

Recent developments in Dutch maritime law: Ship arrests after the “Costanza M”

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1. Introduction

- 1.1. As the economic recession persists, we see more and more companies keeping a better eye on their finances. More attention is given to credit control and payments are chased sooner and more often than they used to. Where this does not result in payment, recovery possibilities are explored in a more serious manner and creditors do not shy away from legal measures.
- 1.2. With the shipping industry taking the economic crisis very hard, that is

certainly true in relation to maritime claims. A pre-judgment¹ vessel arrest is a logical and often effective first step to recover such maritime claims, which is illustrated by the increasing number of vessel arrests in the last few years.

2. Ship Arrest in the Netherlands

2.1. The Netherlands is well-known for its creditor friendly regime when it comes to the arrest of vessels (and other assets). This is true in regard to the arrest procedure, as well as in regard to the basis on which an arrest can be made.

Arrest procedure

- 2.2. In order to arrest a vessel in the Netherlands, the creditor must file an application for arrest to the District Court of the district within which the vessel is located or expected to arrive (shortly). This application briefly sets out the cause of action (e.g. the claim for recovery of collision damages, a claim for supply of bunkers). Documents supporting the claim must be attached to the application as an exhibit.
- 2.3. It is an 'ex parte' procedure, in the sense that the President of the District Court grants leave to arrest only on basis of the application for arrest. The debtor will not be heard and will have no opportunity to fight or dispute the pending arrest at that time.
- 2.4. Once leave to arrest has been granted by the President of the District Court, the lawyers acting for the applicant will instruct the bailiff and the bailiff will arrest the vessel. In order to prevent the vessel from leaving port, the bailiff will inform the port authorities of the arrest. Once the port authorities have listed a vessel as being arrested, that vessel is unable to order the boatsmen, tugs and pilots necessary to leave port. As such, it is practically impossible for an arrested vessel to depart.
- 2.5. In light of this quite simple procedure, an arrest can be effected within half a

¹ For the purpose of this presentation, "arrest" means pre-judgment arrest.

day and sometimes even hours. After the arrest has been made, the debtor can either pay the debt, provide sufficient security or initiate summary proceedings to have the vessel released.

Basis of the Arrest – Substantive Dutch law

- 2.6. Dutch civil law, and more specifically article 3:276 Dutch Civil Code, provides that a creditor can recover its claims against all assets of its debtor. Translated to the maritime practice, this means that – as a general rule – vessels can be arrested if the Owner of that vessel is the debtor of the claim for which the arrest is made. This includes sister ships belonging to the same Owner, to which the claim at hand is not related. The term “Owner” must be explained in this regard as registered Owner and not beneficial Owner.
- 2.7. Another basis for arrest can be found in article 8:360 section 1 Dutch Civil Code, which provides that the Owner is jointly and severally liable, next to the charterer by demise (bareboat charter), for claims against the charterer by demise, which result from legal acts which directly serve the operation of the vessel. This provision creates an additional possibility for creditors to recover their claim against a chartered vessel, even if the Owner is not the (primary) debtor.

Basis of the Arrest - The 1952 Brussels Arrest Convention

- 2.8. In addition to substantive Dutch civil law, an arrest can be based on the provisions of the 1952 Brussels Arrest Convention (hereinafter “the 1952 Arrest Convention”), to which the Netherlands is a signatory. The 1952 Arrest Convention is applicable if the vessel in question flies the flag of a contracting state.
- 2.9. Pursuant to the 1952 Arrest Convention, the prerequisite for an arrest is that the claim at hand constitutes a “maritime claim” as per article 1 section 1 of the Arrest Convention.² Article 1 section 1 of the 1952 Arrest Convention reads as follows:

² See article 2 of the 1952 Arrest Convention.

(1) *“Maritime Claim” means a claim arising out of one or more of the following:*

- *(a) damage caused by any ship either in collision or otherwise;*
- *(b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;*
- *(c) salvage;*
- *(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;*
- *(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;*
- *(f) loss of or damage to goods including baggage carried in any ship;*
- *(g) general average;*
- *(h) bottomry;*
- *(i) towage;*
- *(j) pilotage;*
- *(k) goods or materials wherever supplied to a ship for her operation or maintenance;*
- *(l) construction, repair or equipment of any ship or dock charges and dues;*
- *(m) wages of Masters, Officers, or crew;*
- *(n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;*
- *(o) disputes as to the title to or ownership of any ship;*
- *(p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;*
- *(q) the mortgage or hypothecation of any ship.*

2.10. If a claim indeed constitutes a maritime claim under the 1952 Arrest Convention, a creditor may arrest the vessel in respect of which the maritime claim arose, or any other ship of the registered Owner, i.e. a sister ship. As such, this confirms the aforementioned general rule of Dutch civil law.

2.11. However, the 1952 Arrest Convention contains some further extensions to this rule. The first extension can be found in article 3 section 4, paragraph 1, which provides that when, in case of a charter by demise, the charterer is liable for a maritime claim instead of the Owner, the creditor is allowed to

arrest either the chartered vessel or any other vessel of the charterer by demise. Sister ships of the Owner cannot be arrested. This provision corresponds (partly) with the aforementioned article 8:360 of the Dutch Civil Code.

2.12. Other than Dutch civil law, however, the 1952 Arrest Convention

contains another extension as far as arrest possibilities go. Article 3 section 4, paragraph 2, provides that the aforementioned extension regarding the charterer by demise “*shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship*”.

2.13. This is quite a controversial paragraph of the 1952 Arrest Convention, as it leaves room to discuss whether a vessel arrest is possible, even if neither the Owner nor the charterer by demise is the debtor of the claim. Where Owners and Clubs would surely dispute such option, shipping creditors would encourage any additional recovery possibility. As such, article 3 section 4, paragraph 2, walks the thin line between the importance of unhindered global shipping and the interest of shipping creditors worldwide.

3. Ship Arrest after the “Costanza M”

3.1. The controversy of arresting a vessel for claims against others than the Owner or the charterer by demise, is precisely the subject of the “Costanza M” case, of which the judgment was rendered by the Dutch Supreme Court on 9 December 2011.³

The facts

3.2. *Augusta Due SRL* (hereinafter “Augusta”) was the Italian registered Owner of various seagoing vessels, amongst which m.v. “Costanza M”. On 7 December 2007 Augusta had entered into an agreement with Turkish ship yard *Furtrans Denizcilik Ticaret Ve Sanayi AS* (hereinafter “Furtans”) for the completion and delivery of a vessel under construction, named “Stromboli M”.

³ Dutch Supreme Court 9 December 2011, NJ 2012/243 (“Costanza M”).

- 3.3. The 'contract price' amounted to approximately EUR 30 million, 10% of which was advanced by Augusta. The remaining amount had to be settled upon delivery of the vessel, which was scheduled for 4 February 2010. The agreement furthermore provided that, during the completion of the vessel, it would be owned by Furtrans.⁴
- 3.4. Augusta never took delivery of the vessel and, despite several reminders, never settled the remaining amount of approximately EUR 27 million. Reason enough for Furtrans to seek security for its EUR 27 million claim by arresting Augusta's "Costanza M" in the port of Amsterdam. The subsequent summary proceedings, initiated by Augusta in order to have the vessel released, eventually led to the controversial judgment of the Dutch Supreme Court.

First instance

- 3.5. The President of the District Court of Amsterdam, who had granted leave to arrest "Costanza M" earlier, had to decide over the case in first instance. By judgment dated 26 February 2010⁵ the President denied Augusta's claim to release the vessel.
- 3.6. The President noted that, when following the precise wording of the 1952 Arrest Convention, and more specifically article 3 section 1, the vessel should be released because the arrested "Costanza M" is not owned by the same Owner as the "Stromboli M", of which Furtrans itself was still the Owner pursuant to the building agreement. However, according to the President, the only reason the vessels were not both owned by Augusta, is that Augusta refused to take delivery of the "Stromboli M" for – as far as can be ascertained in summary proceedings – insufficient reasons. It would be unacceptable if Augusta could avoid recovery by simply refusing to take delivery of the vessel. In light of these circumstances, the President of the District Court holds that, for the application of the provisions of the 1952 Arrest

⁴ In the agreement dated 7 December 2007 Augusta was referred to as "*purchaser*", whilst Furtrans was referred to as "*contractor*".

⁵ S&S 2011, 26.

Convention, Augusta had to be considered as the Owner of the “Stromboli M”.⁶

- 3.7. The arrest on the “Stromboli M” was not be lifted, nor did Furtrans have to provide a counter security for possible damages resulting from the continuous arrest. So far, the situation was looking up for Furtrans at last.

Appeal

- 3.8. Strangely enough, article 3 section 4 of the 1952 Arrest Convention was not discussed in first instance. That changes when Augusta appeals the judgment of the President of the District Court.
- 3.9. First, the Court of Appeal of Amsterdam deals with article 3 section 1 of the 1952 Arrest Convention. Where the President of the District Court adopted an extensive interpretation of the term “Owner” in article 3 section 1, the Court of Appeal is not willing to go so far. The Court of Appeal holds that the 1952 Arrest Convention is applicable in many countries, for which reason discussions on interpretation must be prevented as much as possible. Therefore, where the Convention is clear – and this is the case in regard to the term “Owner” as per article 3 section 1 and 2 – there is no room for extensive interpretation and the view of the President of the District Court is overruled.
- 3.10. Probably foreseeing such an outcome on article 3 section 1, Furtrans argues in appeal that article 3 section 4, paragraph 2, extends the possibility to arrest a vessel to claims against all maritime debtors, other than the Owner or the charterer by demise. Following that line of reasoning, Furtrans was allowed to arrest the “Costanza M” for its claim related to the “Stromboli M”, which was owned by Furtrans itself.
- 3.11. The Court of Appeal does not follow Furtrans’ interpretation. In its judgment dated 16 March 2010⁷ the Court of Appeal holds that article 3 section 4 of the 1952 Arrest Convention apparently sought to extend the arrest possibilities

⁶ Whether Furtrans’ claim indeed constituted a maritime claim as meant in article 1 section 1 (L) of the 1952 Arrest Convention was never subject of discussion in this case.

⁷ S&S 2011, 26.

to the circumstances in which a person other than the Owner has the *actual control* of the vessel and that person subsequently becomes liable for a maritime claim (like the charterer by demise). With reference to the preparatory works of the Convention, the Court of Appeal considers that this is true both in relation to the first and the second paragraph of article 3 section 4.

- 3.12. In other words, since Furtrans was in fact the Owner of the “Stromboli M”, and Augusta could not be seen as a “*person other than the registered Owner*”⁸ who had actual control of the “Stromboli M”, Furtrans could not arrest a vessel owned by Augusta, like the “Costanza M”.
- 3.13. The arrest was therefore lifted and Furtrans was ordered to pay the costs of the proceedings in first instance and appeal.

Supreme Court

- 3.14. Even though the “Costanza M” was released following the judgment of the Court of Appeal, Furtrans was not satisfied with the outcome and took the case to the Dutch Supreme Court.
- 3.15. Before the Supreme Court Furtrans persists in its argument that Augusta is in fact “*any other person*” liable for its maritime claim, as meant in article 3 section 4 paragraph 2, and it can therefore arrest any (other) vessel of Augusta, amongst which the “Costanza M”.
- 3.16. The Supreme Court begins by considering that the wording of article 3 section 4, paragraph 2, the 1952 Arrest Convention offers no basis for the narrow interpretation of the Court of Appeal. There is no reason to deviate from the ordinary meaning⁹ of the provision, which clearly is “*any other person*”. According to the Supreme Court this also follows from the purpose of the Convention, which is to simply provide rules on when a seagoing vessel can be arrested, and corresponds with the further context of the provision. It can be derived from the preparatory works that paragraph 2 of article 3

⁸ See article 3 section 4, paragraph 2 in conjunction with paragraph 1, 1952 Arrest Convention.

⁹ The Supreme Court hereby implicitly refers to article 31 section 1 of the 1969 Vienna Convention on the Law of Treaties.

section 4 was added to the draft wording of the Convention at a later stage. In fact, this provision was added upon a proposal by the Dutch delegation who explained the proposal as follows:

“The same applies to all cases where a person other than the legal owner is liable in respect of a maritime claim. Of course, there are many people who are not owners, and their position must be considered. Therefore the proposal in respect of paragraph (I) and (V) of article 3 is to add to paragraph (V) [now section 4, JH] the words “in respect of all cases where a person other than the legal owner is liable in respect of a maritime claim”. I do not think that this proposal of ours can do any harm to anybody who is not a legal owner, and therefore no harm will be done by adopting it.”¹⁰

- 3.17. Against this background, the Supreme Court held that the addition of paragraph 2 to article 3 section 4 could not mean anything other than that an arrest of a vessel is always possible if another person than the Owner of that vessel is liable for the maritime claim and in that case other vessels of that other person can be arrested as well.
- 3.18. Foreseeing that this consideration would result in an avalanche of vessel arrests in the Netherlands for claims against time charterers, agents and the like, the Supreme Court put this immediately into perspective by adding that article 3 of the 1952 Arrest Convention has to be interpreted in the sense that an arrest is only possible if it can be pursued by actual recovery on the vessel, under the applicable law.¹¹ This applicable law must subsequently be determined in accordance with international private law.¹² Failing such recoverability, the arrest is unlawful.

¹⁰ Preparatory works to the 1952 Arrest Convention, p. 341. The Dutch delegation first proposed the paragraph in relation to the specific Dutch legal concept of “reder”, but decided to explain the proposal in a more general way.

¹¹ Again the Supreme Court refers to the Preparatory Works in this regard, which show that a proposal to this end (only allowing arrest if it can be pursued by recovery), was denied due to the Convention only dealing with arrest and not with recovery.

¹² Dutch international private law provides a ‘double test’ in this regard, meaning that a claim is recoverable on a vessel if this is true under both the law applicable to the claim and the law of the flag state (article 10:160 section 4 in conjunction with section 2 and 3 Dutch Civil Code).

- 3.19. The extensive view of the Supreme Court is limited to some extent by the condition of recoverability, although it certainly does not set aside the earlier extensive interpretation of article 3 section 4 paragraph 2.
- 3.20. Returning to Furtrans, the Supreme Court concludes that Furtrans was indeed allowed to arrest the “Costanza M”, if its claim will be recoverable against the “Costanza M” pursuant to the applicable law.¹³ In order to answer that question, the case is referred back to the Court of Appeal of the Hague.¹⁴

4. Conclusion

- 4.1. If anything, the “Costanza M” case has reconfirmed the Netherlands’ reputation for creditors as an extremely friendly jurisdiction to obtain security by illustrating the Supreme Court’s choice for an extensive interpretation of article 3 section 4 paragraph 2 of the 1952 Arrest Convention, regardless of the condition of recoverability.
- 4.2. When applying the “Costanza M” case in practice one would have to substantiate the recoverability of a claim against the vessel when arresting for a claim against *“a person other than the registered owner”*. This can be done by submitting foreign legal opinions to the Court. Seeing how time is often of the essence when it comes to vessel arrests, our advice is to have your foreign correspondent(s) on standby if you are willing to take that route. Other than that, enjoy the (now even more) extensive arrest possibilities Dutch law has to offer.

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¹³ Dutch Supreme Court 9 December 2011, NJ 2012/243 (“Costanza M”).

¹⁴ It is unclear if the Court of Appeal of the Hague has ever rendered its judgment, since this is not published.