

CONVENTIONAL AND NON CONVENTIONAL ARREST OF VESSEL IN SLOVENIA.

By Peter Kos
Attorney Peter Kos
Vojkovo nabrezje 23
6000 koper, Slovenia
Tel: +386 5 627 80 90
Fax: + 386 5 627 80 91
Email: info@peterkos.com
www.peterkos.com

I. Introduction

The Republic of Slovenia became independent in 1991 as one of the youngest European maritime states, became the member of European Union in May 2005. Slovenia is a civil law country with the result that the doctrine of *stare decisis* is not observed. Maritime legislation is within the authority of the Slovenian Parliament (*Državni zbor*) while maritime cases are taken before the District Court of Koper (*Okrožno sodišče v Kopru*) and the Court of Appeal (*Višje sodišče v Kopru*). The right to appeal to the Supreme Court of the Republic of Slovenia (*Vrhovno sodišče Republike Slovenije*) is also granted on certain conditions, when the amount of the dispute exceeds 4.500,00 EUR. Accordingly, whenever the vessel has to be arrested in Slovenia, a petition for an arrest order must be filled before the District Court of Koper. The Court can issue arrest order (*temporary measures*) irrespective of whether a contract contains an arbitration clause and even if a contract contains an exclusive foreign jurisdiction clause. This is also because the arrest order is issued in a special kind of proceedings, called »non-litigious proceeding«, which is not directly connected with the merits of the claim. It is customary for a foreign plaintiff to retain a local lawyer, who must be supplied with a written power of attorney. It needs not to be verified by notary or any other authority. As for the defendant's lawyer a power of the attorney signed by the vessel's master will suffice.

Slovenia is a party to many international maritime conventions (e.g. *the 1952 Arrest Convention*), however there are still a number of them which have not been ratified (e.g. *the 1968 Visby Protocol and the 1999 Arrest Convention*). There are two possibilities for the implementation of international conventions into the Slovenian legal system. The first is ratification of the convention, while the second is its incorporation into marine legislation (i.e. *the Maritime Code*).

According to the Article 8 of the *Constitution of the Republic of Slovenia*, national law and other regulations must be accordance with generally valid principles of international law and with international agreements (e.g. *conventions*) by which Slovenia is bound. Ratified and published international conventions are directly applied by Slovenian Courts.

The new Maritime Code (*Pomorski zakonik*) of the Republic of Slovenia, which entered into force on May 12th, 2001 regulates exhaustively virtually all areas of admiralty law, including law of the sea, safety at sea, registration of ships, liens and mortgages (*hypothecs*), contracts (e.g. carriage of goods and passengers, marine insurance), liabilities, collisions, salvage, general average, conflicts of laws, as well as arrest of ships. It is worth noting that the legislators have taken into account the recent developments of international maritime law.

II. International conventions and national law regulating arrest of ships

Slovenia is one of the contracting to the *International Convention for the Unification of Certain Rights Relating in the Arrest of Seagoing Ships*, adopted in 1952 (*1952 Arrest Convention*). The Convention applied in its original text whenever the ship to

be arrested is flying a flag of the contracting state. On the other hand, if the Convention is not applicable, the provisions of the *Maritime Code* will be applied. The arrest of ships is regulated in Slovenia by two pieces of legislation: the *Maritime Code* and the *Enforcement and Security Act (Zakon o izvršbi in zavarovanju – ZIZ)*. The first is *lex specialis* governing maritime matters, whereas the latter applies in proceedings which are not specifically concerned with ships but may be applied to ships under the general law. Both Acts use the same *terminus technicus* for their proceedings, i.e. temporary injunctions or temporary measures. (*začasne odredbe*).

The *Maritime Code* regulates the arrest of ships in Part VIII, Chapter IV, Section IV, Articles 945 – 959, and it has almost entirely adopted the provisions of the 1952 Arrest Convention. Nonetheless, it is worth noting that some provisions are already based on the 1999 Arrest Convention (e.g. the enlarged list of maritime claims).

III. Differences between conventional and non conventional arrest of vessel

According to the aforementioned Article 8 of the Constitution of the Republic of Slovenia, international conventions which have been proclaimed and to which Slovenia adheres shall have immediate effect in the wording which have been ratified and published. Slovenia is a state party to the 1952 Arrest Convention and accordingly if the vessel is flying the flag of a contracting party it can be arrested in Slovenia exclusively for maritime claims listed in Article 1 of the Convention. On the other hand, for a ship which is flying the flag of a state which is not party of 1952 Convention it is necessary to distinguish between two situations.

The first situation, occurs when there is reciprocity between the state whose flag the ship flies and the Republic of Slovenia. In this case that ship can be arrested only for maritime claims listed in Article 841 of the *Maritime Code*. The requirement of reciprocity means that if Slovenian ship can be arrested in a state which is not a party to the 1952 Convention only as a security for maritime claims, also a ship flying the flag non-party state can be arrested in Slovenia only for maritime claims provided for in the Slovene legislation. Otherwise, if the requirement of reciprocity is not fulfilled the ship can be arrested in Slovenia for every claim independently of its maritime nature.

The list of maritime claims contained in Article 841 of the *Maritime Code* is broader than in Article 1 of the 1952 Arrest Convention, as some maritime claims were added also from the new 1999 Arrest Convention.

According to the Article 841 of the *Maritime Code* the following claims have a maritime nature:

1. Damages arising from a collision of a ship on which enforcement is being conducted or otherwise;
2. loss of life or personal injury occurring, whether on land or on water, in connection with the operation of the ship;
3. salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage the environment;
4. any agreement relation to the use or hire of the ship and any agreement relating to the carriage of goods or passengers on board, whether contained in a charter party or otherwise;
5. general average;
6. pilotage and towage;
7. goods or material supplied to a ship, for her maintenance and operation
8. construction, reconstruction, repair, equipping or docking of the ship;

9. wages and other sums due to members of the ship's crew in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
10. disbursement related to the ship made by master, shipper, charterer or agent on behalf of the ship, ship owner or ship operator;
11. insurance premiums in respect of the ship, payable by or on behalf of the ship-owner or demise charterer;
12. damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; Costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph;
13. cost or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
14. loss of damage to or in connection with goods (including luggage) carried on board the ship;
15. port dues and charges
16. any dispute as to ownership or possession of the ship or between co-owners of the ship as to the employment or earnings of the ship;
17. a mortgage or a charge of the same nature on the ship

Broadly speaking, a ship which is flying the flag of a contracting state to the 1952 Arrest Convention can be arrested in the Republic of Slovenia only for maritime claims listed in Article 1 in that Convention. If the ship is not flying the flag of contracting state it can be arrested for maritime claim listed in the Maritime Code (the broader list, almost identical to the list of maritime claims in the 1999 Arrest Convention) if there is reciprocity between Slovenia and the State of the flag, otherwise it can be arrested for practically every claim.

IV. Subjectivity

As the Slovenian legal order does not allow »*actio in rem*«, the personal liability is the main criterion whether a ship can be arrested. It is possible to arrest a ship in Slovenia also for a claim against the bareboat, demise and time charterer, and in certain limited cases also against the voyage charterer. However, if the ship is not owned by the charterer or operator of the ship against whom the maritime claim is arrested, it can be arrested but the maritime claim cannot be enforced through the forced sale of the ship. So far, the Slovenian Courts have been also reluctant to pierce to the corporate veil.

The provisions of the Maritime Code dealing with this subject are quite similar to those contained in the 1952 Arrest Convention, although there are certain differences. The article 984 of the Maritime Code contains the following provisions:

- (1) Any ship may be arrested which is owned by the same personal debtors, or which is for the claim for which arrest is sought, encumbered by a maritime lien or another right of pledge based on the foreign law, and for other claims listed in the article 841, para.3, of this Act which relate to the ship.
- (2) If the debtor is the bareboat or demise charterer of the ship or a charterer, who according to the law applicable to the contractual relation between him and the ship-owner or ship operator is alone liable to the third persons – this ship may be arrested or any other ship which is owned by the debtor.
- (3) The provisions of the previous paragraph shall also apply in all other cases where an operator or employer who is a personal debtor, and who is not the owner of the ship, is himself liable for the claims for which the arrest of the ship is sought.

(4) In the respect of a claim relates to the owners of the ownership, co-ownership or a mortgage on the ship, only the ship to which this claim relates may be arrested.

The vessel to be arrested must be still owned by the debtor at the time of arrest, except in the case if the claim is secured by a maritime lien, mortgage. For a sister ship arrest the claimant must demonstrate that the alleged sister ships are at the moment of arrest still in the ownership of the debtor.

Generally speaking, if a ship has been already arrested or adequate security provided for the same claim by the same debtor, that ship, as also sister ships, cannot be arrested for the same claim.

V. Other specific preconditions to arrest

The mere allegation of the creditor (claimant) that he has a maritime claim is not enough for a Slovenian Court to grant an arrest order. The creditor must show, if the ship is coming from a state party, at least a probable *prima faice* claim.

Furthermore, according to the Maritime Code the mere probation that the claimant has a probable claim is not enough for an arrest, as the claimant must also prove the danger that without the arrest debtor may try to avoid payment or that there is the risk that the claim may not be recovered.

For an arrest order to be granted the creditor must therefore firstly establish a probable claim, and afterwards to show on the facts of the case (e.g. the acts of the debtor) that there exist a reasonable possibility that the debtor may try to avoid payment or that there is a risk that the claim may not be recovered. It is presumed that such danger exists if payment is to be collected from abroad. If the ship is flying the flag a non-contracting stat it is enough for the claimant to show that he has a probable claim.

VI. Jurisdiction and proceeding for maintaining an arrest

As already mentioned the Slovenian Court has jurisdiction to grant an arrest order also in the case if a contract contains a jurisdiction or arbitration clause. Arrest proceeding and the action on the merits are separate proceedings, however they are interconnected. If the parties do not agree on the jurisdiction or arbitration clause, the Court which issued the arrest order will in most cases also have jurisdiction to decide the case on the merits. As already mentioned, in Slovenia all maritime cases (including arrest) are dealt by the District Court of Koper. Exclusive jurisdiction of the Slovenian Court is regulated in the Article 965 of the Maritime Code, regarding other claims the jurisdiction in cases of international elements (the Maritime Code and the Conflict of Laws Act). The parties may agree to a jurisdiction or arbitration even after arrest.

Every arrest must be latter confirmed by a judgment or award on the merits, which is the basis for the enforcement of the claim. In this respect the Article 952 of the Maritime Code provides that the claimant must commence proceedings on the merits and give a formal notice to the court, all within 15 days from the date of the notification of the arrest. This is also in the case if the claim on the merits is a subject to an arbitration clause. If the arresting party had not started proceedings on the merits in the mentioned time limit and grave the notice to the Court, the ship or any security which has been provided must be released upon the application of the opposite party (debtor).

FIFTH GENERAL MEETING

www.shiparrested.com

RIGA, 8-10 MAY 2008

____ CONFERENCE PAPERS ____



**FIFTH MEMBERS' MEETING OF SHIPARRESTED.COM
RIGA, 8-10 MAY 2008
PROGRAMME**

Conference hosted by Edward Kuznetsov on Friday May 9, 2008

9:00 - Opening and conference session

Valentine de Callatay / Shiparrested.com Network / Opening Address and Introduction

Adrian Christea / CRISTEA & PARTNERS, Romania / "Ship arrest in Romania. Applicability of International Conventions"

Peter Kos / Advocate, Slovenia / "Conventional and non-conventional arrest of vessel in Slovenia"

10:15 - Coffee break

10:45 - Conference session

Arthur A. Nitsevych and Nikolay Melnikov / International Law offices, Ukraine / "Ukrainian shipping in change: overview"

Russell Kelly / LA Marine, UK / "Criminal prosecutions in the UK for breaches of merchant shipping regulations"

Alberto Batini / BB & PARTNERS, Italy / "Ship Arrest pending Enforcement of Arbitration Award in Italy"

12:15 - Conference lunch

13:30 - Conference session

Ana Cristina Pimentel / Armando Henriques, Ana Cristina Pimentel & Associados, Portugal / "Arrest of ships in Portugal – Law and Practice"

Feh Henry Baaboh / Henry, Samuelson & Co., Cameroon / "Ship arrest as an executory measure"

Tony Swinnerton / Swinnerton Moore LLP, UK / "Beneficial ownership"

15:00 - Coffee break

15:30 - Conference session

Gerda Verstappen / Dynamar, Holland / "Marine Investigation and Vessel Tracking - Theory and Practice"

Steven D'Hoine / D'Hoine & Mackay, Belgium / "A few minefields in the 1976 LLMC Convention"

Aleksandrs Abuzjarovs / Marine Legal Services, Latvia / Topic to be declared

17:00 - End of the conference

19:00 - Conference dinner at "Kalku Varti"