



International Comparative Jurisprudence



TRENDS IN SHIP ARREST. CASE STUDY – LITHUANIA

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Received 20 February 2017; accepted 16 April 2017

Abstract. The purpose of this article is to introduce one of the international ship arrest problems, ship arrest trends and compare these trends with the current ship arrest regime in Lithuania. The research shows that the present international regime is suitable for the current fast-changing society and a new convention should be drafted. The modern view of a ship arrest regime seems to be arrest-friendly since more and more various jurisdictions introduce presumptions or abolish strict requirements to make it easier for the creditor to arrest the vessel. The conclusion is that some changes should be made in Lithuania by introducing separate ship arrest rules in the Civil Procedure Code, which will eliminate uncommon and unnecessary restraints. The article will be useful to anyone interested in maritime law, i.e. lawyers, judges and law students.

Keywords: Ship arrest, maritime law, civil procedural law

Introduction

Nowadays we seek to modernize all technologies as well as customs procedures, cargo handling technologies and etc. In the same way, we seek to make legal regimes efficient and appropriate to our fast-changing society. In this study, the author seeks to highlight the main trends and issues of ship arrest, which are no longer suitable for the current maritime society.

Without a doubt ship arrest has considerable implications to the international trade. In general, an arrest means the detention of a ship by judicial process to secure a maritime claim (Nikčević Grdinić, Nikčević, 2012, p.103). Modern maritime trends in Europe show that legal systems are evolving to become more arrest-friendly jurisdictions. For instance, as of 2013 the requirement to prove urgency and threat to the claim is no longer applicable in Germany (Germany – Ship Arrests in Practice, 2016). Thus, even Germany, which is known to be rather strict towards the arrest of ships is changing its laws to be a more arrest-friendly jurisdiction. However, some of countries still prefer the strict regime. In this comparative analysis, Lithuania will be taken as an example.

The arrest of ships in Lithuania is the field of law which has not received much attention so far. Unlike in England or the Netherlands, neither the Code of Civil Procedure (hereinafter referred to as the “CCP”) nor any other Lithuanian national law provides rules to cover ship arrest.

The 1952 International Convention Relating to the Arrest of Sea-Going Ships (hereinafter referred to as the “1952 Convention”) came into force in Lithuania as of 4 May 2002 and is now directly applicable in Lithuania. The 1952 Convention is limited only to an arrest as a conservative measure, which means that an arrest can be placed before

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the start of the court proceedings, so the debtor will not be able to hide his assets before the court judgment is delivered. Accordingly, in this article the arrest of ships shall be discussed as a conservative measure.

In the light of what was said above, the main objectives of this study: (1) to find and ascertain the most critical shortcomings of the prevailing international regime; (2) to determine the current ship arrest trends; (3) to compare the current ship arrest trends with the regime in Lithuania.

In order to complete these objectives, the author will make a comparative analysis of rules and courts practice of common law and civil law jurisdictions. Due to the limited scope of the study and language barriers this article does not analyze all possible jurisdictions.

1. The need of an open list of maritime claims

Before starting a discussion about the arrest of ships in Lithuania and other jurisdictions, there is another topic of international importance which draws attention. Pursuant to the rules of the 1952 Convention, ship arrest can only be made on the basis of a maritime claim and no other claim (Article 2 of the 1952 Convention). This is the first and the main precondition of any ship arrest. However, if the 1952 Convention does not apply, then a ship may be seized in relation to any claim, whether maritime or not.

Article 1 (1) of the 1952 Convention provides a closed list of specific maritime claims. Pursuant to this provision, a maritime claim should be understood as a claim which is enumerated in the Article and no other claim. Thus, the drafters of the 1952 Convention took a strict approach. The supporters of the “closed” list approach consider this strictness as benefit. They believe that by leaving no room for ambiguity and deviation, it subsequently allows avoiding divergence, ensures consistency of interpretation and upholds international uniformity (Lynn, 1999, p. 464). It should be noted that the maritime claim list in the 1952 Convention was based on the list of claims which the English High Court had admiralty jurisdiction under section 22 of the Supreme Court of Judicature (Consolidation) Act 1925². The distinction between maritime claims and non-maritime claims arose in England as a result of battle between the common law courts and the Admiralty court. Thus, the original purpose was to divide claims for each particular jurisdiction, i.e. either to the common law court or the Admiralty court (Meeson, Kimbell, 2011, p. 17-18). However, during the preparation works of the 1952 Convention, the drafters had many discussions regarding the type of claims in respect of which a ship shall be arrested (Berlingieri, 2011, p. 41-42). The common law countries supported the idea of a “closed” list; thus, their position was that a ship should be arrested only in respect of specific maritime claims. Conversely, the civil law countries took the view of an “open” list and argued that the arrest should be permitted for any claim, whether maritime or not (Berlingieri, 2011, p. 41-42). In order to reach the consensus and adopt the convention, the drafters found a compromise and the view of the common law system was taken (Berlingieri, 2011, p. 6).

The so called “open” list should not be understood as a “list” whatsoever. The maritime claim should be considered as any claim of maritime nature. Unfortunately, there is not a single convention which provides an “open” list of maritime claims. However, during the preparation of the 1999 International Convention on the Arrest of Ships, there was an attempt to create a general clause followed by a non-exhaustive list (Berlingieri, 2011, p. 48-49). This clause was worded as follows: “*Maritime claim*” means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or out of a mortgage or a ‘*hypothèque*’ or a charge of the same nature on any ship, or out of salvage operations relating to any ship, such as any claim in respect of: <...>” (Berlingieri, 2011, p. 49).

Supporters of an “open” list argue that it leaves flexibility in wording so that the convention or any law instrument may evolve to meet unforeseen future changes in the maritime industry (Islam, 2007, p. 76). When the drafters of the

² Supreme Court of Judicature (Consolidation) Act 1925. See also Comité Maritime International, *The Travaux Préparatoires of the 1910 Collision Convention and of the 1952 Arrest Convention* (Comité Maritime International 1997) 274; Francesco Berlingieri, *Berlingieri on Arrest of Ships* (5th edn, Informa Law 2011) 41-42.

1999 Arrest Convention decided to take a “closed” list approach, William Tetley, one of the most famous maritime law scholars, shared his disappointment: “*it is regrettable that an “open-ended” list was rejected, because it would have provided greater flexibility to courts applying the Arrest Convention 1999 in future years*” (Tetley, 1999, p. 1966). Indeed, neither one of the mentioned conventions can keep up with the fast-changing maritime society. Even if the new convention was drafted, it is unlikely to be successful since all conventions in maritime industry are being changed extremely slowly. Without a doubt, with the help of growing technologies, maritime industry may encounter new maritime claims and soon there will be even more claims of maritime nature which are not covered under the 1952 Convention. As a matter of fact, the list in the 1999 Convention was already extended by five additional claims. This demonstrates that a “closed” list approach is impractical for the dynamic maritime society (Lynn, 1999, p. 465). Thus, since a “closed” list cannot take into account new types of maritime claims, an “open” list would enable the judge to interpret the law in respect to any new maritime phenomenon.

However, both arrest conventions have “closed” lists and it violates the creditor’s interests. For instance, if the creditor will submit a claim which is not in the list of claims under the 1952 Convention, but at that time it could be considered as a maritime claim, the creditor will not be able to arrest the ship. Therefore, the shipowner is in a better position than the creditor. Having said this, maybe a new and modern convention should be drafted in order to restore the balance between the interests of the creditor and the shipowner. Unfortunately, it is very unlikely that the new convention would be successful, because shipowners will not be willing to waive a regime which is favourable to them.

2. Uncommon requirements

Each jurisdiction has its own rules to govern the procedure of ship arrest, but despite this there is some resemblance between various jurisdictions. Lithuania is not an exception. As in every jurisdiction, Lithuania has some differences from the others. Pursuant to Article 144 (1) of the CCP, the claimant must prove that, in the absence of provisional protection measures, the enforcement of the court’s judgement may get complicated or become impossible. Under Article 147 (3) of the CCP, if the claimant seeks to obtain an arrest before submitting the claim, he has to prove urgency of such arrest.

Thus, in order to obtain an arrest of a ship, the creditor must bring a proof of urgency, i.e. a proof showing a possibility of embezzlement, or the creditor must prove the risk that the upcoming court’s judgment may not be enforced. The courts of law in Lithuania introduced the presumption that a high monetary claim objectively increases the risk of non-execution of the court’s judgment³. However, this presumption is not absolute and in every case the court must assess factual circumstances and the respondent’s financial perspectives⁴. Thus, in order to prove the risk of embezzlement or non-execution of the court’s judgment, the claimant must demonstrate the poor financial position of the shipowner (Driukas, Valančius, 2006, p. 526). This means that the creditor must be able to provide the court with financial documents of the shipowner. However, other documents may be sufficient as well, such as documents indicating the debt to tax authorities or documents showing a vast number of court proceedings instituted against the shipowner and etc. For instance, Vilnius regional court rejected the application of ship arrest on the grounds that the applicants have not provided any evidence regarding the poor financial position of the respondent and ownership of the vessel, thus there was no reason to believe that the court’s judgment will be executed in full (Decision of the Vilnius regional court, 30 July 2013).

Moreover, according to the current court’s practice, even if the creditor manages to prove a poor financial position of the shipowner, it will not be enough to arrest the vessel. The arrest order may be issued only if there is evidence of the respondent’s bad faith, i. e. that the respondent intends to dispose of the assets and etc. Thus, the submission of a civil claim alone without showing a proof that the respondent will seek to avoid the enforcement of the court decision (in other words, act in bad faith) will not form a ground to apply provisional protection measures⁵. This is extremely

³For example, the decision of the Court of Appeal of Lithuania, 2 August 2012, case no. 2-783/2012.

⁴For example, the decision of the Court of Appeal of Lithuania, 28 May 2013, case no. 2-1535/2013.

⁵ For example, the decision of the Court of Appeal of Lithuania, 7 January 2016, case no. 2-27-407/2016.

hard to prove and in many instances the applicant may not possess any documents or information which can indicate bad faith of the respondent. In case of a ship arrest, the applicant may argue that the ship will sail away out of the court's jurisdiction and the court's decision may not be enforced. However, sailing away to its destination is a normal operation of a ship and it does not indicate bad faith of the shipowner. Therefore, the court may not be convinced that there is a necessity to arrest the vessel.

On the other hand, according to the Lithuanian courts practice, it is not enough to prove the threat to enforcement of the judgment. The claimant is also required to prove that the enforcement of provisional protection measures will not violate the principle of proportionality. For instance, in one case, the court rejected the arrest application, because the amount of the claim was not considerably large to the respondent as a private company (Decision of the Vilnius regional court, 30 July 2013). In that case, the court held that principles of procedural law require to keep the balance of parties' legitimate interests, thus the provisional protection measures must be implemented or selected in a such way that neither one of the parties would receive undue advantage (Decision of the Vilnius regional court, 30 July 2013).

Although, the 1952 Arrest Convention does not demand such a requirement of proportionality, but in the same way the Convention does not prohibit it. On the one hand, this requirement is completely acceptable, but on the other hand, as long as ships are involved, this requirement is absolutely inconsistent with the principles of maritime society. In most cases, the ship value will exceed the amount of a claim by a significant margin. In addition to this, a ship may also be the only asset in the jurisdiction and it may also easily leave the port, as well as leaving the claim (even the small one) unsatisfied. As a consequence, the shipowner may start abusing his position and enjoy somewhat of immunity, if his ships cannot be arrested for relatively small claims.

As it was mentioned, the application of Lithuanian law has some differences compared with the other analysed jurisdictions. For example, in Sweden, the claimant must also prove the risk of embezzlement (Section 1 of Chapter 15 of the Swedish Code of Judicial Procedure), but it is presumed that ships as a property are easily moved from place to place; thus, the ship can escape the jurisdiction without any difficulties. The same presumption is applicable in the Netherlands (Articles 711 (1) and 728 (1) of the Dutch Civil Procedure Code). Because of this, under the Dutch laws it is not necessary to prove the risk of embezzlement⁶ (Haak, 2007, p. 116). Similarly, in France, the claimant is not obliged to prove the urgency of the arrest⁷ (Cour de Cassation, November 18, 1986). Furthermore, in Germany, the requirement to prove urgency and threat to the claim is no longer applicable (Germany – Ship Arrests in Practice, 2016). Also, after the “good reason” requirement was abolished, there was no significant increase in court requests to provide counter-securities. Thus, even Germany, which is known to be restrictive towards ship arrest, is changing its laws to be a more arrest-friendly jurisdiction.

Another interesting presumption is found in the Scandinavian law. In both Norway and Sweden, a ship may be arrested without any special reason if a maritime claim is attached to a maritime lien (Falkanger and others, 2011, p. 42) (Section 33-2 (3) of the Dispute Act of Norway, Section 2 of Chapter 15 of the Swedish Code of Judicial Procedure). In principle, such presumption creates a situation where a ship may be seized regarding every maritime claim against the shipowner. However, one must remember that presumption is applicable only when the claim is attached to a maritime lien. Despite this, the shipowner will still be able to resist the arrest of the ship if the claim of creditor is defective. For instance, in well-balanced legal systems as the Netherlands, an arrest must be lifted if it is summarily shown that the debtor has no valid claim, or the arrest was unnecessary, or, a sufficient security is put up for that claim (Article 705 (2) of the Dutch Civil Procedure Code). In principle, the same provisions are in Articles 149-151 of the Lithuanian CCP.

⁶ Krijn Haak, *The Netherlands* (Kluwer Law International, 2007) 116; see also ‘Dutch Beslagsyllabus (Arrest Syllabus)’ [2016] August <<https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/Handelsrecht>> accessed 13 November 2016.

⁷ Cour de Cassation, November 18, 1986, DMF 1987, 696; see also Cecile Lagos, *Transport Law in France* (Kluwer Law International 2012) 132.

To conclude, in the most of analysed jurisdictions the trends are to facilitate the claimant's burden of proof by introducing presumptions or to abandon the requirement to prove the threat to enforcement of the court's decision whatsoever. Although, some jurisdictions require to provide counter-securities, in general the law and maritime society is evolving towards the arrest-friendly direction. Unfortunately, Lithuania does not follow the current ship arrest trends. Hopefully, the aforementioned requirements in Lithuania will be considered as unnecessary restraints.

3. A lengthy procedure

The creditor's interest is to get an arrest order as soon as possible while the ship is still berthed in the port. However, pursuant to Lithuanian law, the court can decide, whether to grant the leave of provisional protection measures, up to three working days after the request was received (Article 147 (1) of the CPC). Naturally, within the period of three working days, the ship may be sailed far away from the jurisdiction. Although in practise it is a rare case when the court takes all three days to decide, but the fact that regulation allows three days period may affect the creditor's decision to obtain the arrest in Lithuanian courts.

Alternatively, the relatively quick procedure is common in the Netherlands. Under Dutch law, the arrest order may be obtained within one working day and may be handed over to the bailiff on the same day (Verhoeven, 1995, p. 15). Article 700 (2) of the Dutch Civil Procedure Code provide that the injunction judge can give authority to make the attachment on all days and at all hours. Therefore, if there is a situation where the arrest order is needed after working hours or in holidays, the standby judge may be addressed with the issue. Furthermore, bailiffs are also available at all hours (Verhoeven, 1995, p. 15); thus, after the arrest order has been obtained from the standby judge, the creditor has no restraints handing it over to the bailiff.

The procedural rules which are applicable in the Netherlands are the most suited to comply with the aforementioned creditor's interests as these rules allow the creditor to obtain and enforce an arrest within hours regardless of the court working hours. Accordingly, the procedural rules in the Netherlands should be taken as an example in other jurisdictions.

4. Wrongful arrest of ships

Pursuant to Article 6 of the 1952 Convention all questions related to whether the claimant is liable for damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for. Thus, the Convention itself does not deal with questions of wrongful arrest of ships, but leaves the matter to national law. As long as international uniformity is concerned, the study shows that the question of liability for wrongful arrest of ships is quite a controversial one. Nevertheless, the liability for wrongful arrest is one of the most important aspects in the ship arrest procedure. The possibility to claim damages incurred by the wrongful arrest maintains the procedural balance between parties. Also, the possibility to become liable for wrongful arrest is probably the primary reason which stops the creditor for submitting the arrest application in bad faith. Thus, any reasonable lawyer should agree that the liability for wrongful arrest is an essential element of the ship arrest procedure.

The liability regimes regarding wrongful arrest may be divided into three main groups.

In the first group of jurisdictions, the shipowner is not able to recover any damages for wrongful arrest unless he can prove that the claimant's actions may be attributed to bad faith (also known as *mala fides*) or gross negligence (known as *crassa negligentia*) (Hill, 1995, p. 143). Naturally, it is very hard to prove such degree of claimant's fault and the claimant might enjoy somewhat of immunity against being sued for damages (Sheppard, 2013, p. 42). In England, this liability regime has been settled for almost 160 years ago in the landmark case of *The Evangelismos*⁸, which

⁸ *The Evangelismos* (1858) 14 Eng. Rep. 945 (P.C.); Robert Margolis, 'Damages for the wrongful arrest of a vessel: the venerable rule confirmed' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 11.

created a longstanding rule known as “the Evangelismos test”⁹. Nevertheless, this rule is still applicable, but the existing liability regime in England draws more and more criticism¹⁰.

In the second group of jurisdictions, the courts award damages when the creditor abused his right of conservatory arrest (known as *abus de droit*). The leading example of such regime is France. Pursuant to French law, not every unsuccessful claim, in respect of which the arrest was made, will qualify as an *abus de droit* (Smeele, 2007, p. 269). According to the Cour de Cassation, it seems that a higher degree of fault is required, i.e. the fault in the form of malice, bad faith or gross negligence (Tetley, 1998, p. 1079). In *La-Bonita* case, the Cour de Cassation ruled that if bad faith on the part of the claimant cannot be proved, the claimant had not abused his right to arrest a ship¹¹. Consequently, this means that the French law position regarding liability regime bears some resemblance to the English regime.

The last group has the strict liability regime in which the arrestor, irrespective of the fault, is liable for damages when the claim is rejected on the merits. The most common example of such liability regime is found in Germany. Under German law, the claimant will be liable for damages caused by wrongful arrest even if he acted in good faith. Quite similar regime exists in the Netherlands. The wrongful arrest is explained as an unjustified violation of debtor’s proprietary rights, i.e. the creditor by enforcing an arrest violates the property rights of the debtor unless he can find a reasonable justification (Smeele, 2007, p. 274). The claim against the debtor is considered as a reasonable justification, but if the claim fails, this would mean that the arrest was an unlawful act (Smeele, 2007, p. 274).

Lithuania also applies the strict liability regime. According to the Supreme Court of Lithuania, if the plaintiff request to apply provisional protection measures before the resolution of the dispute, he acts at his own risk and he is obliged to compensate for losses incurred by the respondent if the claim fails (Decision of The Supreme Court of Lithuania, 20 October, 2015). This means that even if the claimant acted in good faith he cannot escape liability. However, the person who requests to apply liability for wrongful arrest must still prove other conditions of civil liability such as incurred damages. The mere fact that the claim was dismissed and the arrest was wrongful does not necessarily mean that the person incurred damages (Decision of The Supreme Court of Lithuania, 6 August, 2015).

The liability for damages made by wrongful arrest is definitely the issue which is considered before submission of an arrest application to the court. In some situations, the creditor may submit the arrest application to the jurisdiction where the liability regime is more favourable to him (Eder, 2013, p. 117). So, which liability regime should prevail? On the one hand, the liability regime in England or France does not discourage the creditor from making a ship arrest. On the other hand, it is self-evident that the fault of *mala fides*, or *crass negligentia*, or *abuse de droit* (Smeele, 2007, p. 269-270) is extremely hard to prove and the creditor enjoys somewhat of immunity. Thus, the fact that the shipowner cannot claim damages for the wrongfully detained vessel demonstrates the unreasonable violation of his interests. The balance must be kept and if the creditor is allowed to make an arrest, accordingly the shipowner has to be entitled to get compensation for damages caused by wrongful arrest. Therefore, the best choice is to apply the strict liability regime which provides somewhat of a balance. However, the strict liability regime brings some criticism as well. It is possible that the court will change the previously existed interpretation of the legal issue which was for the benefit of the claimant. In fact, this is a very common practice in civil law countries. The courts tend to change the interpretation of specific legal issues according to the fast-changing society and its values as well as economic and political factors (Vaišvila, 2004, p. 362). In such case, the creditor with a valid claim has to take a risk that the court may change the interpretation of the particular legal issue. Needless to say, that such a risk cannot be held as reasonable and just against the creditor.

⁹The “Evangelismos” test: “<...>is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff; or that gross negligence which is equivalent to it?”

¹⁰ See Bernard Eder, ‘Wrongful Arrest of Ships: A Time for Change’ [2013] 38(115) *Tulane Maritime Law Journal* 115-136; Aleka Mandaraka Sheppard, ‘Wrongful arrest of ships: a case for reform’ [2013] 19 *The Journal of International Maritime Law* 41-59.

¹¹Cour de Cassation com 29.11.1983, D.M.F. 1984, p. 552 [*La-Bonita*]; see also Frank Smeele, Liability for wrongful arrest of ships from a civil law perspective. In Rhidian Thomas (ed), *Liability Regimes in Contemporary Maritime Law* (Informa Law 2007) 270.

As a result, we can see that neither one of the liability regimes can be applied alone. It seems that plausible medium must be found between different legal regimes (Davies, 2013, p. 142). It is clear that such regime should have the adjusted strict character, because only a strict liability regime can restore and maintain the balance between the creditor's and the shipowner's interests (Smeele, 2007, p. 276). However, no one has yet managed to introduce such a medium liability regime. The possible option might be the prudent, reasonable and objective lawyer's standard. However, the reasonable lawyer's standard removes the strict character and the regime will not be different than in England or France. So, the plausible medium regime is yet to be found.

Conclusions

1. The "closed" maritime claims list in the 1952 Convention cannot keep up with the fast-changing maritime society which encounters new maritime claims. The fact that the list in the 1999 Convention was extended by five additional claims prove in itself the impracticality of the "closed" list. A new and modern convention should be drafted in order to restore the balance between the interests of the creditor and the shipowner. Unfortunately, it is very unlikely that such convention can be successful, because shipowners will not be willing to waive the regime which is in their favour.
2. In the most of analysed jurisdictions the trends are to facilitate the claimant's burden of proof by introducing presumptions or to abandon the requirement to prove the threat to enforcement of the court's decision whatsoever. Although, some jurisdictions require providing counter-securities, but in general the law and view of maritime society is evolving towards the arrest-friendly direction.
3. The Lithuanian ship arrest procedure and practice does not follow the current maritime trends and it must face some changes. The main change must be made by introducing separate ship arrest rules in the Code of Civil Procedure. These rules, must include a provision which would abolish the requirements to prove urgency and the threat to enforcement of the judgment. However, the creditor still takes the risk and if the claim proves to be unsuccessful, he will be liable for the caused damages. Also, the new rules must have a slightly different procedure from the common rules regulating provisional protection measures. The legislator (1) should create the possibility to obtain ship arrest after court's working hours and (2) they should decrease the duration of ship arrest procedure. If Lithuania manages to make those changes, our ship arrest procedure will be modern and match well-balanced legal systems, like that of the Netherlands. More arrest-friendly jurisdiction would allow Lithuania to make a huge step towards becoming a modern maritime country. If there are any doubts about these changes, the author would like to draw attention to the fact that the Netherlands, as one of the most arrest-friendly jurisdictions, is a leading country in maritime and has the largest port in Europe.

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