

DABELSTEIN & PASSEHL

Rechtsanwälte  Hamburg · Leer





International Law Seminar 2009

Session 2:

The German view:

Arrest of cargo, bunkers, freights and other assets (not vessels) to assist ship owners in their efforts to collect on unpaid bills or claims, as well as some commentary on developments in the field of declaratory judgment

Dr. Marco G. Remiorz





Overview

- Possible arrest actions
- Declaratory actions
- Hot topic:

German Federal Court ruled on unlimited liability of ocean carrier





Arrest actions - basics

- Generally: enforceable judgement or arbitration award declared enforceable by a court necessary to attach assets
- Exception: Arrest allows attachment before the stage of enforceability of the claim
- Conservatory purpose; does not create jurisdiction





Arrest actions - targets

In principle: any inland assets of the debtor

- Cargo, vessel, bunker, money: movable assets
- Real estate: immobile assets
- Claims





Arrest actions – requirements

- Any claim for money due or to become due against the debtor, § 916 German Code of Civil Procedure (“ZPO”)
- Any other claim: interlocutory injunction only, e.g. redelivery of goods
- Sufficient Grounds for an arrest:
§ 917 ZPO section 1 or 2





Arrest actions – requirements (continued)

§ 917 ZPO reads as follows:

- 1) *The arrest of assets is allowed if there is a risk that without granting the arrest the enforcement of a judgement is rendered impossible or substantially more difficult.*
- 2) *It is considered to be a sufficient ground for an arrest, if the judgement has to be enforced abroad and if reciprocity is not granted.*





Arrest actions – requirements (continued)

§ 917 section 1 ZPO (two aspects):

- Protection of enforcement of a **Judgement** which can be declared enforceable in Germany, namely
 - → a German judgement/ arbitration award
 - → a foreign judgement which can be enforced in Germany
 - → a foreign arbitration award enforceable in Germany
- Risk: without the arrest the enforcement of such a judgement is impossible or substantially more difficult





Arrest actions – requirements (continued)

§ 917 section 1 ZPO: “Risk”

- Financial problems of the debtor/insolvency: § 917 I (-)
- The debtor deliberately transfers major parts of his assets in bad faith to make a future execution of a judgement impossible: § 917 I (+)
- The debtor damages the assets of the creditor deliberately by a way of criminal offence: § 917 I (+)
(e. g. fraud)





Arrest actions – requirements (continued)

Alternatively: § 917 section 2 ZPO:

- *Sufficient ground for an arrest if judgement has to be enforced abroad and if reciprocity is not granted.*
- Irrebuttable presumption
- Enforcement in EU in not abroad





Arrest actions – application

- Must substantiate the arrest claim and the grounds for the arrest.
- Supported by at least prima facie evidence:
 - documents, witnesses, export opinion etc.
 - a sworn affirmation stating that the contents of the facts summarizing in the arrest application are correct





Arrest actions – security

- In the discretion of the court to decide if, and up to what amount the applicant has to put up counter security.
- The more prima facie evidence of the case, the less likely the court will order such security
- Tendency of German Courts to ask for counter security up to the claim amount (plus interest/ cost)
- Security can either be paid in cash or, alternatively, it may be provided by an irrevocable and unconditional bank guarantee from a first class bank with a good reputation.





Declaratory actions

- Possible according to German Code of Civil Procedure
- Positive (purporting) action/ negative (denying) action
- Requirements (see § 256 ZPO):
 - No better legal protection possible, e.g. money claim
 - Declaratory interest of plaintiff, e.g. time bar?





Declaratory actions (continued)

- Relation negative/ positive declaratory action in different jurisdictions; forum shopping
- German Federal Court: positive action prevails
- Problem: enforceability, unless changed into money claim once possible





Hot topic:

German Federal Court on unlimited liability of ocean carrier (decision I ZR 212/06) dated 29 July 2009

- General limit: 2 SDR/kg or 666,67 SDR per package
- Exception: Personal intent/ gross negligence of the carrier/ his management
- German specialty: secondary burden of proof to detail handling of cargo
- Failure: rebuttable presumption of grossly negligent organization us such, unlimited liability





Hot topic (continued): Guiding principle

“Initially there is an indication for a grossly negligent organization of the carrier if the cargo is damaged during the ocean transit due to insufficient lashing/ securing.

He has to detail which organizational measures have been taken by himself or his management acting for him to avoid mistakes in handling the shipment.

Failure to do so extends the presumption of a grossly negligent organization from the carrier to his management.”





Hot topic (continued): Consequences

- Whenever lashing/ securing is an issue details on handling have to be provided to fulfill burden of proof
- Not yet known if this will be extend to a general principle
- Likely as German Court are far from being carrier friendly!
- Relevance for Jurisdiction clauses, etc.





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THANK YOU FOR YOUR ATTENTION!

