

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Schedule 4 – Modifications of Enactments Relating to Admiralty Actions and the Arrestment of Ships (Introduced by Section 213)

771. [Schedule 4](#), introduced by section 213, makes amendments to the law relating to admiralty actions and the arrestment of ships.

Definition of “maritime lien”

772. [Paragraph 1\(c\)](#) inserts a new subsection (2) into section 48 of the Administration of Justice Act 1956 (the “1956 Act”) defining the term “maritime lien” for the purposes of the 1956 Act and any other legislation where that term is used. In Scots law a “lien” is a right in security over property where that property is in the possession of the creditor. Where a creditor has a right in security over moveable property which is not in the creditor’s possession that right is known in Scots law as a “hypothec”. However, in international maritime conventions and in other jurisdictions, where a creditor in a maritime claim has a real right in security over a ship, cargo or other maritime property (such as wreck, flotsam or jetsam) which is not necessarily in the creditor’s possession, the right is referred to as a “maritime lien”. Strictly, a maritime lien is a type of hypothec in Scots law and the insertion of the definition in new subsection (2) makes this clear whilst retaining the usage of the term “maritime lien” to maintain consistency with international usage.

773. [Paragraph 2](#) provides for consequential amendments arising from paragraph 1.

774. The list of claims in respect of which a vessel may be arrested is contained in section 47(2) of the 1956 Act (the “section 47(2) list”). [Paragraph 3](#) extends section 47(2)(r) of the 1956 Act so that it applies to claims arising out of any type of charge held over a ship.

The term “admiralty action”

775. [Paragraph 4\(a\)](#) inserts the term “respondentia” into paragraph (h) of the section 47(2) list. Respondentia is a security granted over the cargo contained in a ship for a loan advanced in consideration of a particular voyage.

776. [Paragraph 4\(b\)](#) inserts new subsection (2A) after the section 47(2) list. This gives the label “admiralty action” to any action (whether in the Court of Session or sheriff court) enforcing a claim in the section 47(2) list.

777. [Paragraph 5](#) provides for two amendments consequential on the creation of the term “admiralty action”.

Arrestment *in rem* granted by the sheriff

778. Paragraph 6 inserts new section 47A after section 47 of the 1956 Act to set out the jurisdictional limits of a warrant to arrest *in rem* a ship, cargo or other maritime property granted by a sheriff.

New section 47A – Execution of warrant to arrest *in rem* and of order for sale

779. Section 47A(1) provides that the warrant may be executed either within the territorial jurisdiction of the sheriff court from which the warrant was granted, or anywhere in Scotland provided the ship, cargo or maritime property was within the territorial jurisdiction of the sheriff court which granted the warrant, when the warrant was granted.
780. Subsection (2) makes it clear that an order for the sale of an arrested ship may be made in respect of a ship even although the ship is not situated in the sheriffdom when the order is made, where a warrant for arrestment *in rem* granted by the sheriff has been executed.

Arrestment on the dependence

781. Paragraph 7(2) makes amendments to section 47(1) of the 1956 Act which provide that arrestment on the dependence of a ship, or other maritime property which is not cargo, is competent only if, when the ship in question is the ship with which the action is concerned, the defender is the owner of the ship or a share in the ship, or is the demise charterer of the ship, at the time when the arrestment is executed. It continues to be competent to arrest another ship on the dependence providing the defender owns all the shares in that ship.
782. Note that the restrictions imposed by section 47(1) do not apply to the arrestment of cargo which is specifically excluded from this provision by the amendment in paragraph 7(2)(a).
783. Paragraph 7(3) inserts new subsections (1A) and (1B) into section 47 of the 1956 Act. These subsections provide that when a ship has been arrested on the dependence of an action, a warrant cannot be granted to arrest on the dependence of the same action the same ship or any other ship which the defender owns at least a share in unless the pursuer can demonstrate good cause for the second arrestment. This is consistent with the wording in article 3(1) of the leading international convention on the arrestment of ships (the Brussels Arrest Convention of 1952).
784. Paragraph 7(4) amends section 47(3) of the 1956 Act (which provides for the arrestment of a ship to enforce a claim specified in paragraphs (p) to (s) of the section 47(2) list) making it clear that an arrestment to which this provision applies may arrest a share in a ship rather than the whole ship.

Liability for losses and expenses

785. Paragraph 8 inserts new section 47B into the 1956 Act.

New section 47B – Expenses

786. Section 47B(1) provides the court with the power to award the creditor the expenses of obtaining warrant for and executing an arrestment of a ship, cargo or other maritime property on the dependence. But the court may modify or refuse the creditor's right to these expenses if the creditor was unreasonable in applying for a warrant or if the court thinks it is reasonable to modify or refuse the award of expenses (subsection (3)).
787. Subsection (2), entitles the defender to expenses in opposing the grant of the warrant where warrant is granted but the creditor was unreasonable in applying for the warrant.

Again the court can modify or refuse these expenses if satisfied that it is reasonable to do so. In particular, the court should take account of the outcome of the action.

788. If any other question arises in relation to the expenses of obtaining or opposing a warrant or of executing the arrestment, subsection (5) provides the court with the discretion to deal with it.
789. Subsection (6) provides that expenses of obtaining warrant for arrestment or opposing the warrant are to be treated as expenses of process.
790. Subsection (7) provides that any legislation or rule of law which deals with the recovery of expenses of executing an arrestment on the dependence of a court action which are chargeable against the debtor is not affected by the rules set down by subsections (1) to (4).
791. Subsection (8) provides the court with discretion to deal with the expenses incurred in obtaining a warrant granted for arrestment *in rem* in enforcing a claim listed in paragraphs (p) to (s) of the section 47(2) list or in opposing an application for it.

Factors affecting arrestments

792. [Paragraph 9](#) inserts new sections 47C and 47D into the 1956 Act.

New section 47C – Competence of arresting cargo

793. Section 47C(1) provides that an arrestment of cargo can be executed only where the cargo is on board a ship when the arrestment is executed. Cargo which is not on board a ship is subject to the diligence of attachment (provided the nature of cargo does not make it exempt from attachment on some other ground). The amendment of section 11 of the 2002 Act made by paragraph 10 prevents cargo from being attached when it is on board a ship.
794. Arrestment of moveable property is normally competent only when the property is in the hands of someone other than the debtor. Attachment is usually the appropriate diligence to use when moveable property is in the hands of the debtor. Subsection (2) makes it clear that, as an exception to the normal position, cargo on board a ship can be arrested where it is in the hands of the debtor or a person acting on the debtor's behalf.

New section 47D – Arrestment of cargo: restriction on movement of ship

795. Section 47D has the effect that where cargo on board a ship is arrested, the ship is itself treated as if it has been arrested until the cargo is taken off the ship. The ship is therefore prevented from setting sail and the creditor can apply for ancillary warrants to dismantle the ship or have it brought into harbour providing it can be shown that this course of action is necessary.

Cargo on board a ship exempt from attachment

796. See paragraph [793](#) above.

Location of a ship when arrestment executed

797. [Paragraph 11\(a\)](#) inserts new subsections (5A) and (5B) into section 47 of the 1956 Act. The new subsections provide that an arrestment of a ship, cargo or other maritime property can be executed no matter where the ship or maritime property is situated so long as it is within the territorial jurisdiction of the court (note that cargo must be on board a ship if it is to be arrested). In other words, a ship is still treated as a ship even where it has run aground or is in a dry dock.
798. [Paragraph 11\(b\)](#) amends subsection (6) of section 47 to make it clear that a ship (or cargo on board it) cannot be arrested while the ship is on passage.

Demise charters

799. [Paragraph 12](#) inserts new sections 47E to 47H into the 1956 Act dealing with demise charterers. A demise charter is a type of lease of a ship (often including the services of the master and crew). A demise charterer takes possession of the ship and operates the ship. The length of demise charters can vary from short (1 or 2 years) to long (20 years or the lifespan of the ship). Often the charterer has an option to buy the ship outright at the end of the agreed term. In practice the demise charterer is treated as the owner of the ship as the charterer has control over the operation of the ship and over the master and crew. But the owner in the legal sense remains the person who granted the charter.

New section 47E – Sale of ship arrested on the dependence of action against demise charterer

800. New section 47E makes special provision to allow the pursuer in an admiralty action against a demise charterer to be entitled to complete diligence by judicial sale of a ship which has been arrested on the dependence of the action. The sale is competent even though the ship is likely to belong to a third party.
801. Subsection (2) provides for termination of the arrestment of the ship if the owner or the demise charterer either pays the debt due, or offers the sum in payment and that offer is not accepted within a reasonable time.
802. Under subsection (3), the court may make an order for the sale of the ship on behalf of the pursuer and, under subsection (4), the court must rank any claims on the proceeds of the sale (but taking into account sections 47F and 47G - see paragraphs [804804](#) and [805805](#) below).
803. Subsection (5) provides that a ship so sold transfers to the buyer free from any other claim or encumbrance, including any claim of the previous owner who granted the demise charter. The buyer becomes the new owner of the ship and not just the new demise charterer of it.

New section 47F – Ranking of arrestments on sale of ship chartered by demise

804. New section 47F provides that in competitions in ranking in respect of the proceeds of the judicial sale of a ship, or a share of a ship, arrestment of the ship enforcing the ship owner's debts will be preferred to arrestment enforcing those of the demise charterer even if the arrestment relating to the owner was executed after the arrestment relating to the demise charterer.

New section 47G – Ranking of arresting creditor of demise charterer in sequestration or winding up of owner

805. New section 47G provides that a creditor of a demise charterer who has arrested the chartered ship on the dependence of an action against the demise charterer will be entitled to claim a dividend or preference (if any) resulting from the sale of the ship in the event of the ship's owner being sequestrated or wound up. The creditor has no rights over the proceeds of sale of any other asset belonging to the owner. Subsection (3) applies the provisions of the 1985 Act and the Insolvency Act 1986, which have the effect of equalising diligences executed within 60 days before a sequestration or winding up, to an arrestment against a demise charterer where the ship owner is sequestrated or wound up.

New section 47H – Arrestment to found jurisdiction in action against demise charterer

806. New section 47H has the effect that where a pursuer wishes to raise an action against a demise charterer to enforce a claim listed in the section 47(2) list but the demise charterer is not within the jurisdiction of the court, the pursuer can arrest the ship under

*These notes relate to the Bankruptcy and Diligence etc. (Scotland)
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demise charter (providing it is within the court's jurisdiction) to found jurisdiction for the action and allow it to be heard by that court.

807. [Paragraph 13](#) amends section 6(c) of the Sheriff Courts (Scotland) Act 1907. It is linked with the provision in new section 47H and it makes clear that the arrestment of a ship within the jurisdiction of the sheriff and which is under demise charter will bring the demise charterer within the jurisdiction of the sheriff even though the charterer would not normally be subject to that jurisdiction.