, and that the maritime lien would be lost if the arrest order was not granted. Thus, the High Court remitted the case to the enforcement court for reconsideration of whether the avoidance requirement had been met. On 28 June 1996, the enforcement court granted an arrest order that the ship was not to depart.
- 5.7 However, the enforcement court's arrest order of 28 June 1996 regarding the fishing vessel was appealed to the High Court of Western Denmark.

²⁰ See, *inter alia*, Bredholt, Martens and Philip, "Søloven med kommentarer", 3rd edition, p. 134, Allan Philip, "Arrest i Skib", 1989, Marius nr. 251, p. 10, Jesper Martens, "Nye regler om arrest i skib", Juristen 1990, p. 238, note 2, Jes Anker Mikkelsen and Jesper Windahl, "Arrest i skib", UfR2005B.258, and Gomard, "Fogedret", (1997), p. 228.

²¹ See section 91.

²² This discussion has to do with the fact that it follows expressly from section 96 of the MSA that the rules regarding arrest provided in the AJA apply as a parallel to the special rules in the MSA.

²³ Reported in UfR1996.1244V.

²⁴ See section 627(2).

²⁵ Part 4.

²⁶ See note 19.

- 5.8 Thus, a few months later, on 23 September 1996 in case B-1917-96²⁷, the same case was tried again by the High Court of Western Denmark.
- 5.9 This time the High Court of Western Denmark contradicted its reasoning in its prior decision stating that the avoidance requirement of the AJA does not apply if the arrest is requested pursuant to the MSA rules. The reasoning for this decision was that part 4 of the MSA provides a special and independent code of practice for arrest which is to apply if the conditions pursuant to the MSA are met regardless of whether the conditions for arrest in the AJA are met. According to the High Court, section 96 of the MSA, including its wording and the legislative history and material thereof, was not to lead to a different conclusion.
- 5.10 The High Court of Eastern Denmark reached the same conclusion in its decision of 6 May 2004²⁸.
- 5.11 The circumstances were that the claimant, an engine shop, had done some repair work on the vessel from which they had a due claim that they wanted to secure by arrest of the vessel. The enforcement court had refused to grant the arrest order reasoning that the avoidance requirement was not met. The enforcement court referred to section 96 of the MSA in its reasoning. The enforcement court's decision was subsequently appealed to the High Court Eastern Division by the claimant. When the enforcement court forwarded the case to the High Court of Eastern Denmark, when the decision had been appealed, the enforcement court pointed out that it is disputed in theory as in practice whether the avoidance requirement of the AJA has to be met in cases where the arrest is governed by the MSA.
- 5.12 The High Court of Eastern Denmark referred to the decision of 23 September 1996, case B-1617-96, of the High Court of Western Denmark (referred to above) and reasoned that part 4 of the MSA is to provide an independent code of practice for arrest which may and must apply when the arrest conditions of part 4 of the MSA are met irrespective of the fulfilment of the arrest requirements of the AJA. Thus, the High Court of Eastern Denmark lifted the decision of the enforcement court and remitted the case to the enforcement court for reconsideration.
- 5.13 Apparently, the Arrest Convention 1952 seems not to provide an obstacle to having an avoidance requirement when applying for arrest in vessels in Denmark.
- 5.14 However, as the Arrest Convention 1952 neither expressly nor implicitly provides such limitations in terms of the avoidance requirement, it is my opinion that the MSA must be interpreted in accordance with the Arrest Convention 1952 and therefore the avoidance

²⁷ Reported in UfR1996.1500V.

²⁸ Reported in UfR2004.2203Ø.

requirement is not a prerequisite that must be met in order to carry out an arrest in vessels in Denmark.

- 5.15 It should be noted that the issue has not yet been brought before the Supreme Court of Denmark. A clarification of the issue will be well-received as it is of substantial significance to the possibilities of carrying out an arrest in vessels in Denmark pursuant to the MSA.

6. Formal procedural requirements for arresting a vessel

- 6.1 The formal procedural rules regarding the practical procedure of an arrest in general and in vessels mainly follow from section 631 of the AJA, which refers to a number of the procedural rules regarding the practical procedure in connection with the levying of execution proceedings and enforcement of claims other than pecuniary claims that follow from the AJA²⁹.

6.2 Written request

- 6.2.1 A claimant petitions for an arrest order at the enforcement court by submitting a written request with the enforcement court in the relevant jurisdiction. The request must contain sufficient information and documents of the facts regarding the claim on which the claimant relies in order to enable the enforcement court to consider the matter and to convince the court that the claim presumably exists and that the arrest conditions are met³⁰.

6.3 Formal hearing

- 6.3.1 Furthermore, the claimant must appear or be represented at a formal hearing shortly after having petitioned for an arrest³¹. The enforcement court may upon request from the claimant refrain from notifying the defendant of the request for arrest and of the date of the hearing if the enforcement court finds that the purpose of the arrest might otherwise be lost, i.e. there is a risk that the ship departs and disappears³².

6.4 Security

- 6.4.1 In accordance with article 6(1) of the Arrest Convention 1952, the AJA and the MSA contain provisions regarding the claimant's security when petitioning for an arrest.

²⁹ These are sections 487, 488(3), 489, 491, 492(1), 493(1)(2), 494, 495-500, 501(4)(5), 502(1)(nos. 2 and 3), 503, 504(1)(4), 505(2)-(4), 506, 507(2)-(4), 508-518, 519(1), 520(1), 523(2)-(4), and 524.

³⁰ See section 631(1) of the AJA.

³¹ See sections 491-492 of the AJA.

³² See section 493(2) of the AJA.

- 6.4.2 Section 629 of the AJA provides that the enforcement court may require that the claimant provides security of an amount fixed by the enforcement court in order to secure those damages and losses the arrest of the ship may inflict on the defendant.
- 6.4.3 In general, security is demanded when the defendant contests the claim and there is a certain doubt regarding the claim. As this is normally the case, the principal rule is that the claimant has to provide security either by providing a sufficient guarantee issued by a well-known and reputed Danish bank, P&I Club or an insurance company.
- 6.4.4 The MSA has a corresponding rule³³ which provides that the security amount fixed by the enforcement court may not exceed an amount that is equal to 5 days' loss of hire for the vessel. When the arrest has been executed the enforcement court may as a condition for upholding the arrest determine that the amount of security is increased.
- 6.4.5 On the contrary the debtor is encouraged to avoid or lift the arrest during the arrest proceedings by providing security for the creditor's claim including interests and estimated costs occurred by the arrest proceedings³⁴.
- 6.5 *Action to confirm the arrest*
- 6.6 According to the AJA³⁵, the claimant must within a week after the arrest file a lawsuit with the high courts of Denmark regarding the claim in question in order to justify and confirm the claim. If the claimant fails to do so the arrest may be lifted by the enforcement court³⁶. However, the defendant may waive this requirement of legal proceedings during the arrest proceedings.
- 6.7 If the legal proceedings before the high court establish that the claimant's alleged claim did not exist at all or only for a minor amount, the claimant must compensate the defendant for the damages and losses that the arrest has caused on the defendant. The same applies if the arrest turns out to be unlawful for other reasons and the claimant thus should have refrained from petitioning for an arrest.
- 6.8 These procedural rules also apply to arrest proceedings pursuant to the MSA³⁷.
- 7. Legal effects of an arrest**
- 7.1 When the enforcement court grants a request for arrest, the court declares the assets in question 'arrested'. In general, the formal procedure is that the enforcement court in-

³³ See section 94.

³⁴ See section 630(2) of the AJA.

³⁵ See section 634.

³⁶ See section 638(1) of the AJA.

³⁷ See section 2.4 of this paper.

forms the defendant of the arrest order and its legal effects, e.g. the ship is prohibited from sailing and a violation thereof will constitute a criminal offence³⁸. This information is provided either by the enforcement court at a meeting with the defendant or by submitting a written statement to the defendant or his representative.

- 7.2 The enforcement court registers the arrest order in the court's official records and issues a transcript of the arrest order to the claimant shortly after the arrest. The arrest will usually be carried out effectively by the enforcement court taking the ship's articles or vital parts of the vessel in order to physically and technically prevent it from sailing.
- 7.3 Finally, it should be noted that the decision of the enforcement court to either grant or refuse the arrest may be appealed to the high courts of Denmark within 4 weeks from the date of the arrest or the decision of refusing arrest. However, such an appeal does not suspend the decision, and thus in cases of appeal of an arrest order the arrest and its legal effects remain in force during the appellate proceedings³⁹.

³⁸ See section 632(2) of the AJA.

³⁹ See section 640 and part 53 of the AJA.

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