

Arrest of evidence in shipping disputes

Recent developments in Dutch case law have opened up possibilities to arrest documentation and/or other evidence. This conservatory measure to safeguard evidence can also be used on board of a vessel, for example to arrest documents such as deck logs, port logs and crew lists. An evidentiary arrest can be used in support of claims against the vessel, her owners and/or charterers, as the case may be.

Background

An evidentiary arrest provides a reprieve for inter alia charterers and cargo interested parties, when they have to deal with the reluctance of shipowners and P&I Clubs to provide documentation relating to an incident on board of a vessel, as the latter fear it may prejudice their legal position. In nearly all cases, the documentation is necessary to determine the legal position. The reluctance to provide the relevant documentation therefore results in an unequal, and in some cases inequitable, situation for parties, as the possibilities for parties that have a legitimate interest in ascertaining the cause of an incident are severely limited. This in turn has consequences for the ability of these parties to prove their claim if (arbitration) proceedings are commenced. An evidentiary arrest may then prove helpful.

Procedure

In order to obtain the court's permission to make an evidentiary arrest, specific requirements have to be taken into account. Firstly, the party requesting permission to make an evidentiary arrest has to have a legitimate interest for doing so. Secondly, the documentation requested should relate to a legal relationship between the party requesting the arrest on the one hand and the party who has legal control over the documents on the other. Moreover, the request needs to pertain to specific documents, thus excluding 'fishing expeditions'. This entails that the arrest petition should contain a list specifying particular documents along with an explanation as to why the documents are relevant for the party requesting the arrest. In addition, requirements with regard to the legitimacy of the claim and measures to safeguard the integrity of the arrest documentation have to met. Courts will dismiss petitions that fail to meet these requirements.

It is also possible to arrest evidence that is not in the debtor's actual possession, but is in the custody of third parties. For instance, it is possible to arrest evidence and documentation that has been taken off the vessel and is kept at the offices of the vessel's agent.

Practical aspects

In urgent cases, an evidentiary arrest may be arranged in a matter of hours. Dutch courts and bailiffs are on hand to act at a moment's notice, if necessary. Permission for arrest can even be requested during the evening hours and weekends; judges are usually willing to consider arrest applications (almost) immediately. Once permission to arrest particular evidence is granted, the bailiff proceeds to the vessel to make the arrest. During the arrest, copies will be made of the documentation on board, in hard copy or digitally. The presence of an IT specialist, who can assist the bailiff with the extraction of the documentation from the computer systems, may be required. The party who is confronted by an evidentiary arrest, is generally allowed to request that the bailiff postpones the arrest until its lawyer has arrived. The lawyer can then advise and protect the party's interests as the arrest takes place.

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The conservatory nature of the evidentiary arrest

After the arrest, the documentation is not made directly available to the party on whose behalf the arrest was made. The arrest ensures that evidence is kept safe and can be used by the party at whose request the arrest was made at a later stage, for instance during proceedings. The evidence is therefore kept by a court ordered sequestrator until a judicial order is given, granting the arresting party access to the arrested documentation. In practice, however, after an arrest of evidence has been made, it is not uncommon for parties to agree amicably that the arrested documentation may be accessed. In any event, the arrest prevents that documentation disappears.

Conclusion

The possibility of an evidentiary arrest in the Netherlands means that parties are no longer solely dependent on the benevolence of the party who has the documentation in its custody when it comes to obtaining documentation necessary for the assessment of their legal position. The evidentiary arrest has proven to be a valuable asset to support a claim, for example against shipowners and P&I Clubs. On the other hand, shipowners and P&I Clubs should be aware that they may be confronted by an evidentiary arrest on board of their vessel whilst they visit ports in The Netherlands when documentation is not provided voluntarily.