

12_Issues Related to Maritime Claims and the Arrest of Ships[english]

Business operations relating to international seaborne trade are often quite dynamic and intensive. The relationships concerning the use of ships are complex and quickly changing, while the contracts for the supply of goods and services to ships are concluded with entities from different countries, e.g. bunkering contracts, contracts for the supply of special oils or repair works, or contracts for the replacement of parts of the ships. Given the various options for the operation of a ship by different persons in accordance with different legal arrangements, it is often the case that the supply requests are made by persons other than the owner of the ship, which makes it necessary to assess on behalf of whom the contract has been concluded and whether the creditor is entitled to a maritime claim in the specific case and therefore the creditor has the power to request the arrest of the ship in accordance with the applicable substantive and procedural law of Bulgaria. This issue is of great practical relevance, insofar as the arrest of a ship is typically an effective measure to secure future or existing claims due to the great loss and damage that the defendant would sustain in the event of a lengthy stay of the ship at the relevant port of her arrest which, in its turn, often leads to willingness to settle the dispute in an amicable way and to reach out-of-court satisfaction of the creditor.

In this connection, in accordance with Article 364a(1) of the Merchant Shipping Code (MSC), a ship at a Bulgarian sea port, regardless of the flag that ship is flying, may be arrested only to secure a maritime claim within the meaning of Article 1(1) of the International Convention on the Arrest of Ships. For this reason, it should be clarified, first and foremost, what the maritime claim is, what legal grounds can be invoked and which persons would be passively legitimized in the event of a maritime claim.

The definition of the term “maritime claim” is set out in the International Convention on the Arrest of Ships. Most generally, it means a claim arising out of loss or damage caused by the operation of the ship, the ownership, possession and use of the ship, her complement, the goods carried on board, the damage caused by the ship to the environment, and the costs or expenses for port services. The types of relationships which could lead to a maritime claim are exhaustively enumerated in the Convention and the courts of justice are very strict in the assessment of the existence of such a legal relationship.

Next, it should be clarified which person would be the defendant in maritime claim proceedings. Typically, it is the person in possession of the ship, i.e. the person operating the ship on his own behalf, regardless of whether this person is the owner or user of the ship on other legal grounds (e.g. a bareboat charter contract, a time charter contract, or another type of contract). Therefore a shipping agent, for instance, could not be the defendant even when the grounds for serving a maritime claim in accordance with the Convention are in place because the shipping agent represents the owner, charterer, manager or operator of the ship before the port authorities, before all government institutions and bodies, and before all natural and legal persons in Bulgaria. In accordance with Article 222 of the Merchant Shipping Code, the agent acts on behalf of and at the sole expense of the person in possession of the ship, i.e. the representation is direct and all legal effects apply directly to the represented person without changing the legal sphere of the agent unlike the case of indirect representation. The legislation enables the shipping agent to conclude transactions relating to the ship's stay at the port as instructed by the person in possession of the ship but this does not mean that the agent could be considered a debtor in the bilateral relationship in which the agent took part as a direct representative of one of the parties¹.

In the same vein of thought, the ship's manager could not be passively legitimized in cases of maritime claims relating to the supply of goods and services or the insurance of the ship or other grounds, insofar as the ship's manager is obligated to provide one or more services which are explicitly enumerated, for consideration, to the person in possession of the ship and cannot be considered to be operating the ship in any way. Therefore if the ship's manager negotiates, for instance, the supply of fuel and lubricants, it will be the person in possession of the ship who will be directly liable for the related debt. As stated above, this person is not necessarily the ship's owner.

The liability of the bareboat charterer for any debt relating to the maintenance and operation of the ship is a different case. In accordance with the legal definition which is set out in Article 199a MSC, a bareboat charter contract is a contract to charter a ship for a certain period of time, under which the charterer is granted full powers to possess and control the ship, including the powers to appoint the master, the officers and the rest of the ship's complement throughout the chartered period. The liability of the charterer to third parties

includes the claims arising out of the operation of the ship in accordance with Article 199h MSC and the obligation of the ship's owner to deliver the ship fit for service to the charterer covers the condition of the hull, the machines and the equipment in accordance with Article 199e(1) MSC. After the ship's owner fulfills the obligation to deliver the ship fit for sea service, the maintenance of this fitness is the obligation of the bareboat charterer in accordance with Article 199e(2) MSC. The law-maker has included the explicit provision (Article 199e(2), second sentence of the MSC) that the removal of any hidden defect of the ship is the obligation of the ship's owner, whereas all costs or expenses relating to the operation of the ship are to be borne by the charterer in accordance with Article 199g MSC. For this reason, the bareboat charterer is a person in possession of the ship within the meaning of the MSC and is passively legitimized for any transactions he has concluded for the operation of the ship.

These persons who are liable under maritime claims, however, are not necessarily the persons with respect to whom the arrest of the ship could be allowed to secure a debt.

The latter include, first and foremost, the persons who were owners of the ship at the time when the maritime claim arose provided that they are liable for the claim and are owners of the ship at the time of the arrest. It is also possible to allow the arrest of a ship or ships which, at the time of the arrest, are owned by the person who is liable under the maritime claim and who, at the time of asserting the claim, was the owner, bareboat charterer, time charterer or voyage charterer of the ship involved in the maritime claim.

Furthermore, the arrest is admissible with regard to a ship the bareboat charterer of which was liable under the maritime claim at the time of its assertion and the person is the bareboat charterer or owner of the ship at the time of the arrest.

Finally, the arrest is admissible against persons who are liable under maritime claims arising out of rights in rem or encumbrances on the ship.

In all cases, the arrest of a ship which is not owned by the person who is liable for the maritime claim is admissible only if the laws of the State in which the arrest is requested allow enforcement measures relating to the claim through a court judgment or forced sale of the ship.

As to the applicable substantive law, in accordance with Articles 9, 12, 13 and 23 of the Merchant Shipping Code, the law of the State the flag of which is flown by the ship (law of the flag) regulates the legal grounds and the scope of the liability of the person in possession of the ship, the legal status of the members of the complement and the relationships between the members of the complement and the person in possession of the ship, and the relationships arising out of or in connection with events or actions on board of the ship at sea or in waterways outside the jurisdiction of any State. Where an international agreement to which Bulgaria is a party sets out rules other than those laid down in the Code, the provisions of the international agreement prevail. At the same time, the ownership right and the other rights in rem relating to ships, the acquisition, modification or transfer of these rights and the entry into the register of ships are regulated by the law of registration, while the form of the agreement transferring ownership rights or vesting rights in rem to a ship is governed by the law of the State where the agreement is concluded.

In closing, it should be pointed out that when a ship is arrested to secure a claim it is necessary to act promptly due to the risk that the ship might leave the relevant Bulgarian port and avoid the arrest. Therefore it is important to assess several basic elements. Firstly, it should be clarified whether a maritime claim within the meaning of Article 1 of the Convention exists or not. Next, it is extremely important to examine the legal relationships between the creditor and the possible defendant and the passive legitimation under the relevant maritime claim so that to assess whether the possible defendant belongs to the group of persons with respect to whom the arrest of the ship is admissible as a measure to secure the claim. The assessment of these factors is a guarantee for the prompt and effective arrest of ships as a measure to secure the debt to creditors in existing or possible future maritime claims, while minimizing the risk of unjustified arrest of ships, which could generate big loss or damage for the person in possession of the ship.

1 Cf Judgment No 1100 of 3 December 2013 in Appellate Commercial Case No 1188/2013 of the Varna Regional Court.