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-convential 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"


SHIP
ARRESTED.COM

SHIP ARREST IN ROMANIA. APPLICABILITY OF INTERNATIONAL CONVENTIONS.

By Adrian Christea
CRISTEA & PARTNERS
Cuza-Voda street,nr.54,flat 3
900682 Constanta, Romania
Tel 00 40 241 518 112
Fax 00 40 241 518 802
Email: adiclaw@seanet.ro

Conditions imposed by Romanian law:

a) Indicate and provide evidences to the Court that plaintiffs have started the main legal action (Court action or arbitration proceedings according to the provisions of the C/P or B/L) against the defendant. The evidence should be a letter from a Court, apostilled according to Hague Convention 1961 or a letter from the arbitrator appointed showing that arbitration has started;

b) Indicate and provide evidences to the Court that the defendant in the main proceedings is the owner of the vessel;

c) Provide a bank letter of guarantee to the Court up to the amount of 10 % of the claimed amount (the amount will be fixed by the Court but in most of the cases is 10%). The main purpose of such bank letter of guarantee is to compensate the losses of the defendant owner if finally the claim of the plaintiff will be found ungrounded by the Court. In many of the contracting states of the 1952 Arrest Convention , there is no practical applicability of such provision.

In case the matter is very urgent, vessels can be provisionally arrested through the Harbour Master, paying a tax of Euro 400 (Saturdays and Sundays Euro 800).

A notice of arrest will be notified to the Harbour Master. Harbour Master will place the order of arrest to the vessel's file and will not interupt in any way vessel's operations. Notice of arrest will become effective when the vessel will finalise operations and vessel's agent will attend Harbour Master to receive vessel's permit to leave outside. Starting with the hour when vessel's agent will ask for the Permit to leave, Harbour Master will count 24 hours (Saturdays and Sundays are not included within this hours anyway) and the vessel will be arrested for 24 hours. During these 24 hours, plaintiff will need to apply to the Court asking for the arrest of the vessel. Courts are judging these cases on an urgent basis and normally are issuing the decision within 24 hrs. There is no need for the time being to place the counter-security which will be requested by the Court at a later stage.

Court costs are in the region of Euro 100. Lawyer fees normally calculated on hourly basis. Costs are usually recoverable from defendant.

Romania has acceded to the International Convention for the unification of rules about the arrest of vessels, signed in Brussels on May 10th 1952, on November 8th 1995. For the participant states of the 9th Diplomatic Convention of Maritime Law, it was enforced on February 24th 1956.

Article 8, paragraph 1 of the Convention provides that its provisions are applicable in any contracting state to any vessel that carries the flag of a contracting state. Paragraph 2 of the same article concedes the possibility that vessel that carries the flag of a non-contracting state may be arrested in one of the contracting states according to one of the claims listed in Article 1, or according to any other claim that permits the arrest according to the laws of that state. We consider that this stipulation flagrantly contravenes the principle of *"RES INTER ALIOS ACTA",* principle that needs to be observed even in the treaties between states.

Particularities of some of the maritime claims of 1952 Arrest Convention.

a) Masters, officers or the crewmembers payments; English legal practice witnessed the problem whether these payments should include expenses as well, the adjacent wages paid by the employer, such as the payment of contributions for social insurance, dues, retirement fund etc. and the answer was positive, meaning that the wages of the crewmembers include the respective adjacent expenses; likewise, they have decided that the financial loss generated by the lack of employment, caused by an accident, maritime disaster is not a maritime claim in the sense of the Convention stipulations;

Interesting problems have been witnessed in the Romanian legal practice with regard to whether the allowance for travel abroad of the crewmembers represents a maritime claim in the sense of the stipulations of article 1 item 1 letter m) of the Convention, considering that Romanian crew members receives their salaries both in the country, in Romanian lei, and also the respective allowance for travel abroad, due to them during their displacement in international voyages. The answer may be found by conducting a comparison between the 1952 Arrest Convention, respectively article 1 item 1 letter a) of the Convention regarding maritime privileges and mortgages of 1993, Convention that hasn't been ratified by Romania yet. While the first Convention makes reference to masters', officers' or crewmembers' salaries, the Convention regarding maritime privileges and mortgages expressly stipulates: "salaries and any other amounts due to the Master, officers and crewmembers, amounts due as a result of their being employed onboard the vessel, including costs necessary for their repatriation and social insurance contributions". The fact that the second convention which, otherwise, is much newer, includes within maritime privileges area all rights owned by navigation personnel, while the first convention only makes strict reference to salaries, leads us to the conclusion that, at present, according to the law, allowances for travel abroad are not included within the maritime claims category. Considering that in all the other member countries of the Convention there is no distinction between the salary and the allowance for travelling abroad and for reasons of justice, we believe that the respective allowance can be included within the category of salaries, from the point of view of Convention applicability. Nevertheless, in order to stop floating legal practice of the member states of the Convention regarding arrest of maritime vessels, proposals were made for the amendment of this convention, in the sense of aligning the terms used in the Convention regarding maritime privileges and mortgages.

It is very important to mention, within the study of article 3 of the Convention, the existing distinction between maritime privileges and maritime claims governed by the Convention. The privilege is, according to the definition given by art. 1722 Civil Code as well as by the literature in the field, "the acknowledged right of a creditor, which usually arises out of its claim quality, to be preferred before the rest of the creditors, even mortgagers".

Within the domain we are interested in, privileges are governed by the International Convention for the unification of certain rules regarding maritime privileges and mortgages – Brussels, April 10th 1952, Convention ratified by Romanian Law no. 43/1937. Maritime claims, on the other hand, according to the definition given under art. 1 item 1 of the 1952 Arrest Convention , have the meaning of the affirmation of a right or a claim as a result of one of the causes listed under paragraphs a) – q) under art. 1.

As a result of the above mentioned matters, there is an essential difference in Romanian law between maritime privileges and maritime claims, difference arising out of the fact that, while privileges are generally known as real guarantee rights, giving the holder both a purchase right and a preference right, representing a favour granted by the law to a creditor, based on which it is to be paid before all other creditors, maritime claims are of no such nature, they being nothing else but

simple claims arising out of certain legal facts or acts, result of maritime vessels exploitation.

Article 7 of the 1952 Arrest Convention includes a very important attributive clause competent for the trial merits judgment, in favour of the Courts of the states where arrest took place, respectively if these courts are competent according to the internal law of the state where the arrest is approved, in one of the cases mentioned by the Convention.

This disposition of the Convention has special practical and theoretical value, disputing the Romanian civil procedural system governing the arrest procedures contained under art. 907, 908 Romanian Commercial Code, the first quoted article expressly disposing on the fact that the interested party in a commercial cause shall be able to request the arrest on the mobile assets of its debtor , but only simultaneously or subsequent to previous commencing of the action on the merits (main claim proceedings) against the debtor. According to the system instituted by art. 7 of the Convention, the request of arrest on the vessel belonging to the debtor shall automatically entail the competence of the respective court in judging the action on the merits between the parties, under the situations restrictively presented under art. 7 par. 1 item a)-f). As a result, the dispositions of the Convention always allows commencing of the arrest proceedings previous to the claim on the merits, having as consequence the establishment of the competence of the respective court in judging the action on the merits in the cases shown above, the derogatory nature of the norms under art. 907 Commercial Code resulting with evidence.

The attribution of jurisdiction, operated by the Convention in favour of the court at the arrest place is not an exclusive rule, but establishes an alternative competence, the plaintiff having the possibility of commencing the claim on the merits to a competent court according to the law applicable to the legal report between the parties.

The fact that the Convention derogates from the provisions of art. 907 Commercial, establishing in certain cases a distinct system of procedures governing the institution of arrest on the maritime vessel, is very clearly explained by the provisions of art. 7 par. 2. According to it, in case the court under whose jurisdiction the vessel was arrested has no competence to decide on the merits of the trial (respectively there is none of the situations stipulated under art. 7 par. 1), the bail or guarantee requested according to the provisions of art. 5 of the Convention in view of releasing the arrest, shall guarantee the execution of any condemnations subsequently delivered by the competent court in order to decide on the trial's merits and the court or any other legal authority of the arrest shall establish a time limit until when the plaintiff shall initiate proceedings before the competent court.

According to the provisions of article 7 par. 3 of the 1952 Arrest Convention "*If the agreements between the parties include either an attributive clause of competence of another jurisdiction, or an arbitral clause, the court shall be able to establish a time limit within which the plaintiff shall be allowed to initiate proceedings on the merits*".

Generally, Romanian courts of justice considers that, reported to the provisions of art. 6 par. 2 of the Convention (*the application of procedure rules of the contracting state law where the arrest was requested*) and the dispositions of art. 907-908 Romanian Commercial Code, the condition of the existence of an action on the merits pending with a court of justice or arbitration court on the date of starting the arrest procedures is not fulfilled and they usually rejects the request for vessel's arrest in case of the inexistence of the main claim proceedings on the date of commencing the arrest proceedings.

In our opinion, these considerations have no legal grounds for the reasons listed below:

a) according to the provisions of article 11 para 2 of the Romanian Constitution, the "*Treaties ratified by the Parliament, according to the law, are part of the internal law*";

b) The International Convention of 1952 for the unification of certain rules on the arrest of maritime vessels was ratified by Romania in the virtue of Law no. 91/1995, being thus an internal law, which governs a special matter and which contains its on procedural provisions;

c) Article 6 para 2 of the Arrest Convention makes reference to the procedure rules which are not provided by the Convention, avoiding those for which the Convention has its own procedural rules;

d) Art. 907-908 Commercial Code, respectively art. 591 and the following of the Civil Procedure Code represent general provisions, with procedural applicability in all cases considering the issue of arrest procedure on any goods, and the provisions contained under art. 7 of the Convention are special provisions, derogatory, which apply in the case of a maritime vessel arrest (special affectation goods) only, not in the case of any other goods;

e) Art. 7 par. 3 of the Convention is naturally found after art. 6 par. 2, case which clearly shows the legislator's will to decide in the sense already mentioned, thus the provisions contained under art. 7 par. 3 having no longer a meaning and, at the same time, no practical application;

f) Most or possible all signatory countries of the 1952 Arrest Convention apply the rules concerning the arrest of vessels in the sense mentioned above;

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 me 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 if 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 nothing 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 injuctions 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 nothing 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 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) carries 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).

UKRAINIAN SHIPPING IN CHANGE.

By Arthur Nitsevych, and Nickolay Melnykov
International Law offices, Ukraine
2/4 Observatorny Lane, Suite 57
65014 Odessa, Ukraine
Tel: 38 048 7155855
Fax: 38 0482 496925
Email: odessa@murs.com.ua
www.admiralty.com.ua

Although Ukraine is a shipping country with long traditions it still does not view this sphere as the most important. This is a view on changes in this industry.

Port development

Ukraine envisages that in near future the growth tempo of containerization will be great. So, to meet the contemporary needs it is necessary to solve the issue of combination of work of several huge container terminals in sea ports with high-capacity terminals inside Ukraine.

Four main ports in Ukraine (Odessa, Ilyichevsk, Yuzhny, Mariupol) provide about 70% of all sea port cargo operations in Ukraine. Looking at the map and analyzing the prospects of the cargo base, there are two main development trends. The first is the reconstruction of available port berths together with the increase of depths and loading capacities. The second is to create new handling terminals. Anyway, the most likely could be business alliance with successful companies which control freight flows and intend to use port cargo terminals.

According to IMO rules the supervisory body of shipping safety and environmental protection cannot be the part of a commercial structure. So, state-owned ports, anyway, keep general control of the port and the state supervision of safety conditions and commercial operations regarding stevedoring and storage are separate. The advantages of state control in safety questions are thus combined with those of private initiative and competition in cargo operations. Port management is now becoming not a commercial but an administrative structure, operating the public (state) property of the port and implementing the supervision on the safety of the shipping industry in port waters.

There are many programs led by European institutions to study the existing options of port development in Ukraine. For example, we have been involved in *Illichivsk Port Modernisation Project and Corporate Development* financed by EBRD and *"Improvement of Maritime Links between TRACECA and TENs Corridors*".
The conclusion is that in near future there will be a boom in port development in Ukraine by providing different schemes of PPP (public private partnerships).

Ship arrest

The development of shipping has always been an external policy priority in Ukraine. So, there is an extreme necessity as to settlement of the existing disputes in that area to allow the foreign and domestic ships feel safe and secured once entering Ukrainian ports. There are two basic legal acts which regulate the arrest of a ship - the Merchant Shipping Code of Ukraine and the Civil Procedural Code of Ukraine. Ukraine is not a signatory of Ship Arrest Convention, thus, all the proceedings happen under local legislation.

Since there is no strict procedure of ship arrest the above Acts create prospects for different tricks and traps. For instance, a claim can be brought against a resident of Ukraine who is the agent of a shipowner, and that will be considered as a ground for the ship arrest although the action will be defeated.

There are also a number of provisions in the Civil Procedural Code in which a claim may be brought in the place the damage occurred or in the place the damage occurred or in the location, if the location of the shipowner is unknown.

A provision of the Business Procedural Code stipulates that the court may arrest a vessel giving an order on provisional measures for 10 days period. During that period of time the claim must be filed to a corresponding court or arbitration. But once again different tricks provide the extension of 10 days period of time.

The conclusion is that in Ukraine it's extremely difficult to arrest a vessel, but once she is arrested it's much more difficult to release her. This requests being very accurate in claims handling and disputing. Clients are recommended to be advised by lawyers once the dispute arises to settle the amicable agreement or to find some other solution before ship arrest in Ukraine.

Yachting

Set on the northern shores of the Black Sea, between the Azov Sea and the Danube Delta, Ukraine has been endowed by nature with many more natural harbours than any of its neighbours. Some of these are on the Azov Sea, an enclosed body of water that until recently was barred to foreign vessels. Facilities for yachts in Ukraine are limited but are constantly improving, and the opening of a new marina in Odessa has made a great difference. Another is being built in Ilyichevsk.

Several rallies held in the Black Sea in recent years have persuaded the authorities to bring about some considerable improvements to the yachting infrastructure. The present legislation provides good opportunities both to build marinas with modern infrastructure and to build new boats. It's important that clients can obtain a ready-made product financing its construction stage-by-stage at a very competitive price.

Ship building and repair

The share of the Ukrainian vessels in cargo transportation in Ukraine is about 5%, the average vessel age is more than 20 years old. The existing programs to build new vessels belonging to different state-owned ship owners are not being implemented because of a lack in financing. Nevertheless, Ukraine continues to be a well-known shipbuilding country as it has many shipbuilding yards.

Today there are some changes. There are agreements under which Ukrainian shipbuilders build new vessels financed through the European bank of Reconstruction and Development (EBRD). Ukrainian shipbuilders can be very successful, for example, in building tugs. Foreign orders include building ship hulls. Although the heart of shipbuilding is Nikolaev, Kherson and Sevastopol are also trying to develop its business.

The main trends of shipbuilding development are creation of normal conditions to finance the shipbuilding; and creation in the local basin of Black Sea and Azov Sea of main-line feeder systems to transport containers and oil products.

In the meantime, the ship repair industry is also being developed. To begin with it has been connected with the lease of former state-owned ship repair yards in Ilyichevsk and Mariupol. Investors began to implement their investment programs which immediate effect. There are many private ship repair companies providing ship repair at competitive conditions. Clients must be very careful as ship owners and ship repairers usually use offshore entities. This often does not enable to settle claims and disputes go to local courts.

Ship registration

Ukrainian registry provides for full registration and parallel registration under bareboat charters. The main issue to remember is that the vessel can fly the flag of Ukraine if it belongs to an entity created either by Ukrainian physical or legal persons. So, companies with foreign elements must build their structures in a sort of way that provides the fulfillment of the above rule.

Although the vessel registered in Ukraine does not bear any tax privileges sometimes it may be an interesting tool in shipping management, for example, taking into account the requests of ITF and other seafarers' employment regulations.

Employment of seafarers

Ukraine is one of the largest seafarer suppliers to the world maritime fleet. Although there is a paucity of precise information on seafarers employed in the industry, the estimated number of Ukrainian seafarers is not less than 75,000. About 30% are engaged on the national flag vessels and Ukrainian vessels trading under a foreign flag. The others are employed on the foreign flag vessels. Anyway, Ukraine enters the top five labour supplying nations.

The bulk of claims, whether crew, admiralty, pollution or cargo are handled entirely by the local correspondents. But things happen and occasionally it is impossible to reach agreement. In Ukraine as a rule the seafarer (or his family) is represented by local lawyers supported by the Trade Union Officials, or vice versa. At this stage it is necessary to seek advice and support from specialist law firms. In a Ukrainian court it is extremely difficult to fight on employment issues. The legislation is very old (The Labour Code has come into force in 1971 in the Soviet Union era) and does not meet modern requirements. So, preference is to meet with either the crewman or his representatives face to face and negotiate a compromise. Sometimes it may be possible to allow each party to go away with something at the very beginning of the dispute. Sometimes it may involve a relatively inexpensive concession from owners, for instance, to agree an extra period of sick pay or to fund rehabilitation. Sometimes it simply becomes a matter of agreeing payment of an agreed sum, within a short time period and with a further agreed sum for the lawyers representing the crewman.

What are the general chances of shipping development in Ukraine? First, Ukrainian shipbuilding offers cheap labour but enough qualified resources with old but solid shipbuilding facilities. Ukraine produces much steel. This provides a unique chance for this sector if local shipbuilders unite with foreign investors who have a combination of finances and modern technology.

Second, Ukraine still keeps qualified crew members with the well-developed education that improves their chances of working overseas.

These two possibilities – shipbuilding export and export of crew members – can be effectively used today because they reflect global trends in shipping. Our experience in legal assistance for many projects both above and others makes us believe so.

THE CONSEQUENCES OF BREACHES OF MERCHANT SHIPPING REGULATIONS IN THE UK

By Russell Kelly
LA Marine, Lester Aldridge LLP
Alleyn House
Carlton Crescent
Southampton, SO15 2EU
Tel : 02380 827415
Fax : 02380 827452
Email : russell.kelly@LA-law.com
www.la-marine.co.uk

In this session we will review the Authorities' powers to detain vessels and prosecute owners and crew. We will consider typical offences for which vessels are detained and prosecuted and the penalties imposed and we will look at the procedures involved and consider how to respond if your client's vessel is investigated or detained.

Over the past three years over forty reported prosecutions have been brought by the MCA, of which nearly half involve foreign registered vessels or foreign seafarers. Typical offences include breaches of the Collision Regulations, pollution, conduct endangering ships or individuals, drunkenness (in breach of the Railway and Transport Safety Act, breach of prohibition notices, improper certification, forging certificates and cheating in exams). We will look at the offences and penalties in more detail later on.

Inspections and investigations of both British flagged and foreign flagged ships in UK ports are undertaken by surveyors from the Maritime and Coastguard Agency (MCA). These surveyors are appointed under the Merchant Shipping Act 1995 and have wide powers, including the right to board a United Kingdom ship wherever it may be in the world and any other ship (foreign flag) in United Kingdom waters if they have reason to believe that it is necessary for them to do so.

It is an offence under Section 260 of the MSA to intentionally obstruct an inspector in the exercise of his powers.

If an inspector is of the opinion that a person has contravened a regulation he may serve an improvement notice requiring the person on whom the notice is served to remedy the contravention of the regulation in question within a specified period.

If an inspector is of the opinion that activities have been carried out on board the ship or are likely to be carried out on board the ship which involve the risk of serious personal injury or serious pollution of any navigable waters the inspector may serve a prohibition notice. This will specify the matters which give rise to the risk (or contravention of the regulations) and will direct that the activities to which the notice relates shall not be carried out and/or that the ship shall not go to sea until the matters referred to in the notice have been remedied.

So the inspectors have fairly wide powers and these are used on a regular basis, both to undertake port state control inspections and to investigate possible breaches of statutory regulations.

Prosecutions can be brought by the MCA, the Crown Prosecution Service and the Police or by the relevant Harbour Authority where the offence occurs within the jurisdiction of that harbour. Following investigation by the MCA inspectors a report will be compiled and referred to the Secretary of State who will make a decision as to whether to drop the matter, issue a caution or to prosecute. A prosecution will be commenced by issuing a summons in the Magistrates Court. Unlike in civil proceedings, where there is a specialist Admiralty Court to deal with shipping

matters, there is no such equivalent in the criminal court system and matters will be heard in a Magistrates Court along with run of the mill offences and be determined by lay magistrates (not legally qualified) who are not familiar with the Regulations or the offences concerned.

Many of the offences are such that can be determined by either the Magistrates Court or the Crown Court. In the Crown Court the matter is heard by a judge with a jury.

The maximum penalties for most offences arising under the Merchant Shipping Act and the Regulations made thereunder is £5,000 in the Magistrates Court. There is, however, no limit on the fine if the matter is dealt with by the Crown Court. In respect of pollution the maximum fine that can be imposed by the Magistrates Court is £250,000, again this is unlimited in the Crown Court. Certain offences also carry the possibility of imprisonment, for example a person guilty of an offence under Section 58 of the Merchant Shipping Act (Conduct Endangering Ships, Structures or Individuals) can receive imprisonment for a term not exceeding two years if the matter is dealt with in the Crown Court. The Magistrates Court has no power to imprison for this offence.

It would be rare for the maximum sentence to be imposed, particularly on a first time offender where there were genuine reasons for the breach of the regulations. A review of the reported prosecutions certainly supports this view.

Clearly it would be unwise to ignore a prohibition notice if one is issued by an inspector as this can lead to prosecution and a fine. However, it is possible to contest the issue of a prohibition or improvement notice by giving notice to the inspector who issued that notice, within 21 days of receiving the inspector's notice, referring the matter to an Arbitrator for determination. Referring the matter to an Arbitrator in this way suspends the operation of the improvement notice until the Arbitrator's decision is published. In the case of a prohibition notice the Arbitrator must be asked to rule whether the notice is suspended pending his decision. If the Arbitrator decides that there was no valid basis for the inspector's opinion or that it was unreasonable to issue a notice in those circumstances, he may cancel the notice or amend it as he thinks fit. Both parties may make representations to the Arbitrator before he makes his decision. If the Arbitrator decides that the prohibition or improvement notice was not validly issued the Arbitrator may award the person on whom the notice was served compensation in respect of any loss suffered by him in consequence of the service of the notice. Any compensation awarded under this section will be payable by the Secretary of State and where a vessel suffers unreasonable delay by reason of inspection and detention the owners or charterers may be entitled to claim damages and costs from the Secretary of State.

SHIP ARREST PENDING ENFORCEMENT OF ARBITRATION AWARD IN ITALY.

By Alberto Batini
Batini & Associati
Via Di Franco 9
57123 Livorno, Italy
Tel: +39 0586 883232
Fax**:** +39 0586 884233
Email: albatini@tin.it
www.studiolegalebatini.com

1. Uniform law on Arbitration. The Conventions governing the International Commercial Arbitration.

1.1 The advantages of arbitration over traditional litigation in national courts for parties to international contracts wishing to settle their disputes are well known. One of the main advantages is without any doubt the existence of multilateral and bilateral international conventions on the recognition and enforcement of foreign arbitral awards, the most famous being of course the New York Convention of 1958 which succeeded the 1927 Geneva Convention and the 1923 Geneva Protocol. There are of course important multilateral international conventions such as for instance in Europe the Brussels Convention or the Lugano Convention, however their application is much more limited than the New York Convention of 1958 to which today more than a hundred countries have adhered to.

1.2. The New York Convention is generally considered as the most successful international convention in the field of international private law. It has been interpreted and applied in more than 700 court decisions in which the national courts have generally supported the Convention to a large extent. These decisions are reported and commented upon in the *Yearbook Commercial Arbitration* which has devoted since 1976 a separate section on them. According to the leading commentator of the New York Convention, Professor Albert van den Berg, the enforcement of an arbitral award has been refused in less than 5% of the cases. This being said, although Article III of the Convention clearly lays down a general obligation of the Contracting States to recognize and to enforce the foreign arbitral awards subject to the conditions set forth under Articles IV and V, the interpretation and application of the Convention in some Contracting States has been sometimes problematic. Some authors consider in this respect that *"the principal weakness of the New York Convention seems to be its failure to define certain terms"* such as for instance "arbitral awards" or "public policy".

2. National or Domestic Rules

Should neither multilateral conventions nor bilateral conventions on recognition and enforcement of arbitral awards be binding upon the state in which a party intends to enforce an award, then that party should examine the question of enforcement under the national or domestic rules of the particular country or state.

Due to the number of multilateral and bilateral conventions and, in particular, to the constantly increasing number of states which are parties to the New York Convention, this situation becomes very rare.

However, it is important to mention that even if a country is a party to a convention such as for instance the New York Convention, consideration may still have to be given to the national or domestic rules which in some countries implement the Convention. For instance, in the United States the Convention has been implemented by federal law that is to say the Federal Arbitration Act (FAA). In other countries such as for instance Switzerland, the New York Convention is, on the contrary, directly applicable and did not need to be implemented internally.

In the United States, when neither the New York Convention nor the bilateral conventions ("FCN Treaties") are applicable, one has to refer either to Chapter I of the FAA or to the various state laws on enforcement of arbitral awards.[1]

3. The 1958 New York Convention on the recognition and enforcement of foreign arbitration awards: the Enforcement of foreign arbitration awards in Italy.

We have seen that the use of arbitration in international trade (and maritime trade) is widely accepted also in order to avoid unfamiliar courts in unfamiliar jurisdictions: however, one of the problems likely to arise is that in such an unfamiliar jurisdiction the final award is to be enforced, at least in case the losing party fails to comply spontaneously with the award. From this point of view the 1958 New York Convention is aimed at making properly-rendered arbitration awards easy to enforce abroad. Therefore, a prevailing party in an international arbitration can seek out the jurisdiction where a losing party's assets are located, recognise the arbitral award there, and attach those assets as if the award were a local court judgement. Before the New York Convention gained world-wide acceptance, many foreign tribunals were reluctant to recognise arbitral awards rendered against their nationals. Furthermore, many foreign tribunals lacked the legal procedures to enforce awards. The latter was not the case of Italy: our Code of Civil Procedure contains a set of rules dedicated to the recognition and to enforcement of foreign judgements and foreign awards, even if the enacting of the New York Convention implied that such rules were partially – even if not expressly - abrogated.

Italy is a Contracting State to the 1958 New York Convention, which was enacted with Law 19th January 1968 no. 62 and is in force as of 1st May 1969.

According to article I of the Convention, the same applies "*to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.*"

In Italy the New York Convention is applied *erga omnes* in respect of either Contracting or non Contracting States.[2] Accordingly, Italy is bound to apply the

---

[1] In Italy arbitration is governed by a set of provisions laid down by the Code of Civil Procedure. Specific rules apply to international arbitrations (such being those where either party was resident of, or had his actual seat in, a foreign State at the date of execution of the arbitration agreement, or at least a major part of the obligations arising from the contract had to be fulfilled abroad). Furthermore, particular provisions are dictated for the recognition and enforcement of foreign awards (it should be noted that Italy has ratified the most important international Conventions on the subject, such as the New York Convention on Commercial Arbitration of 1958 and the Geneva Convention of 1961).
Pursuant to Law no. 25 of 5th January 1994, the Italian law on arbitration has recently undergone extensive reform which should, inter alia, facilitate international arbitration proceedings. The above law both modified a number of the existing articles of the code of civil procedure and added a whole new chapter relating to international arbitration (articles 832 - 838). Amongst specific points of interest introduced by the new law is the fact that no specific approval is required for an international arbitration clause, unlike in relation to a "national" one. Arbitrators in "international" proceedings are also now to be permitted to make their award in the course of a conference held by video-telephone. One of the most important innovations of the new law, however, lies in the fact that a stream-lined procedure has been created for the recognition and execution in Italy of foreign arbitration awards. In this case an application must be made directly to the President of the Court of Appeal who will merely check compliance with a number of formalities before issuing an order for recognition and execution. The only pre-requisites for the latter are that the dispute relates to a subject matter that may be considered by way of arbitration in Italy, and that the award does not contain provisions which are contrary to "public policy".
It should, however, be noted that in the event of a successful challenge to such an order, the case will proceed by way of ordinary civil proceedings. In addition to the provisions relating to international arbitrations, changes have also been made in relation to the law governing arbitration in general. An arbitration agreement may now, for example, be entered into by way of telex or telegraph, and, more importantly, the arbitration clause may be contained in a separate document to the contract itself. Moreover, the validity of the arbitration clause can be considered separately from the rest of the contract, meaning that the arbitrators will now be able to act in cases where the validity of the contract itself is at issue. One of the most significant changes in the law, however, is the fact that jurisdiction in arbitration proceedings will no longer be excluded merely by the fact that proceedings are pending in the courts in relation to a case which is "connected" to the subject matter of the arbitration. Previously, case law reflected the tendency for arbitration cases to be "drawn" before the courts in such circumstances, and which was often used as a tactical manoeuvre to delay the duration of a dispute.
The parties may now also agree that in the event that the Court of Appeal should declare the arbitration award invalid, the case will be referred back for a second arbitration on the merits, unlike the previous practice, which was for the Court of Appeal to proceed to hear the case on the merits once it had decided that the award was null and void.

Convention to any arbitral award regardless the fact that the same was issued or not in another Contracting State. In addition, in various judgements our authorities and in particular *our Supreme Court stated that it is not necessary that the parties to the arbitration must be nationals of the State where the arbitration took place, or nationals of a contracting state. From this point of view, Italy is bound to apply the Convention even in case the arbitral award was issued in a non contracting state, and even if the parties of such an arbitration were not citizens of such a state, nor citizen of any contracting state.*

The application of the Convention is therefore unlimited, both under the point of view of "space", and under the point of view of the involved subjects: it is applied *erga omnes*[3].

4.The procedure to obtain the award recognition.

As I mentioned before until the new law on arbitration was enacted (1994) Italy had not complied with the requirement under article III of the New York Convention.[4]

Domestic arbitral awards are enforced through an easy and quick "exequatur procedure". Before 1994 in case where enforcement of a foreign arbitral award was sought, a civil procedure was to be started before the Court of Appeal of the place where execution was to be levied, serving a writ of summons onto the defendant and substantially waiting for a substantial period of time (usually at least three or four years) to have the award enforceable.

In the procedure of recognition Italian Courts applied indeed article V of the Convention, whose text reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

---

[2] When acceding to the Convention, Italy made no reservation at all notwithstanding what provided under article I para. 3 of the Convention, with relevant effects also with reference to domestic law. Actually, it is remarkable that, notwithstanding the fact that under Italian conflict -of - laws regulations a reciprocity clause exists (see article 16 of the preliminary disposition to the Italian Civil Code), at that time (1968) Italy did not declare that it would apply the Convention to awards issued only in the territory of another contracting State, and did not use the faculty expressly provided under article I para. 3 of the Conventions.

[3] However, being parties to the same Convention does not imply that construction and implementation of the Convention is the same among all the Contracting States. Lack of uniformity in interpretation and implementation of the Conventions is wide spread and for this reason the Working Group on arbitration of UNCITRAL (the United Nations Commission on International Trade Law) is examining possible means to achieve the objective of ensuring a uniform interpretation of some issues of the Convention, above all the issue of "form" (which shall be examined in para 3 below) so that the form responds to the needs of international trade. These "possible means" include also the adoption of a declaration, resolution, or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement.

[4] Article III states that "*each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards*".

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The above article limits dramatically the range of objections which can be raised by the defendants: however, the necessity of starting a civil procedure in order to have the arbitral award recognised was contrary to what the New York Convention provided under article III.[5]

[5] The procedure is modelled on that contained in the Brussels Convention. It can be summarised in brief as follows:

1. The request for the recognition and enforcement of a foreign award must be submitted to the President of the Court of Appeal, in the district of which the defendant is domiciled or in Rome if the defendant is seated abroad. For this purpose, it is necessary to join to the above request the award and the arbitration clause (or the contract in which said clause is embodied). Both documents must be exhibited either in original or through a certified copy.
The proceeding is rather quick. The President, after having verified the formal regularity of the award, declares that the award is enforceable, unless:

i) the dispute could, according to Italian law, not be submitted to arbitration; or
ii) the content of the award is against the public order.

2. Against the decree of the President, which declares that the award is enforceable, the defendant can, within 30 days from the notification of the decree, ask that the decree be revised by the Court of Appeal. In such a case, an ordinary proceeding of first instance will follow. Likewise, the revision of the denial of recognition can be required. The Court of Appeal can annul or revoke the recognition or the enforcement of the award, if the opposing party can prove that:

i) the parties were unable to stipulate the arbitration clause, or the clause was not valid pursuant to the law specified by the parties or, in the absence of a choice of law, by the law of the State where the award has been issued; or ii) the party against which the recognition of the award has been requested, was not informed of the appointment of the arbitrators or of the proceeding, or was unable to submit its defenses; or
iii) the award has pronounced on a dispute which was not contemplated by the arbitration clause, or the award has pronounced beyond the limits laid down in the clause; nevertheless, the parts of the award regarding questions covered by the clause can be recognized and declared enforceable, if they can be separated from the questions which were not included in the clause; or
iv) the appointment of the board or the arbitration proceeding did not comply with the provisions laid down by the parties or, in the absence of such provisions, with the law of the place where the proceeding took place; or
v) the award has not become binding, or has been declared void, or has been suspended by any competent authority of the State where it had been pronounced, or by any competent authority of the State in accordance with the law of which it had been pronounced.
In the case mentioned under v), if the annulment or the suspension of the award has been requested to the foreign competent authority, the Court of Appeal can stay the proceeding for the recognition or the enforcement of the award. If the proceeding has been stayed, the Court can, upon request of the party which has required the enforcement, order that an appropriate guarantee be given by the other party.
In addition to the aforementioned cases, the Court can refuse the recognition or the enforcement in the same cases under which the President of the Court can reject the request for the recognition of the award, previously examined.
It should be noted that, in any event, the provisions laid down by international conventions shall prevail on the rules previously examined.

3. Following the decree of recognition (or the judgment rejecting the request of revision), the enforcement proceeding can be started: ie, a formal summon to pay can be served on the defendant and, in case of non payment within 10 days, the seizure of the assets (movable or immovable) through the Court's bailiff, and subsequent sale through public auction, can be requested.
4. Practically, for the purpose of obtaining the recognition and the enforcement of a foreign award, the following documents are necessary:

- the original or a certified copy of the award;
-the original or a certified copy of the contract, in which the arbitration clause is embodied;
- a power of attorney, duly legalized by the Italian Consulate, or complying with the requirements laid down by the Hague Convention of 1965 ("Apostille").
As regards any certified copy of the award or of the contract, such a copy must be authenticated by a public Notary or by the Italian Consulate: the public Notary's seal should then be legalized through the "Apostille" (Hague Convention of 1965) or by the competent Italian Consulate.

5. The limit of the public order

As indicated, one of the main issue to be determined under article V of the Convention is the concept of *public order* preventing an award to be enforced. The concept of public policy, or public order, differs in civil law systems from the concept in common law, even if the meaning of this expression is to some extent vague and indistinct. Both article 16 of the 1980 Rome Convention on the law applicable to contractual obligations and article 27 of the Brussels Convention make reference to "public policy" or public order: in particular the latter article states "*A judgement shall not be recognised: 1. if such recognition is contrary to public policy in the State in which recognition is sought (*omissis*)."*

Usually a difference is made between domestic public order (which consists of high standard of morality and social conduct in a civilised society in general, and in that society in particular) and international public order/policy (which consists in the protection of fundamental principles of international community and the most fundamental principles inspiring the law). Article V of the Convention is constructed by our authorities as making reference to the international public order.
As far as "public order" is concerned, our authority have stated the following principles:

i. the procedure bringing to the award is not relevant;
ii. the fact that a procedure connected to the arbitral procedure is pending before an Italian Court is not relevant;
iii. the fact that the award was issued by two arbitrators is not relevant (under Italian law the panel of arbitrator must be composed of an odd number: one, three, five…)
iv. the fact that the reasons of the decision were not specified is not relevant,
v. the fact that the arbitrators decided only on certain issues, separating and postponing any decision on other issues, is not relevant.

However, it must be noted that a recent decision issued by the President of the Milan Court of Appeal refused the enforcement of an award since the same was obtained by a shipowner who, according to English law, appointed its arbitrator, who remained as sole arbitrator (and issued the award) failing the opponent to appoint its own arbitrator. This decision was highly criticised by our literature.

Nevertheless, usually our courts have used the concept of public order very sensibly and usually from this point of view problems are not likely to arise.

6. "Protective measures" pending recognition and enforcement.

Article 39 of the 1968 Brussels Convention reads as follows:
During the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought. The decision authorising enforcement shall carry with it the power to proceed to any such protective measures

Article 47 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters similarly states:

> 1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.
> 2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.
> 3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Under the 1958 New York Convention there is no similar provision: Sometimes it is advisable to "seize" ships or other assets before or pending the enforcement procedure in order to secure the applicant's credit. In the loop of law and Convention the problem is whether a Court order granting an arrest of assets (including ships) can be obtained before filing the application for the enforcement of the award, and whether execution can be started while pending the appeal procedure.

Considering that the *exequatur* procedure of a foreign award must be similar to the procedure to enforce an Italian arbitral award, indeed the case our firm and the undersigned was involved in 1999 obtained the first (and as far as we know, the last) precedent on the matter.

On behalf of Dutch interests we obtained in 1999 an arrest order of the mv "Radomyshil" belonging to an Ukrainian ship-owner from the Italian Court of Venice before starting the recognition procedure, which was then started before the competent Court of Appeal (in Rome). The opponents tried to challenge the decision sustaining *inter alia* that the competent Court to issue the arrest order was not the local Court but the Court of Appeal of Rome (i.e. the same court of the recognition), applying the above article from the Brussels Convention.

However, the Examining judge confirmed our opinion and the decision was published by Italian law review "*Diritto marittimo*" as the first precedent in favour of this theory. This avoids having to refer to the Court of the recognition to obtain an arrest, enabling the arrestor to file his arrest application directly to the Court where the vessel is lying. The practical implications are numerous. Basically in Italy the Courts of recognition of foreign awards, being Appeal Courts, are not familiar with arrest procedures. Moreover the time frame of an action in the Appeal Court is often longer and more complicated than in local first instance courts. Avoiding Appeal Courts will ensure prompt and smoother answers to arrest application to secure claims pending enforcement or recognition of arbitral awards. Subsequently both the Court of Appeal of Genoa (12.2.2000, Morviasputnik vs. Azov Shipping) and the Court of Appeal of Rome (15.07.2003, Martingale vs. Azov Shipping) reversed this jurisprudence. There is yet no Supreme Court ruling on this matter.

7. The 1952 Arrest Convention and Italian Ship's Arrest legislation.

Italy is also, as it is commonly known, a Contracting State to 1952 Arrest Convention[6]. According to the provisions of such uniform legislation a claimant might apply to the local Court in order to obtain an arrest order against a ship to secure one or more of the maritime claims listed under article 1.1 of the Convention, always provided that his claim is directed against either the registered owner of the ship or the ship owner (including bareboat or demise charterer) . Thus a 'maritime claim' against the time charterer or the voyage charterer or the manager of the ship could not be secured by way of a ship's arrest according to 1952 Arrest Convention. Nor any such claim could be enforced or secured by way of an arrest according to the Italian Code of Navigation, which provisions do not alter the fundamental rule of Italian common law stating that a debtor is liable for his obligations only with the assets falling in his property, unless a lien provided by the law attach a particular asset.

It should also be reminded that article 8 (2) of the Convention provides that a ship flying the flag of a non-Contracting state may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest. The consequence of this rule in Italy, as in many other jurisdictions, is that a claimant is entitled to apply for an arrest order against a ship flying the flag of a Contracting state only in respect of one or more of the maritime claims listed under article 1,

[6] 10.5.1952 Brussels Convention on Arrest of Seagoing Ships. The Convention was enacted in Italy with Law 25 October 1977 No. 880.

while, on the contrary, a vessel flying the flag of a non-Contracting State might be arrested in respect of such maritime claims and many other different claims. In this sense the ratification of the Arrest Convention guarantees the State that its flagged tonnage shall not be exposed in the other Contracting States to arrest measures different than the ones previously agreed in the Convention.

Therefore, in case the "winning party" in an arbitration seeks to enforce the award in Italy and intends to arrest a vessel of a loosing party which belongs to a Contracting State to 1952 Arrest Convention, this Convention shall apply, and therefore the vessel can be arrested only in case the award decides about a maritime claim listed under art. 1(1). On the other hand for execution proceedings in general this limitation does not exist, and any vessel can be attached as soon as the award is declared enforceable.

8. Damages for wrongful arrest

This interesting issue is referred by Article 6 of the Arrest Convention to the law of the Contracting State in whose jurisdiction the arrest was made or applied for. Italy, as United Kingdom, has a tradition of substantially exonerating the arrestors from a material risk of being found liable for damages for wrongful arrest. No express provisions could be found in the Code of Navigation while a general principle dictated in the Civil Procedure Code under article 96 states that an arrestor enforcing an arrest order without any right can be condemned to pay damages if he acted without the ordinary prudence. Clearly an arrestor acting under the scope of 1952 Arrest Convention is unlikely to be found lacking of a right of action or indeed acting without the ordinary prudence. There are no specific Court precedents on the subject. I recently settle at the last Court hearing a case on behalf of ship owners for damages for wrongful arrest which would have been the first ruling in Italy. In such case the arrestors obtained an arrest order pursuant to art. 1.1 (e) of the Convention against the new bareboat Charterers of a vessel to secure a claim arose under the previous bareboat charter party. The cargo claim was addressed to a different ship owner and furthermore the flag of the vessel (Panama) did not provide for any lien for such type of claim. Therefore the arrestor acted without any right under the Arrest Convention and without the ordinary prudence, having failed to ascertain the provisions of Panamanian law on liens and having disregarded our communications regarding the new bareboat charter party in force with a different ship owning company. The Court of first instance found in favour of the immediate dismissal of the arrest order originally granted *ex parte* by an honorary judge. Nevertheless, when the case for damages for wrongful arrest came before the Court, after a long trial the Judge suggested both parties to reach an amicable agreement because of the several doubts arising to him from both sides. This was due in fact to an unclear general rule on damages for wrongful Court actions provided for by Italian law and to the absolute lack of uniform interpretation of such rule.

ARREST OF SHIPS IN PORTUGAL – LAW AND PRACTICE

By Ana Cristina Pimentel
Armando Henriques, Ana Cristina Pimentel
& Associados, Sociedade de Advogados, RL
Av. Miguel Bombarda, 50 - 2a,
1050-166 Lisboa, Portugal
Tel: 351 - 217819990
Fax: 351 – 217930615
Email: ah.acp@netcabo.pt

THE LEGAL BASIS

Portugal is a party to the CMI 1952 Brussels Convention relating to the arrest of sea-going ships.

It will therefore be possible in Portugal to arrest a vessel sailing under the flag of a Contracting State for one of the credits listed on article 1 paragraph 1 of the above mentioned arrest Convention, letters a) to q), the so called "Maritime Claims". Such an arrest would be decided on the basis of the provisions of the Brussels arrest Convention, that is, the arrestor will have to produce evidence – summary evidence considering the arrest procedure rules that are urgent and simpler – confirming the probability of the existence of the credit that is being claimed. Although the wording of the Convention refers to "allegation" of a right or claim, Portuguese Judges have decided it is necessary more than just a mere "allegation".

It will also be possible, as provided on article 8 nr 2 of the Brussels Convention, to arrest a vessel sailing under the flag of a non-Contracting State for the same list of maritime credits referred on article 1 paragraph 1 of the Brussels Convention, as well as for other credits; however, on such particular situation, where the nature of the credit is not a "maritime claim", it will be necessary to follow the rules of Portuguese internal law, namely, the Civil Code and the Civil Procedure Code referring to arrest of assets in general. In such case, the arrest applicant besides the need to produce evidence on the probability of the existence of the credit that is being claimed will also need to produce evidence on what is called an acceptable fear that if the arrest is not granted, the arrestor will lose the possibility of obtaining payment of his credit. The arrestor will have to allege and put forward precise facts and produce evidence before the Judge of the financial situation of the arrestee or any other facts necessary to justify the urgent need for the arrest as the sole alternative to obtain payment later, on the basis of the actual situation of the arrestee from an economic, financial or conjuncture point of view. Such evidence may sometimes be difficult to provide.

The vessels that may be subject to arrest, as determined by article 3 paragraph 1 of the Brussels Convention, are the vessel that gave rise to the credit, as well as any other vessel owned by the same person or entity that was the owner of the vessel at the time the claim arose. Only the particular registered owner concerned is taken into account and not any group related relationship between different shipowners.

THE PROCEDURE

When requesting for the arrest of a ship, the arrest application to be submitted to Court will have to include a detailed description of the facts of the case and amounts claimed, attaching all the supporting documents evidencing the relationship between the parties involved and the claim presented, as well as a list of witnesses to be heard by the Judge to confirm the facts of the case described and a power of attorney, allowing the Lawyer to act in Court. Court fees will also have to be paid, which amount will depend on the total amount of the claim.

According to article 12 paragraph 2 of Law 35/86, dated 4th September, within the subsequent 24 hours after the submission of the arrest application, the Judge will have to give a preliminary decision ordering the detention of the vessel or dismissing the arrest application.

The detention order is immediately transmitted by fax by the Court to the Harbour Master Office of the Port where the vessel is staying and is thereafter transmitted to the Master and Agent of the vessel by the Harbour Master Office, responsible for the enforcement of the detention order.

The Judge will then schedule the date for the hearing of the witnesses appointed by the arrestor, normally within a period of 5 to 8 days depending on the Court's agenda.

After hearing the witnesses for the arrestor the Judge will give his decision on the facts of the case, listing those facts considered summarily evidenced on the basis of documents and oral evidence produced, followed by a decision on the merits of the arrest application, stating the facts and law applicable to the case, establishing the amount guaranteed and ordering the arrest of the vessel.

The arrest application and decision are then served to the Master of the vessel, as representative for the Owner and to any other entity listed on the arrest application, with all the supporting documents. From this moment onwards the procedure ceases to be confidential.

The arrestee(s) will then have a period of 10 days to oppose to the arrest decision. There is an additional time limit of 10 days if the service is made by the post, abroad. The arrestee may contest the facts of the case on the basis of which the arrest was granted as well as the legal basis used to grant the arrest. The arrestee will have to present a written paper, signed by an appointed Lawyer, stating all his arguments, attaching the necessary supporting documents and presenting a list of witnesses to be heard to confirm his version of the facts.

Thereafter, the Judge will analyse the arguments of the arrestee and providing they are consistent, will schedule an oral hearing to hear the testimonies of the witnesses appointed, or alternatively will immediately give his decision on the merits of the arrestee's counter-arguments. The arrestor's Lawyer will be present at the oral hearing of the arrestee's witnesses and will have the possibility of cross-examining the witnesses. Again a new decision is given after the oral hearing, analyzing the facts and arguments of the arrestee and giving a final decision on the arrest application, confirming the arrest, dismissing the arrest application or reducing the amount of the guarantee previously granted.

The final arrest decision given is subject to appeal to be decided by the Appeal Court, but this appeal does not have a suspensive effect, meaning if the vessel is released from arrest, she may immediately leave the port without any guarantee being put forward and the arrestor will lose the benefits of the arrest in case the Appeal Court Judges will decide favourably to his position within the appeal submitted.

The release of the vessel from arrest may be obtained through the deposit by the arrestee of the amount fixed on the detention or arrest orders, in cash, at the Court's order, or through a bank guarantee issued by a Portuguese bank which wording is acceptable by the arrestor and the Judge, or alternatively, through any other type of guarantee considered acceptable by the arrestor and submitted to the Court or exchanged privately between the parties, arrestor and arrestee.

The main proceedings subsequent to the arrest will have to be engaged before the competent court within 10 days after the receipt of a notification from the Court confirming the service of the arrest decision has been made to the arrestee. An

additional time limit may be requested to the Judge on the basis of article 7 paragraph 2 of the Brussels Convention when proceedings will have to be engaged before a different jurisdiction in another country.

As far as counter-security is concerned it is foreseen on article 390 paragraph 2 of the Civil Procedure Code that whenever the Judge considers appropriate, bearing in mind the particular circumstances of the case, the Judge may request the arrestor to put up adequate security without asking for the arrestees position. This represents a discretionary power given to the Judge. However, to our knowledge this was never requested and is not the normal practice at the Lisbon Maritime Court.

If the arrest application is considered unjustified or will became extinguished due a fact for which the arrestor is sole responsible, the arrestor my be considered liable for the damages caused to the arrestee, providing he did not act as a normal prudent man. The civil liability of the arrestor will be analysed under the principles of common civil liability.

The arrest application will be extinguished if the main proceedings subsequent to the arrest are not engaged within the time limit established; if the arrest proceedings are stopped due to the negligence for the arrestor for more than 30 days and if the main proceedings subsequent to the arrest will be decided against the arrestor.

The Lisbon Maritime Court is competent to decide arrest applications for vessels calling at any port on the whole continental territory of Portugal. Are therefore excluded from the competence of the Lisbon Maritime Court the Islands of Madeira and Açores. The arrest of a vessel calling a port at Madeira or Açores will have to be submitted to the jurisdiction of the local Civil Courts.

SHIP ARREST AS AN EXECUTORY MEASURE

By Feh Henry Baaboh
Henry, Samuelson & Co.
Immeuble Ndeke & Fils, Apt. 109 (Suite 20-24)
158 Rue des Manguiers Bali
P.O. Box 15805 Akwa, Douala-Cameroon
Tel: (237) 3343-87-63
Fax: (237) 3343-87-91
Email: fehlaw@henrysamuelson.com
www.henrysamuelson.com

Applicable laws:

CEMAC Merchant Shipping Community Code of 03/08/2003 (the code) applicable in Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea and Tchad.

The OHADA Uniform Act on the simplified recovery procedure and means of enforcement of 10/04/1998 (the Uniform Act) also applicable in all the CEMAC member states above.

N.B: The applicable law is actually the CEMAC Merchant Shipping Community Code which only makes reference to the OHADA Uniform Act.

Territorial Jurisdiction:

Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea, Tchad.

Definition:

Ship arrest as an executory measure is the restraining of a ship by anybody holding an executory title in view of having the ship sold. Such executory titles would include:
- Court decision
    - Decree absolute;
    - Court orders/rulings which do not obey the nisi-absolute rule
- Foreign judgments (final) and arbitral sentences (final) with an exequatur obtained in the CEMAC member state wherein the ship is to be arrested.
- A consent judgment (minutes of conciliation signed by the parties and the judge).
- Notarial acts with the executory formulae.
- Decisions to which the municipal law of each CEMAC member state attaches the effect of a court decision.

Procedure

The application for ship arrest is filed before the President of the competent High Court according to the procedure in the Uniform Act for attachment of real property. If there are more than one ships (anchored in different jurisdictions) to be arrested, the application is filed in one of the competent jurisdictions.

The arrest proper

Upon arrest a report is made and a keeper designated under the same conditions as in ship arrest as a conservatory measure. Such report must contain the following details:
- name, profession and residence of the creditor upon whose instruction he is acting; here the code assumes (not all too correctly though) the creditor would always be a physical person, as one only talks of "profession" with reference to a physical person.

- court decision authorizing the arrest;
- amount of claim justifying the arrest;
- date of the notice to pay (which preceded the petition);
- forum election done by the creditor in the competent jurisdiction, and in the place where the ship is berthed;
- name and address of owner of the ship;
- name, category, tonnage and nationality of the ship.

The report must equally have a statement and description of the launch, rigging and gear of the ship as well as its supplies and store rooms.
If the ship is flying the flag of a CEMAC member state, the arrest report is registered in the register kept by the competent maritime authority and in which the ship is immatriculated. This registration is required within seven days of the date of the report/arrest. But this deadline is increased to twenty days if the place of arrest and the place where the register of immatriculation is kept are not situated in the same CEMAC member state.

The creditor shall within three days notify a copy of the report to the ship owner and at the same time summon him to the court of the place of arrest so he may say why the ship under arrest should not be sold. If the owner is not resident in the jurisdiction of the court the notification and summons are served on the captain of the ship or the representative of the owner or the captain in that order.

The deadline of three days is increased by 30 days if the person to be served is without the CEMAC territory. On the contrary if the person to be served is a foreigner resident without the CEMAC territory and is not represented, the summons and notification shall be served according to the procedure of common law i.e. deadline of distance would become applicable.

The report of arrest is recorded in the register of maritime mortgages kept by the competent administrative authority. This recordal is required within 7 days with effect from the date of the arrest report, which deadline is increased by 20 days if the place of arrest and the place where the register is kept is not situated at the same port.

The conservator of maritime mortgages issues a status of the recordal of the mortgage charge to the creditor. Within 7 days of the delivery of this status of mortgage charge, the arrest is notified to creditors recorded in the domicile elected in the records. This deadline is increased by 20 days if the elected domicile is not situated in the jurisdiction of the competent court that issued the order to arrest.

The notification to creditors indicate the date they have to enter appearance in court; this date must be without 30 days with effect from the date of the date of notification in the case where the elected domicile is not situated in the jurisdiction of the court.

The sale

The conditions of sale of the ship is fixed by the competent court according to the procedure of common law applicable to the forceful sale of realties. The notice of sale is posted on the most apparent/visible part of the ship, on the main door of the court before which the sale would take place, in public place or in the wharf of the port where the ship is berthed, at the chamber of commerce, at the customs office and at the headquarters of the maritime district of the place.

The applications for setting aside, oppositions, payment and deposit of the price of sale, collocation of creditors and the distribution of proceeds are done according to the rules of procedure of common law applicable to the forceful sale of realties.

BENEFICIAL OWNERSHIP

By Tony Swinnerton
Swinnerton Moore
Cannongate House,
64 Cannon Street
London EC4N 6AE
Tel: 020 7236 7111
Fax: 020 7236 1222
Email: Tony@swinmoore.com
www.swinmoore.com

As a matter of English law in rem proceedings may only be brought against the ship in connection with which the claim arises if the following conditions are satisfied:

a) the claim must have arisen in connection with a ship and
b) the person who would be liable on the claim in a claim in personam must have been the owner or the charterer or in possession or control of the ship when the cause of action arose and
c) at the time the claim is brought i.e. when the Claim Form is issued, the person who would be liable on the claim in a claim in personam must be the beneficial owner of all of the shares in the ship or the charterer of it by demise

There are a number of listed claims and to arrest a vessel a claiming party must bring themselves within one of those specified categories.

Except in the case of claims brought in respect of ownership, or where the claim may be brought against a ship which is under demise charter, it is necessary for the court to identify the beneficial owner of all the shares in the ship which is sought to be proceeded against in rem in order to determine whether the claim may be brought against that ship. This process has given rise to controversy as to precisely what is meant by the phrase "beneficial owner".

The position changed in 1981 under the Supreme Court Act and the consequence of this is that the ship may be arrested if the person liable in personam is the demise charterer but where the arrest is of another ship it is clear that the ship cannot be arrested unless the person liable in personam is the owner of the ship and not merely the demise charterer. A company which has filed a petition under Chapter 11 of the U.S. Bankruptcy Code and which has thereby been transformed into a "debtor in possession" remains the beneficial owner within the meaning of the Supreme Court Act.

One aspect which has given rise to controversy is the extent to which it is permissible to look beyond the registered owner of a ship in order to find the beneficial owner. It is clear that Parliament did not intend the investigation simply to be limited to the identification of the registered owner and in The Aventicum the court said "where damages are claimed by cargo owners and there is a dispute as to the beneficial ownership of the ship, the court in all cases can and in some cases should look behind the registered ownership to determine the true beneficial ownership…it is plain that the court will not be limited to a consideration of who is the registered owner or who is the person having legal ownership of the shares in the ship; the directions are to look at the beneficial ownership. Certainly, where there is a suggestion of a trusteeship or nominee holding there is no doubt that the court can investigate it".

However, the suggestion that the court is empowered to embark upon a wide ranging investigation of corporate shareholding and to lift the corporate veil simply for the purpose of the investigation of beneficial ownership is wrong. In The Saudi Prince the court did investigate the purported transfer of ownership of a ship before the Claim Form was issued to see if in truth there had been a change in the

beneficial ownership – on the facts the court held that there was no effective change of ownership and therefore the ship could be proceeded against in rem and arrested.

It has long been the practice of the shipping business to arrange for several ships which are financed by a common source and managed or operated as a fleet, to be registered in the names of separate companies whose only asset is the particular ship registered in its name. Often such companies will be registered in a country where the identification of shareholders in companies is not a matter of public record – usually known as the "one-ship company". This has been a source of irritation to cargo interests and others who consider that they are deprived of the benefits of the sistership provisions of the 1981 Supreme Court Act. The courts have recognised that the "one-ship company" is a legitimate business arrangement and in the absence of evidence of fraud it is not permissible to lift the corporate veil in order to look behind the "one-ship company" structure for the purpose of identifying the beneficial owner of the company and say that the beneficial owner of the company is the beneficial owner of the ship. As a matter of English law the beneficial owner of the ship is the company which is a separate and distinct legal entity from the beneficial owner of the company.

In The Maritime Trader a ship was owned by a company MTS and the shares in that company were owned by MTO so that MTS was a wholly owned subsidiary of MTO. The court held that the ship was not beneficially owned by MTO and therefore could not be arrested to secure a claim against that company. The Admiralty Judge said "the starting point is the fundamental principle of company law that a shareholder has no property, legal or equitable in the assets of the company". He approved the comments in a previous case (Rodwell Securities v IRC) which held "according to the legal meaning of the words, a company is not beneficial owner of the assets of its own subsidiary; the legal meaning of the words takes account of the company structure and the fact that each company is a separate legal person". The Admiralty Judge then went on to say "from that starting point there is no way in which it can be said that the maritime trader was 'beneficially owned as respects all the shares therein' by MTO unless the corporate veil can be lifted. I would not hesitate to lift that veil if the evidence suggested that it obscured from view a mask of fraud rather than the true face of the corporation".

In The Maritime Trader there was no evidence that the ship had been purchased by MTS in order that it would not be available as security for a judgement against MTO and so the Admiralty Judge refused to lift the corporate veil. In effect endorsing the "one-ship company" arrangement. In his judgement he asked the question "what is wrong with using the company structure to limit liability" and to that question he said that the answer must be "nothing unless it is a sham".

The legitimacy of the "one-ship company" has also been endorsed in Hong Kong where it was held in The Neptune in 1986 saying that the use of one-ship companies as a means of limiting liability did not raise an inference of fraud so as to justify the lifting of the corporate veil.

The Maritime Trader was a case concerned with a vertical relationship between the holding company and a subsidiary. The horizontal relationship between connected "one-ship companies" was considered by the Court of Appeal in The Expo Agnic which was arrested in respect of a cargo claim arising out of the sinking of another vessel, the 'SKIPPER J'. The two ships were owned by separate Panamanian companies whose officers and shareholders were the same individuals, the ships were managed by the same Panamanian company. It was the contention of cargo interests that lifting the corporate veil would establish that the two ships were in the same beneficial ownership (allegedly that of a particular Greek shipowner connected with the managers) and that discovery should be given to enable investigation of the question of beneficial ownership to take place. This argument was rejected by the Court of Appeal which held that the right of arrest under

section 21(4)(ii) did not extend to a ship owned by a sister company of the owning company the ship in connection with which the claim arose.

The principle flaw in the attack on the one-ship company structure was exposed by the Master of the Rolls, Lord Donaldson saying:

> "In real commercial life, thus far at least, registered owners, even when one-ship companies, are not bare legal owners. They are both legal and beneficial owners of all the shares in the ship and any division between legal and equitable interests occurs in relation to the registered owner itself, which is almost always a juridical person. The legal property in its shares may well be held by A and the equitable property by B but that does not affect the ownership of the ship or shares in that ship. They are the legal and equitable property of the company".

He went on to say:

> "This involves the proposition that the registrations are shams. I am as realistic as most judges who have served in the Commercial Court but I really do not see the commercial advantage of the creation of sham registered ownerships. Mr. Pothitos no doubt has a legitimate interest in running these ships, including the two ships with which we are concerned, as a fleet, but he can do this by running a series of genuine one-ship ship owning companies as a group. He does not need a structure involving a holding company and subsidiaries, and still less sham companies. As governing shareholder in each company he can cause them to use their individual assets to the mutual advantage of members of the group and of Mr. Pothitos".

The distinction between The Maritime Trader and The Expo Agnic and the other cases to which I referred (The Aventicum and The Saudi Prince) is that the latter pair of cases involved an allegation by the defendant shipowners of a change in beneficial ownership subsequent to the claim arising but before the issue of the Claim Form, so that the genuineness of the change required investigation whereas there was no change of ownership involved in the former pair of cases and therefore nothing to investigate. This was recognised by Lord Donaldson in The Expo Agnic where he said:

> "the truth of the matter as I see it, is that section 21 does not go, and is not intended to go, nearly far enough to give the plaintiffs a right of arresting a ship which is not the 'particular ship' or a sister ship but the ship of a sister company of the owners of the 'particular ship'. The purpose of section 21(4) is to give rights of arrest in respect of 'the particular ship', ship in the ownership of the owners of 'the particular ship' and those who have been spirited into different legal i.e. registered ownership, the owners of 'the particular ship' retaining beneficial ownership in that ship".

Thus, as a matter of English law it is very important to identify the ship against which a claim arises and to obtain security without delay to avoid a sound claim failing because there has been a change of ownership and the possibility of the vessel no longer being available for arrest.

Marine Investigation and Vessel Tracking: Theory and Practice

By Gerda Verstappen
Dynamar
gverstappen@dynamar.com

Dynamar B.V. in the Netherlands has been operating for more than 25 years and is a well-known credit agency in the maritime sector. Basically, we research a company's background and operations and allocate a credit rating based on a number of factors. Over the years we have built up a database counting over 10,000 reports on companies in the maritime, trucking, oil and aviation industries.

Some 10-years ago, we officially started the Marine Investigation Department, which offers tailor-made services to the needs of clients such as marine lawyers, banks, bunker traders, P&I clubs and others, including private investigators. We provide ship-tracking services, asset tracking, due diligence services while sometimes we answer a client's particular question about a given entity or industry. Every question or search is different and will be considered on its own particular information needs. From time to time, we will also handle research projects outside the shipping industry, if and when we believe we can be of assistance and provide a quality service.

It is true that nowadays ship tracking has become simpler compared to 20 years ago, when I joined the company. Ship tracking was a service we provided on an ad hoc basis only. It was not only very time consuming, but also very difficult as the Lloyds Maritime Index arrived by mail from England, developing countries and ports could be very difficult to reach and even obtaining a current telephone number of a port could take all morning.

With modern technology, ship tracking has become less time consuming and as such less costly. However, the AIS (Automated Identification System) System used on ships is not the end of ship tracking, although some believe it to be so. For instance, the AIS System on board a ship can be switched off. Indeed, our experience is that a ship will not often transmit its position if it is not required to do so.

Furthermore, the ship's AIS transmission can omit or provide the wrong data:

- voyage related data such as destination, estimated time of arrival or any changes in navigational status.
- dynamic data such as the position, course, speed and heading of the ship
- the vessel's name and MMSI number.

As such, we still rely on time-tested methods to provide our clients with correct and up to date information. We also aim to provide a pro-active service as much as possible in order to allow our clients to prepare an arrest, as far in advance as possible, whilst at the same time we stay as much as possible in the background as we do not want to alert any party to our interest in the ship's destination and arrival.

The Marine Investigation business has seen changes in recent years. "Rule B" attachments under the supplemental rules for certain admiralty and maritime claims have become highly popular in recent years. Given that the shipping industry in general enjoyed several excellent years in the recent past, it will be interesting to see how much more popular the "Rule B" attachment will become during a market downturn and how the US courts will cope with such a workload. Indeed, we received comments from lawyers regarding the unwillingness of a number of judges to grant a "Rule B" attachment. Moreover, companies are taking steps to avoid having their funds attached in New York by setting up their own offices in New York or making payments in currencies other than US dollars and by using administration companies to make payments.

We are asked regularly to conduct background research on companies in order to pierce the corporate veil. We will always ask for the information the client has on file, which can provide us with useful leads. For instance, we linked an offshore registered chartering company to a company in the USA from the signature and person's name on a document. We could prove that the signature of the director of the USA-based company was the same as the signature on the document of the offshore company. More recently, we could show that a private person, who denied any involvement with a particular ship, had signed the financial accounts of the ship owning company.

We will also handle due diligence projects and background checks on private persons and companies. For instance, we checked the background of a person who claimed to have set up a multi-million dollar company. This information was correct, but the person neglected to inform our client that the company had gone bankrupt.

We use a wide range of information sources, including international (newspaper) databases, shipping databases, company and ship registers, ship broker's reports, etc. However, we will also access local newspapers and talk to local and international sources in the shipping industry. Furthermore, we are constantly searching for new reliable information sources and are always looking for ways to obtain information from official sources directly.

If need be, we will hire private investigators to have a look around at the subject's premises or to obtain company records from the authorities in such countries where it is highly difficult to obtain such information in a timely manner when requesting from long distance. We will discuss taking such a step first with the client. Furthermore, we prefer to work with other investigators who are recommended through our contacts in these circles.

In one such case, a ship chartering company's phone had been disconnected, although the company was registered as 'active' with the authorities. Our sources visited the office building and found out that the company's directors (two brothers) had closed the subject company and transferred the office lease to a new company, which was probably owned by the directors' parents. In addition, the new company had a different telephone number. However, the directors of the previous company at the old address were still active in the new company on a daily basis.

In another case, a chartering company provided a list of ships previously fixed with charter dates, letters of recommendation and reported that it had offices in Canada and in other European countries. A quick check revealed that the Canada office had closed several years before. Moreover, it turned out that people who were not clients or suppliers of the subject company, including one of the company's ex-employees and a personal friend of the director, had written the letters of recommendation. An extensive check of the fixture list showed that most of the ships mentioned were sold or broken up before the date that they were allegedly fixed.

It is also worthwhile to check the jurisdiction where a ship chartering company is registered before arresting the ship's bunkers. In the recent past, we have seen that operators use exactly the same company name for multiple companies that are registered in different jurisdictions such as Mauritius, Hong Kong, Liberia, British Virgin Islands. Another variation is that a company having a ship on trip or time charter will sublet the ship to another (related) party in order to avoid bunker arrest.

As every research project is different, we do not have a standard working approach, but look at what information is needed by the client and analyze how best to obtain this information if not by a direct approach, then by approaching research from another angle. 'Thinking outside the box' is definitely required in this line of business.

A FEW MINEFIELDS IN THE 1976 LLMC CONVENTION:
Review of legal practice in Belgium.

By Steven D'Hoine
D'Hoine & Partners
Schaliënstraat 30
2000 Antwerp, Belgium
Tel: +32 3 470 23 00
Fax: +32 3 470 23 10
Email: steven.dhoine@dplaw.be

1. Introduction

It is a peculiarity of maritime law that the owner of a ship involved in a nautical accident causing harm to other parties is entitled to limit his overall liability for the resulting claims for compensation – whether for death, injury to persons, damage to property or for purely financial losses – by creating a 'limitation fund' for the benefit of his creditors.

Originally the shipowner's right to limitation of liability was granted to him in domestic legislation of maritime nations engaged in overseas trade. However, during the twentieth century attempts were made to unify this area of law internationally which resulted in the adoption of several conventions on limitation of liability.

The oldest treaty with general application is the 'Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels' (adopted in Brussels on 25 August 1924), which was followed by the 'Convention relating to the limitation of the liability of owners of seagoing ships', which was signed in Brussels on 10 October 1957, and came into force in 1968 (hereinafter 'the 1957 Brussels Convention').

Subsequently the 'Convention on the limitation of liability for maritime claims' or the '1976 LLMC Convention', which is the subject of this presentation, was adopted in London on 19 November 1976. It raised considerably the limits of liability for claims covered, in some cases up to 250-300 % in comparison to the 1957 Brussels Convention.

The 1976 LLMC Convention entered into force on 1 December 1986. It entered into force in Belgium on 1 October 1989.

On 3 May 1996, the Protocol to the 1976 LLMC Convention was agreed. This '1996 Protocol' provides for higher liability limits thus substantially increasing the amounts of compensation payable in the event of an incident. It further establishes a simplified procedure of tacit acceptance for updating these amounts. The 1996 Protocol entered into force on 13 May 2004. It has not yet been ratified by Belgium.

Attention will be paid mainly to the constitution of the limitation fund as laid down in the Articles 11 to 14 of the 1976 LLMC Convention as well as to some related aspects of conflict of laws. The current presentation only deals with limitation of liability with respect to seagoing ships.

2. Constitution of the limitation fund as a bar to other actions

Pursuant to Article 13(1) of the 1976 LLMC Convention "*any person having made a claim against the fund*", where such fund has been constituted in accordance with Article 11 (which will be dealt with below),

> "*shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted*".

When an incident with a seagoing ship occurs, the cited Article 13(1) makes clear that once the fund is constituted, the owner is protected from any conservatory or enforcement measures from the creditors upon its assets with respect to the same incident. For example, as soon as the fund is constituted, the ship involved in the incident or any other ships of the owner may no longer be arrested. It must be clarified however that the owner, by establishing a limitation fund, does not admit his liability. If at the end of the limitation proceedings it is ultimately decided that the shipowner is not liable, the fund is to be returned to the shipowner who constituted it.

Pursuant to the wording of Article 13 the prohibition contained in this provision only exists for claimants "*having made a claim against the fund*". However, it is clear that a creditor having a claim which qualifies for limitation, but did not (yet) claim against the fund, is prohibited from taking any enforcement measures against the owner, or at least against the assets of the owner in other LLMC states.

3. Place of constitution of the limitation fund

3.1. Article 11(1) of the 1976 LLMC Convention establishes that
"*any person alleged to be liable may constitute a fund with a Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation*".

The concept "*legal proceedings*" as mentioned in Article 11(1) is widely interpreted. During the preliminary works of the 1976 LLMC Convention the term "*action*" was replaced by "*legal proceedings*" arguably because "*action*" was considered too limited.

It is clear that a creditor claiming damages from the shipowner by serving a writ of summons upon the shipowner, is instituting such legal provisions.

Belgian courts hold the view that conservatory measures such as a ship arrest satisfy the requirement of prior "legal proceedings". It is even accepted that a fund may be constituted as soon as the owner is held liable by the creditor, even if judicial steps are yet to be taken by the creditor.

Reportedly, in the Netherlands, applications for the appointment of a judicial expert (to examine cause and size of damage to cargo) and for the hearing of witnesses prior to litigation (to have evidence formally recorded in court) are held to be "legal proceedings instituted" within the meaning of Article 11(1) of the 1976 LLMC Convention. According to this Dutch case law, a creditor indicates by such steps to pretend a claim.

3.2. Article 11(1) of the 1976 LLMC Convention gives the claimant the opportunity to choose the jurisdiction in which to pursue his claim while excluding *forum* shopping by the owner. For example if, following a collision on the high seas, one of the vessels involved calls a port of country A, the owners of the other vessel might be tempted to arrest for jurisdiction and security. However, supposed that country A still applies the 1957 Brussels Convention with its lower limits, it may be better to refrain from arresting and await the vessel's arrival in the port of a state that applies the 1976 LLMC Convention or even better the 1996 Protocol with their higher limits.

When different actions are brought against the owner in different party states, the owner may choose to constitute the fund in any of those states. He is not obliged to constitute the fund in the state where the legal proceedings were first initiated. However, when legal proceedings in a particular state are only motivated by providing the owner a *forum*, the court should reject its jurisdiction.

The owner of a vessel, anticipating arrest, cannot do anything to force a claimant into a jurisdiction of his own choice. The owner has to wait until the creditor initiates legal proceedings.

However, it has been reported that the English courts interpret Article 11(1) differently, allowing the owner to take the initiative to start limitation proceedings. In their opinion Article 11(1) provides for an additional ground of jurisdiction: the owner may initiate limitation proceedings in any *forum* where there is jurisdiction pursuant to the general rules, as well as in the *forum* where legal proceedings were initiated against him pursuant to Article 11(1) of the 1976 LLMC Convention.

In any event, it is clear that the courts have jurisdiction to file a claim in the (party) state where the fund has been constituted. Such jurisdiction is based directly upon Article 11(1) of the 1976 LLMC Convention, whilst there is no need for the court to invoke any other national or international provisions upon jurisdiction.

3.3. Finally, with respect to jurisdiction, Article 7 of 'Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial actions' (hereinafter the 'EEX Regulation'), should be considered.

This provision stipulates that where by virtue of the EEX Regulation a court of an EU member state has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this by purpose of the internal law of that member state, shall also have jurisdiction over claims for limitation of such liability.

Pursuant to Article 5(3) of the EEX Regulation a person domiciled in a member state may be sued, (apart from being sued in the courts of that member state) in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur (i.e. the *lex loci delicti*). These courts have jurisdiction in actions relating to liability from the use or operation of a ship. As a consequence, pursuant to Article 7 of the EEX Regulation, these courts would also have jurisdiction over claims for limitation. However, the 1976 LLMC Convention has priority over the EEX Regulation (pursuant to Article 71(1) of the EEX treaty). In many European countries (including Belgium) honouring the interpretation that artikel 11(1) of the 1976 LLMC Convention seeks to exclude the choice of *forum* by the owner, Article 7 of the EEX Regulation cannot be used to create an alternative *forum* for establishing a limitation fund.

4. Limitation of liability for wreck and cargo removal

4.1 The 1976 LLMC Convention provides that certain of its provisions are optional for the party states. Pursuant to Article 18(1) of the 1976 LLMC Convention any state may reserve the right to exclude the application of Article 2(1)(d) or (e).

Belgium has made such reservation excluding the following claims from limitation of liability:

> *"(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;"*
> and
> *"(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship."*

The reservation by Belgium implies that the 1976 LLMC Convention does not apply to the liability for the costs of removing or destruction of a stranded or sunk ship and its cargo. Such liability is instead governed by a separate Belgian statutory limitation system.

4.2 The possibility for 1976 LLMC states to make reservations upon certain provisions of the 1976 LLMC Convention, makes it essential, when problems of limitation arise, to consult the national legislation which gives domestic effect to the 1976 LLMC Convention in the country concerned.

However, it will not always be easy for the courts to determine which domestic law applies. A court involved in proceedings to limit a shipowner's liability for costs of removal of a wreck, may choose to apply the law of the place where the wreck is lying (the law of the place of the wrongful act or *lex loci delicti*), the law of the contract (*lex contractus*), the law of the flag, or his own law (*the lex fori*).

In the past the Belgian courts involved in such proceedings, mainly applied the law of the place where the wreck is lying (without taking account of the fact whether the liability is contractual or extra-contractual). The law of the flag used to be applied when collisions happened on the high seas. Although such a solution has been supported by legal authorities, it appears that the law of the flag has not been applied by any Belgian court since 1961. Legal authorities also argue in favour of the national law of the court (i.e. the *lex fori* instead of the law of the place of the wrongful act), except if the dispute is more closely connected with another legal system.

4.3. An additional difficulty lies in the fact that the (territorial) scope of the Belgian provisions relating to limitation of wreck and cargo removal is not entirely clear.

Supposed that a ship sinks in a port or in the territorial waters of another state than Belgium (state A), or on the high seas. Subsequently a claim is instituted in Belgium and the shipowner constitutes a limitation fund in Belgium. The Belgian judge decides to apply his own law. However, it is unclear whether the Belgian provisions relating to limitation of wreck and cargo removal may be applied in order to limit the liability for wrecks lying outside the Belgian territorial waters. If these provisions are not applicable, it is further unclear whether outside the Belgian territorial waters the 1976 LLMC Convention is entirely applicable in Belgium without reservations or whether the liability of the shipowner is unlimited. The latter solution is only acceptable if state A (the state in which the ship is lying) also excluded the application of Article 2(1)(d) or (e) of the 1976 LLMC Convention. However, such solution is not acceptable if state A has also a separate limitation system for costs of wreck and cargo removal or even accepts limitation under the 1976 LLMC Convention. In such a case it has been argued by Belgian legal authorities that the law of state A should be applied or, alternatively, that the owner must be allowed to constitute a limitation fund pursuant to the Belgian provisions relating to limitation of wreck and cargo removal.

5. Conclusions

Limitation pursuant to the 1976 LLMC Convention and, accordingly, the constitution of a limitation fund, may be applied for in any state party in which "*legal proceedings*" are instituted in respect of claims subject to limitation. The Belgian courts interpret this concept widely allowing conservatory measures such as ship arrest to satisfy the requirement of "*legal proceedings*". However, in Belgium it is clear that the owner cannot do anything to force a claimant into a jurisdiction of his own choice. He has to wait until the creditor initiates legal proceedings. If such legal proceedings are commenced in Belgium, the competence of the Belgium courts is based directly upon Article 11 of the 1976 LLMC Convention, whilst there is no need for the Belgian court to invoke any other national or international provisions upon jurisdiction.

In Belgium the 1976 LLMC Convention does not apply to the liability for the costs of removing or destruction of a stranded or sunk ship and its cargo. However, the territorial scope of the Belgian provisions relating to limitation of wreck and cargo removal is not entirely clear.

Marine Legal Services SIA
11 Elizabetes Street
Riga, LV-1010, Latvia
phone: +371 67 359 670
fax: +371 67 359 671
e-mail: edward@marinelegal.lv
web:

Marine Legal Services SIA is a law firm based in Riga, Latvia who is active member of shiparrested.com network and has a dedicated team specializing in maritime and insurance law. Marine Legal Services (MLS) welcomes clients from different sectors of maritime and trade industries as well as marine insurers and mutual P&I clubs.