

**Furtrans Denizlick Ticaret Ve Sanayi AS ("Furtrans") v Augusta Due Srl ("Augusta")** The "Constanza M"

**Supreme Court of the Netherlands ("SCN") (summary proceedings):  
Vice-President J.B. Fleers as Chairman and the judges A.M.J. van  
Buchem-Spapens, F.B. Bakels, C.E. Drion and G. Snijders LJM:BT2708,  
December 9, 2011 (published December 9, 2011)**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=bt2708>

Mr R.A.A. Duk for Furtrans, Mr R.S. Meijer for Augusta

**CONSTRUCTION OF ART. 3(4) SECOND PARAGRAPH, INTERNATIONAL  
CONVENTION RELATING TO THE ARREST OF SEA-GOING SHIPS 1952  
("Convention")**

**Summary**

In this case the SCN gave the following two decisions:

1) The words "a person other than the registered owner of a ship" in the second part of Art. 3(4) do not relate to a person that has powers of control over the vessel that are equivalent to those of a charterer by demise.

2) Art.3 Arrest Convention must be construed in such a way that that article only allows an arrest of a vessel based on the Convention if the applicable law (that is, the *lex causae*, the law governing the merits of the dispute) allows the arrest to be enforced against the vessel.

Case note written Nigel Margetson, Advocaat (Lawyer) in the law office of Margetson & Margetson, Dordrecht.

**Facts**

Augusta (as "purchaser") entered into a contract with Furtrans (as "Contractor") for the building and purchase of the vessel "Stromboli M" ("Contract"), which vessel was already under construction. The Contract price was Euros29,950,000. Augusta made a down payment of Euros 3,000,000. Pursuant to the terms and conditions of the Contract, Augusta would pay the balance of the Contract price on delivery of the vessel, which was to take place on 4 February 2010. Pursuant to the terms and conditions of the Contract, the property in the "Stromboli M" remained with Furtrans during the construction period.

Augusta failed to take delivery of the vessel and did not pay the balance of the Contract price. Augusta also owned other vessels, including the "Constanza M". Furtrans arrested the "Constanza M" at Amsterdam to obtain security for the balance of the Contract price, interest and costs. Furtrans alleged a maritime

claim as set out in Art.1.1 of the Arrest Convention, namely a claim arising out of the construction of a ship, and said that Augusta was a 'party' within the meaning of the second paragraph of Art.3.4 of the Convention. This article reads as follows:

"When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph 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."

#### Court of Appeal of Amsterdam

The court of first instance allowed the arrest. The Court of appeal of Amsterdam however rejected Furtrans' argument that the second paragraph of Art.3.4 allowed the arrest. The Court of Appeal said: "The words "a person other than the registered owner of a ship is liable" in the second paragraph of Art.3.4 are meant to refer to a different party that is equal to the charterer by demise that is referred to in the first paragraph of Art.3.4, in the sense that that other person is in command of or has the actual power over the particular ship to which the claim pertains and is liable for that claim in that capacity. As in this case Furtrans retained the property and the actual power over the built vessel, the "Stromboli M", Augusta is not an "other" person as meant in this sentence."

The Court of Appeal invoked the travaux préparatoires to support this decision.

#### Supreme Court of the Netherlands

Furtrans appealed to the SCN. The SCN allowed Furtrans' appeal. It said that the words of the Convention, which words it considered "in the first place to be deciding", (fn.1) did not offer any support for the narrow interpretation that the Court of Appeal had placed on the second paragraph of Art.3.4. The SCN then went on to explain why, in its view, the words of Art.3.4 were clear.

The SCN then went on to discuss the travaux préparatoires (fn.2) relating to that provision, saying that it followed therefrom that "(...) an arrest is allowed in all instances where a different party from the owner of the vessel is liable for a maritime claim and that in such cases an arrest is also possible on other vessels of that different party."

The SCN then pointed out that the travaux préparatoires made clear that there were objections to Art.3.4 because of the broad possibilities that that article seemed to create to arrest a vessel for a maritime claim which pertained to a

vessel that was not owned by the debtor of the claim. After discussing the travaux préparatoires the SCN said:

“Art. 3 of the Convention must be construed in such a way that an arrest based on the Convention is only possible if, under the applicable law, it is possible to enforce the arrest against the vessel. It is true that by the words of the Convention an arrest is also possible outside of this case, but outside of this case the arrest should not be allowed because of the absence of a lawful interest to arrest the vessel, as it will not be possible to pursue the arrest. The reason for this conclusion is that pursuant to the Convention an arrest is solely allowed to secure a maritime claim (see art. 9 and art. 1, first paragraph and at 2)”.

The SCN went on to say that this construction of Art. 3 accords with that followed in many other countries and it refers to F. Berlingieri, *Arrest of Ships*. A Commentary on the 1952 and 1999 Arrest Conventions, 4th ed. 2006, appendix II, question 7.2, p. 367-369.

The SCN concluded by saying that, assuming that its claim was indeed a maritime claim, Furtrans was entitled to arrest the *Constanza M*, subject to the applicable law allowing the arrest to be enforced against the *Constanza M*.

## Comment

1) The decision of the SCN is in accordance with the view of Professor Philip, as discussed in Berlingieri, “Arrest of Ships”, 2011, paragraph 7.118.

2) In its two decisions of 12 September 1997 relating to the HANJIN OAKLAND (United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. versus Hanjin Shipping Co. Ltd, NJ 1998, 687) and the MICOPERI 7000 (United Towing Limited versus Micoperi Offshore S.p.A., NJ 1998, 688), the SCN decided that under Dutch Private International Law (Conflict of Laws), an arrest of a vessel to secure a claim against a different party other than the Owner of the Vessel was only lawful if it was possible to enforce the claim against the arrested vessel under both the *lex causae* (the law that governs the merits of the claim) and the *lex registrationis* (the law of the place where the vessel is registered). It would now seem that, in the light of the decision in the *CONSTANZA M*, a vessel can be lawfully arrested in the Netherlands, in a case where the Arrest Convention applies, for a claim against a different party than the owner if the claim can be enforced against the vessel under only the *lex causae*. If this conclusion is correct, the possibilities to arrest vessels in the Netherlands for a claim against a different party than the owner of the vessel have been broadened.

Fn.1 By these words, the SCN means that, as the words of the Convention are clear, there is no reason to construe the words by making reference to the travaux préparatoires (see articles 31 and 32 of the Vienna Convention on the law of treaties 1969)

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Fn.2 The SCN's discussion of the travaux préparatoires is an obiter dictum. It was probably given because of the Advocate General's (the advisor to the SCN) in depth discussion of the travaux préparatoires which had led him to conclude that the judgment of the Court of Appeal of Amsterdam was correct