

SHIP ARREST IN UKRAINE (QUESTIONS 1 to 9)

By Arthur Nitsevych & Oleksandr Chebotarenko*
INTERLEGAL Law firm
nitsevych@interlegal.com.ua
www.interlegal.com.ua
24B, GenueZskaya str,
Odessa, 65009
Tel/Fax: +38 (0482) 337528 / 29



1. Please give an overview of ship arrest practice in your country.

Ship arrest in Ukraine is not simple though relatively inexpensive. The practice of ship arrest is rather wide, especially in the ports of Big Odessa (Odessa, Ilyichevsk, and Yuzhny). On the 7th of September 2011 Ukraine joined the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952. On the 16-th of May 2012 the Convention took effect for Ukraine.

Previously, the matters of ship arrest were governed almost exclusively by the Merchant Shipping Code, which stipulated the possibility of the arrest, but did not set out the procedural rules. Thus the procedure for arresting a ship was governed by the common regulations of national procedural law. Arrests of ships were usually realized by the attachment of bunker fuel as security for the commercial suit or as a precautionary measure (pre-trial attachment), in which case the petition on arrest had to be followed by the filing of a lawsuit on the merits with the same court which imposed the arrest.

In order to implement the Convention into national law, Ukraine adopted amendments to the Commercial Procedural Code and the Civil Procedural Code. Now, matters involving ship arrest are subject to the competence of the relevant local commercial court or the court of general jurisdiction at the port of registration of the ship or the port of ship's call. However, Ukrainian commercial procedure exists only in the form of adversarial proceedings, meaning that a person with a maritime claim must initiate an action in a Ukrainian court and then apply for the arrest within the framework of such proceedings. Brussels convention covers the situations where the arrest is being imposed by one court and the case on the merits is being heard by another court. This concept is not peculiar to Ukrainian legislation; therefore, in most cases the arrest of the ship must be followed by an action on the merits in a Ukrainian court.

The legislation provides that the Ukrainian courts may hear a case on the merits if the defendant has movable or immovable property in the territory of Ukraine. A ship calling at a Ukrainian port may act as such property, but in practice it may be difficult to arrest the ship under the Convention since the Ukrainian court may declare a lack of jurisdiction, particularly where the contract giving rise to a maritime claim explicitly provides for commercial arbitration outside Ukraine. Court practice is not uniform, and generally the courts tend to avoid disputes involving complicated issues of jurisdiction. Under such conditions, the practice remains rather controversial.

2. Which International Convention applies to arrest of ships in your country?

The International Convention for the Unification of Certain Rules Relating to the Arrest of a-Going Ships (Brussels, May 10, 1952) is the basic Convention. Also Ukraine adhered to the International Convention on Maritime Liens and Mortgages 1993 on 22 November 2002.

3. Is there any other way to arrest a ship in your jurisdiction?

There are many ways to arrest a ship in a Ukrainian port. As a rule vessels are arrested in Ukraine by means of:

- a) preliminary arrest in security of a maritime claim pursuant to the order of the Court/ Commercial court;
- b) arrest within the frame of enforcement of Court or arbitration award in accordance with national legislation;
- c) arrest of a ship under a criminal matter.

Commercial courts and courts of general jurisdiction are the state courts which exercise jurisdiction over maritime disputes. The Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine is a domestic arbitral institution with a panel of arbitrators specializing in maritime **arbitration**.

4. Are these alternatives e.g. saisie conservatoire or freezing order?

These measures are similar to saisie conservatoire or freezing order.

5. For which types of claims can you arrest a ship?

In Ukraine the ship, being the debtor's property, can be arrested regardless whether claims are maritime or not. Nevertheless, according to the maritime law of Ukraine the vessel may be arrested only upon at least one of the following conditions:

(i) a claim referred to the category of privileged claims, particularly:

- claims arising out of labour relations, claims for recovering damage inflicted by injury, other impairment of health or death;
- claims arising out of nuclear damage and maritime environment pollution as well as elimination of said pollution consequences;
- claims regarding port and channel dues;
- claims regarding salvage and payment of general average contribution;
- claims for reimbursement of losses resulting from collision of vessels or from other sea casualty, or from damage to port facilities and other property located in the port as well as to navigational aids;
- claims for reimbursement of losses related to cargo or baggage;

(ii) a claim based upon the vessel's registered mortgage;

(iii) claim referring to the rights of ownership or possession of a vessel;

(iv) a claim not indicated hereinabove and referring to the person that is the vessel owner by the moment of origination of the said claim and is responsible for this claim by the moment of starting a procedure connected with vessel's arrest;

(v) charterer of the vessel on bareboat charter is liable for the said claim and is the vessel's bareboat charterer or her owner by the moment of starting a procedure connected with vessel's arrest.

6. Can you arrest a ship irrespectively of her flag?

It is possible to arrest a ship irrespectively of her flag in Ukraine.

7. Can you arrest a ship irrespectively of the debtor?

Ukrainian legislation recognizes jurisdiction in personam and does not support the action in rem, therefore it is impossible to bring a suit in rem against the vessel to satisfy debts arising from the operation or use of the vessel, by the person other than the owner.

8. What is the position as regards sister ships and ships in associated ownership?

Associated vessels can be arrested if by the moment of initiating the arrest procedure they were property of a person liable for the maritime claim and who was the proprietor/owner of the vessel to which the said claim has arisen.

9. What is the position as regards Bareboat and Time-Chartered vessels?

Associated vessels can be arrested if by the moment of initiating the arrest procedure they were property of a person liable for the maritime claim and who was the charterer of her on bareboat, time or voyage charter basis. The exceptions to this rule are claims with regard to ownership or possession of vessels.

*Arthur Nitsevych is a Partner of "Interlegal" law firm. Membership: LMAA (London Maritime Arbitrators Association); IBA (International Bar Association); SCMA (Singapore Chamber of Maritime Arbitration); The Nautical Institute of the United Kingdom; EMLLO (European Maritime Law Organization). Chairman of the Nautical Institute of Ukraine, Member of the Board Lawyers of Ukraine in Odessa Region, solicitor of the Odessa City Bar Association. Mr. Arthur Nitsevych has been practicing law since 1992 specializing in Shipping, Transport and Logistics, Transactions and Investments. Arthur Nitsevych is the Head of Organization Committee of the Annual International Conference "Practice of Maritime business: sharing experience" (2005-2011) and Maritime Days in Odessa 2012-2014, the President of Nautical Institute, Ukraine. He conducted numerous seminars and legal trainings at national law schools and international conferences remaining the author of more than 90 articles.

"Interlegal", celebrating 20 years of practice, is a top listed Ukrainian law firm focused on Transport, Shipping and Trade. The company employs 20 lawyers headquartered in Odessa, Ukraine with its offices in Turkey and Georgia.

*Mr. Oleksandr Chebotarenko is a Senior Lawyer in "Interlegal" Law firm, a lecturer, member of the Ukrainian Bar Association; Transport, Shipping & International trade Law Expert. He focuses on business improvement and corporate development of the maritime and transport industry mostly. He has 20 years experience as transport & forwarding companies' legal advisor regarding business planning of maritime and transport systems including multimodal, ports and terminals all over Ukraine. Amongst his clients there are also P&I Clubs, foreign law firms and commercial banks. Mr. Chebotarenko is a certified attorney-at-law (since 1997). He is Member of the Bar Council of the Odessa region, Honorary Member of the "Ukrainian Container Lines Association", and Associated member of the Nautical Institute of Ukraine. Mr. Oleksandr is the author of numerous articles in Ukrainian & international professional publications.

SHIP ARREST IN UKRAINE (QUESTIONS 10 to 26)

By Vagif Mallayev*, Senior Partner
LEXCELLENCE

v.mallayev@lexcellence.com.ua

www.lexcellence.com.ua

Business Center Morskoy-2, 11

Polskiy spusk, 9-th Floor, office #5, 65026 Odessa

Tel : +38 048 737 7931

Fax: +38 048 737 7932



10. Do your Courts require counter-security in order to arrest a ship?

The Courts may require counter-security as a prerequisite for arrest of a ship, but in practice it happens rarely. The better evidences are arranged and presented with the claim to the court the more chances to avoid the payment of counter-security.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

There is no procedural difference in respect to arresting a ship for maritime claim and a maritime lien.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes, Ukraine ratified the International Convention on Maritime Liens and Mortgages (Geneva, 1993) on 22.11.2002.

13. What lapse of time is required in order to arrest a ship since the moment the file arrives to your law firm?

Two-three business days will be required in order to arrest a ship.

14. Do you need to provide a POA or any other documents of the claim to the Court?

No, we do not need a POA, Ukrainian advocates may represent claimant's interests in a court and the State Enforcement Service of Ukraine (bailiff service) on basis of an Advocate's Warrant being submitted along with extract from the Legal Agreement certified by the advocate and by his Client. We need all documents relating to the claim, which are in possession of the claimant, - the presence of the written evidences may help to avoid a payment of counter-security to the Court.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

The Court may require an original or its notarized and legalized copy of any document the plaintiff referred to in his claim. It is worth noting that Courts very formalize the issue of acceptance of evidences. Written evidences are welcomed.

We recommend preparing most important written evidences (contracts, BLs, charter parties, survey reports etc.) in original or its notarized and legalized (apostilled) copies. Other copies can be certified by the claimant's corporate seal and by signature of authorized officer. In case your Ukrainian advocate received a document in original he may hold the original in his office and the certified copy that is arranged by him will be served to the court. Documents cannot be filled electronically.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Yes. Unless a forum had been chosen by parties to consider the substantive claim in a foreign jurisdiction, the case may proceed on its merits in Ukraine as per the Art 7 of the Ship Arrest Convention (1952), and in some cases when domestic law otherwise gives the local Court jurisdiction, e.g.:

- (a) any claims if one of defendants is domiciled in Ukraine;
- (b) proprietary claims relating to the possession of a ship, title to or ownership of a ship or a share in a ship;
- (c) claims arising out of employment contract with ship's crew if a claimant is domiciled in Ukraine;
- (d) claims arising out of loss of life or personal injury to a person who is domiciled in Ukraine or in case the accident took place in Ukraine;
- (e) claims arising out of damage caused in Ukraine to property of private persons or legal entities during the operation of a ship;
- (f) claims arising out of any contract which specified a place of its execution or has to be executed in Ukraine only.

17. What is the procedure to release a ship from arrest?

There are two options:

- a court, which arrested a ship may lift the arrest itself;
- a court of appeals may dismiss an order of arrest that was issued by a court of first instance.

18. What type of security needs to be placed for the release?

Best security that would be accepted by Ukrainian courts is a bank guarantee issued by a Ukrainian bank. It is also possible to propose to a court a deposit arranged with a Ukrainian bank or real estate property that is situated on the territory of Ukraine.

19. Does security need to cover interest and costs?

Ukrainian courts require that a security covers all amount demanded by claimant in his statement of claim submitted to the court.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

No, Ukrainian courts do not accept LOU of P&I Clubs.

21. How long does it take to release the ship?

In case of option (i) mentioned in para 17 above: 3-4 days. In case of option (ii) mentioned in para 17 above: 20-30 days.

22. Is there a procedure to contest the arrest?

Yes, you may write a reasoned petition to judge who arrested a vessel, or you may appeal his decision to court of appeals within 5 days.

23. Which period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

Civil proceedings: the Code does not provide a certain time – subject to a Court's decision. Commercial proceedings: there is no special reference to the ship arrest procedure, but generally, pursuant to the Art. 43-3 (3) of the Commercial Procedure Code of Ukraine a claimant must commence legal actions on the merits within 5 (five) days from the day of obtaining the arrest order.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes, Ukrainian Courts on request of defendant acknowledge a wrongful arrest in case of:

- (a) The arrest is cancelled by decision of a Court.
- (b) The claimant fails to commence proceedings on the merits within the given time.
- (c) The claimant recalled his claim.
- (d) The claimant fails in his legal action on the merits. In case a wrongful arrest is acknowledged defendant may claim to an initiator of arrest to cover all losses and damages incurred.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

No, Ukrainian Courts do not acknowledge the pierce and lift of the corporate veil. The basic principle of civil law is that a shareholder or director/officers of a legal entity could not be held liable for any debts or liabilities of the corporation.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

No. A vessel's auction will take place only after the end of Court proceeding as an enforcement of the final Court judgment entered into force.

*Vagif is a Head of the firm's Shipping, International Trade and Insurance arm. Vagif has been involved in a wide range of both dry and wet shipping disputes on the side of P&I Clubs and Owners. His broad experience in dry shipping includes charterparty, Bill of Lading, ship building, and he also has experience of handling claims in the wet side: collision, general average, personal injury/loss of life and pollution. Vagif is attorney at law, member of Odessa Bar Association, Ukrainian National Bar Association and International Bar Association. Before practice of law his career includes 7 years in insurance sector starting from executive officer to chairman of the Board of Ostra Insurance company. He graduated the faculty of law (LLB) of Mechnikov's Odessa National University in Odessa, Ukraine; the faculty of psychology (LLM) of the International Academy for Psychology in Sant-Petersburg, Russia.