

Transportation

Arrest of Sea-Going Ships as Security for Maritime Claims: Ukrainian Practice

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Arrest of a sea-going ship is one of the most effective means of securing a maritime claim in the international practice. The question of arrest of ships is well regulated internationally, however, at present Ukraine is not a party either to the *International Convention for*

the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (Brussels, 1952), or to the *International Convention on Arrest of Ships (Geneva, 1999)* and therefore the corresponding questions are regulated exclusively by the norms of internal legislation and above all by the *Merchant Shipping Code (MSC)*.

According to article 41 of the MSC arrest of a ship means any detention of a ship or limitation of its movement executed for securing maritime claims mentioned in article 42 of the MSC during the period of location of such ship at a Ukrainian sea-port. This definition of the arrest is quite similar to that provided for by the *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (Brussels, 1952)*.

The term “maritime claim” has been defined in article 42 of the MSC as claim arising out of the right of property and other proprietary rights for a ship, construction of a ship, management, running or commercial use of a ship, ship’s mortgage or execution of measures connected with the rescue of a ship, namely, a claim in connection with:

- 1) causing damage as a result of loss or damage to property in connection with operation of a ship;
- 2) causing damage as a result of loss of life or injuring the health on land or on water directly connected with the operation of a ship;
- 3) causing damage to the environment;
- 4) remuneration due for conduct of rescue operations or fulfilment of requirements of any rescue agreements;
- 5) compensation and other amounts due for the removal or an attempt at removing the threat of causing damage, for taking preventive measures or execution of analogous operations;
- 6) salvaging, removal or destruction of a wrecked ship or her freight and the expenses caused thereby;
- 7) any agreement of use or hire of a ship;
- 8) any agreement of carriage of freight or passengers on a ship;
- 9) loss of or damage to goods including baggage during transportation or in connection with it;



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- 10) general average;
- 11) pilotage;
- 12) towage;
- 13) supplying foodstuffs, materials, fuel, equipment, including containers, for operation of a ship and her maintenance;
- 14) construction, repair, reconstruction or reequipment of a ship;
- 15) charges and dues in port, canal, other navigable waters as well as in dock;
- 16) wages and other funds due to the master, officers and crew in connection with their fulfilment of official duties on board a ship, including the repatriation expenses and social insurance contributions paid on their behalf;
- 17) disbursements made on behalf of a ship by a captain, owner, charterer, or agent;
- 18) insurance premium including mutual insurance contributions paid in relation of a ship by her owner or the charterer on a bareboat charter;
- 19) any commission, broker, or agent remuneration paid in relation of a ship by her owner or the charterer on a bareboat charter;
- 20) any dispute over the right of property for a ship or her possession;
- 21) any dispute between two or several owners of a ship concerning the use of a ship and distribution of property;
- 22) mortgage of a ship;
- 23) any dispute connected with the sale agreement of a ship.

The above-mentioned list of maritime claims completely reflects the list of maritime claims contained in the *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (Brussels, 1952)*.

Of special importance in the practice of merchant navigation are maritime liens. A considerable disadvantage of the existence of this legal institute in Ukraine is absence of its normative definition. The most important characteristic of the

maritime liens, the complete list of which is provided in article 358 of the MSC, is the preferential right for the settlement of certain maritime claims prior to other claims and the priority of their settlement.

Arrest of a ship is one of the most important legal institutes defending the rights of creditors in merchant navigation. In most of the countries arrest of sea-going ships, as a rule, has its significant specifics. In Ukraine there is to certain extent a unique situation in this sphere. The judicial practice of arrest of sea-going ships is not uniform and, in fact, two approaches can be differentiated between within the practice.

According to the first one arrest of a sea-going ship is possible only as a security measure within action proceedings. While according to the second one such arrest is possible outside of action proceedings as a means of securing a maritime claim. As it is well known, the second approach is prevalent in the world practice; however, in Ukraine it has just a few supporters, which can be explained by serious deficiencies in Ukrainian procedural legislation. Neither the *Civil Procedural Code*, nor the *Commercial Procedural Code* contains special norms regulating the procedure of arrest of a ship on a maritime claim. In its turn the MSC, while providing for the possibility of such arrest itself, does not regulate its procedure.

Article 41 of the MSC provides for that the arrest of a ship is possible only under a court or arbitration decision or under the decision of the President of the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry. The latter, according to p.4 of the Statute on the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry, may happen only in the cases subject to consideration by the Maritime Arbitration Commission on the basis of an arbitration agreement.

In the MSC there are no rules defining the jurisdiction and cognizance of this kind of cases. The *Civil and Commercial Procedural Codes* also do not contain any special norms in this regard. Therefore, the jurisdiction is often defined at the place of location of immovable property, to which according to Article 1 of the *Mortgage Act of Ukraine* sea-going ships have also been attributed.

The absence of special regulation of the procedure of arrest of a sea-going ship as security for maritime claims as a rule has resulted in practice in the arrest of ships conducted as a security measure in action proceedings. However, quite recently in our practice there has been a case of arrest of a sea-going ship as providing security of maritime claims, which appeared due to rescue of a ship and general average. An application on arrest of the ship, located at the moment in Nikolayev Sea Trade Port, was considered by a district court of the city of Nikolayev. While accepting this application and during its consideration the circumstance that the ship had finished its voyage in this port was taken into consideration. According to article 278 of the MSC the relations connected with the general average are regulated by the legislation of the state in the port of which the ship has ended its voyage after the accident that caused a general average, if not otherwise provided for by the agreement of the parties. In addition, according to article 43 of the MSC a ship, in relation whereto maritime claims have arisen, may be arrested if a maritime claim belongs to the category of the maritime liens according to pp. 1, 2, 3-5 and 7 of article 358 of the MSC of Ukraine. Maritime claims of an applicant are attributed to the maritime liens according to p.4 part 1 of article

358 of the MSC. Having considered this application and the submitted documents the court passed a ruling on arresting the. Afterwards the parties have reached a settlement agreement and the ship was released from arrest. As we can see the major goal of the arrest of the ship, namely, forcing the debtor to provide the security demanded by the creditor in the order defined by the law was achieved.

To the best of our knowledge the above case was and remains the only in Ukraine when a ship had been arrested under maritime claim, not within the course of action proceedings as a measure securing a claim. Of course, the example provided above is not an evidence of a stable court practice of arrest of sea-going ships as security of maritime claims; it only confirms the thesis of possibility of such procedure in principle even in the existing legal field of Ukraine. It should be noted that the prevailing practice is still the arrest of ships as a security measure under the action proceedings. Thus, the problems still exist and there is no consensus of opinion on this question.

This discussion can be ended only by way of implementing special procedural rules in Ukrainian legislation relating to the arrest of ships under maritime claims, as well as by Ukraine's accession to the international conventions on the arrest of sea-going ships, to which the majority of the leading sea powers of the world are parties.

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