

THE ARREST

news

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by Nikolay Radev, Kinkin & Partners Law Firm
- *Arrest Damages: The Merits of the Merits*
by Felipe Arizon, Arizon Abogados

Arrests in Bulgarian Waters and Mortgagee's Claims

By Nikolay Radev, Kinkin & Partneres Law Firm

Introduction

A case of a great interest is the one described below concerning a ship arrest imposed by a world leading marine fuel firm. The case involves the implementation of a ship arrest procedure over two vessels, moored in two Bulgarian sea ports over which there were claims for ownership by a third party – mortgagee.

Issues to consider

The plaintiff in the case, represented by “Kinkin & Partners”, is a world leading marine fuel firm. An order for bunkering was made on behalf of the owners of the ships. Owners were involved in the case by their manager, the operator of the vessels.

The order for bunkering was expressly confirmed by the plaintiff, and as a result of this confirmation, a contract for bunkering was concluded. Additionally, an

invoice for the delivery of bunker fuel was issued and delivered to the ordering company.

Payment of the bunkers was not made. The plaintiff sought to secure his claims by arresting the ships in Bulgarian ports. In accordance with Article 364a of the Merchant Shipping Code, applicable in Bulgaria, a merchant ship, which is located in a Bulgarian sea port, regardless of the flag under which it sails, can be arrested to secure a maritime claim under Art.1, para.1 of the 1999 Geneva International Convention on arrest of ships, (ratified by Bulgaria since 12 January 2001, in force since 14.09.2011).

The plaintiff instructed “Kinkin & Partners” to obtain security for the claim against the ship owners by arresting the two ships. As a result of the plaintiff's application, a security measure under Art. 364a, para 4 of the Merchant Shipping Code was imposed by the

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Court. The Court did not request the plaintiff to provide any counter security. The claim on the merits was to be dealt with abroad against the vessel owners before the court of the defendant's domicile.

Further issues

Following the arrest of the ships, a foreign bank appeared requesting ownership rights over the vessels, the arrests to be revoked, and the possession over the vessels to be handed over.

Requests made by the parties in the case

Firstly, the ship owners and the bank requested the Court to order the plaintiff to put counter security under the Bulgarian Code of Civil Procedure. Against these requests, the plaintiff alleged that the foreign bank was a third party not entitled to participate in these interim proceedings. The foreign bank had no reasonable legal interest and its demands were inadmissible. Moreover, it was up to the court dealing with the claim on the merits to establish whether counter security by the plaintiff should be provided. The court rejected the request of the owners and the bank.

In addition, the foreign bank requested: (i) the court to revoke the arrest order based on the foreign decision issued regarding the possession of the ships. The plaintiff objected the foreign decision had not been admitted for execution, and/or (ii) the court to revoke the security arrest against issuance of a bank guarantee under Art. 4 of the 1999 International Convention on ship arrest. The plaintiff objected the case was not within the scope of the said article.

Corresponding jurisdiction

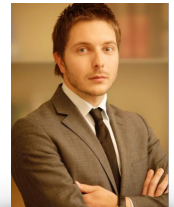
It is interesting to highlight that in the present case the maritime claim, supply of bunkers, falls within the scope of Art. 1, (l) of the 1999 Arrest Convention. However, this scenario falls outside the exception provided in Art. 4 of the 1999 Arrest Convention. The option provided in the second sentence of Art. 4, i.e., *a court ruling by virtue of which the person in whose possession the ship is to continue to use it if a*

sufficient guarantee has been provided, is applicable if this is requested by the party in the arrest proceedings in whose possession the ship is. In this particular case the foreign bank did not have possession of the ships. Therefore, the request made by the foreign bank did not fall within the scope of Art. 4 and the ships could not be released from arrest. As a result the Court upheld the plaintiff's arguments and rejected the application for the release of the ships.

Conclusion

To conclude, the claim on the merits succeeded before the foreign court and a three-party agreement between the foreign bank, the vessel owners and the plaintiff was reached. As a result of this agreement, payment of the claims has been made by the third party – the bank – and accordingly a request for the release of the ships was made by the plaintiff and agreed by the Court.

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Mr. Radev has worked with the Kinkin & Partners team since 2007. He has more than 10 years practice in the area of Shipping & Transport; he also practices in Insurance Law, Tax Law and Litigation. Mr. Radev is resourceful, swift and creative in approaching complicated cases. He is industrial in effectively protecting his clients' interests.

Arrest Damages: The Merits of the Merits

By Felipe Arizon, Arizon Abogados

Those present at the superb annual meeting in Singapore last year may recall the presentation I made for the panel of strange arrests chaired by Richard Faint. I did not manage to win the bottle of whiskey, but I tried. My presentation was about an arrest case that took place in the north of Spain in November 2014. The matter is still on going. Many stages have been completed including the arrest proceedings and the London arbitration.

Our client was the voyage charterer under a Gencon form. The alleged maritime claim arose as a result of the decision of the ship owner not to turn up at the loading port. The owner alleged that the presence of ice rendered the voyage frustrated, and he decided he was not obliged to go to the loading port. The charterer rejected the owner's argument and claimed substantial damages for this alleged breach of the charterparty.

After hearing the charterer's arrest application, the Commercial Court of Donostia agreed and granted the arrest order based on the 1999 Arrest Convention and the Spanish Shipping Act 2014. The registered owner appeared in person before the Commercial Court, the registered owner in this particular case was not a Company but a Russian individual. He submitted that the Commercial court did not have jurisdiction to arrest the ship because of the arbitration agreement that, he stated, was binding upon himself and the shipping management company. Accordingly, he argued that the High Court of Donostia, and not the Commercial Court of Donostia, was competent to hear the arrest case. The owner also argued that the security for the arrest was not sufficient. The registered owner's precise words in contesting the arrest were: *"As the plaintiff itself acknowledges on his arrest application, the disputes arising in relation with the charter party*

entered into by the parties shall be subject to arbitration in London".

The commercial Court refused the owner's position and an appeal was presented by the owner before the Court of Appeal of Guipuzcoa, solely on the grounds of lack of jurisdiction, where appellant again relied on the CP's provisions of the arbitration agreement stating: *"This proceeding arises from the arrest of the MV "Georgiy Ushakov" requested by the plaintiff before the Commercial Court of San Sebastian in support of the corresponding arbitration proceeding to be pursued in London as a consequence of the disputes that have arisen between the plaintiff and my client in relation to the charter party dated September 17th, 2014 agreed by the parties."* The registered owner's appeal was refused by the Court of Appeal and then the registered owner opted to place security and lift the arrest under section 4 of the 1999 Arrest Convention. The deposit receipt made reference to a bank account owned by the managing company.

A few months later, it turned out that the parties were unable to reach an agreement and two arbitrations were started against the registered owner and the managers of the vessel as disclosed on the CP terms. Until that moment, the registered owner had indicated he was the true owner of the vessel, which was managed by party also cited in the CP.

Oddly enough, the owner changed his version of the case and the London arbitrators accepted the new submissions of the registered owner, namely that he was not part of the CP. Before the arbitrators, the owner declared that the vessel had been leased to a third company, which in turn was demise chartered to the current commercial operating company of the vessel stated on the CP.

As a result of the arbitration award, the registered owner formulated a claim against the charterers for arrest damages. This claim has been refused by the Commercial Court on the grounds that, *inter alia*, the demise charterers, as alleged by the owner and stated

by the arbitrators, should have been the party to suffer the damages and that excluded the owner from having a valid claim. The Court held that the purported loan agreement between the owner and the demise charterers was not proven by the documents presented to the Court. The owner has appealed this judgment to the Court of Appeal.

One of the questions that arose in this case was: Can the owner present two factual versions of the case that cannot be conciliated to one another before the Spanish Court and London arbitrators? And if so, can the owner get away with it and sue for damages? Money turns on this issue as the substantial fees incurred in London could have been avoided if the ship owner would have disclosed when the ship was arrested that he was not a party to the CP. It is suggested that the position of the owner in this case is full of contradictions and tainted with a certain degree of turpitude so as to bring the case within the *ex turpi causa non oritur action* rule:

The owner's position has been misleading in the arrest and arbitration proceedings. While in Spain, the owner contended he was a party to the voyage charter party to challenge the Court's competence to arrest the ship. Conversely, in London, he later argued that he was not a party to the charter.

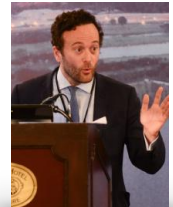
Furthermore, does this way of acting, i.e. telling a serious lie in Spain, amount to a tort actionable by the charterers in Spain? We shall have the response in the following issues of this publication. To date, the charterers have commenced proceedings in Spain to claim damages and an indemnity from the owner's tortious acting. The owner has contested the competence of the Spanish Court to deal with this tort claim. The Spanish Court has held that the Spanish Court has competence to deal with the charterer's claim. In so doing, the Magistrate has held that the Court of First Instance is internationally competent, taking into account that the harmful event extends beyond the change of position in the arbitration that took place in London and also covers the malicious

action of the defendant, ship owner, to maintain different versions in England and in Spain, which causes costs and damages to the claimant charterers in both proceedings. This should not have occurred should the same version have been maintained in both proceedings, in the English Arbitration and in the Spanish judicial Litigation.

To be continued...

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Felipe is a leading lawyer in commodity and maritime law in Spain. He is co-author of Maritime Letters of Indemnity. Ph.D in English Law at the University of Newcastle upon Tyne (England, 2008); LL.M. in maritime and commercial law at Southampton University (England, 1998). Visiting Scholar at the University of Tulane-New Orleans, (U.S., 2006). Law degree from the University of Malaga (Spain, 1996).

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DOBREV & LYUTSKANOV
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Dobrev & Lyutskanov has a new organisational structure, in which four appointments were made. Katerina Gramatikova - Junior Partner, Gergana Ilieva is now Senior Associate and Lyuben Todev is a Lawyer.



Katerina Gramatikova joined DOBREV & LYUTSKANOV Law Firm in 2006 as an associate. Ms Gramatikova has been a Senior Associate since 2011 and in August 2016 she was made Junior Partner.

She heads the following departments: Competition Law; Energy; Public Procurement and Concessions. She also works in the areas of Environment and Utilities and Infrastructure, Litigation and ADR and Transport and Communication.

Katerina is currently undertaking a Part-time PhD at the Department of International Legal Studies, Institute of State and Law, Bulgarian Academy of Sciences. She specialised in EC Competition Law in King's College, University of London and US Corporate Law and International Trade Regulations in Boston University, Legal Summer School in London in 2008.

She graduated from Sofia University St. Kliment Ohridski (LL.M. 2003), with a specialisation in Jurisdiction and Public Administration.

Ms Gramatikova is a lecturer at the Centre for Continuing Legal Education "Krustyo Tzonchev" at the Supreme Bar Council. President of the National Committee of Union Internationale des Avocats (UIA) for Bulgaria and Member of the Sofia Bar Association.



Gergana Ilieva joined DOBREV & LYUTSKANOV Law Firm in 2010 as an Associate. She is now Senior Associate. Gergana is heading Litigation and ADR; Employment and Immigration. Ms Ilieva graduated from Sofia University St. Kliment Ohridski (LL.M. 2003) and has completed specialisation courses in the sphere of Jurisdiction and International Law and International Relations. Member of the Sofia Bar Association.



Lyuben Todev joined the team of DOBREV & LYUTSKANOV Law Firm in 2013 as a trainee. He has been Junior Associate since 2014, and Lawyer since August 2016. Lyuben specialises in Corporate and M&A; Employment and Immigration.

Mr. Todev has graduated from Sofia University St. Kliment Ohridski (LL.M. 2012), specialization in Public Administration.

Upcoming Events

University of Southampton - Institute of Maritime Law
9th Singapore Short Course

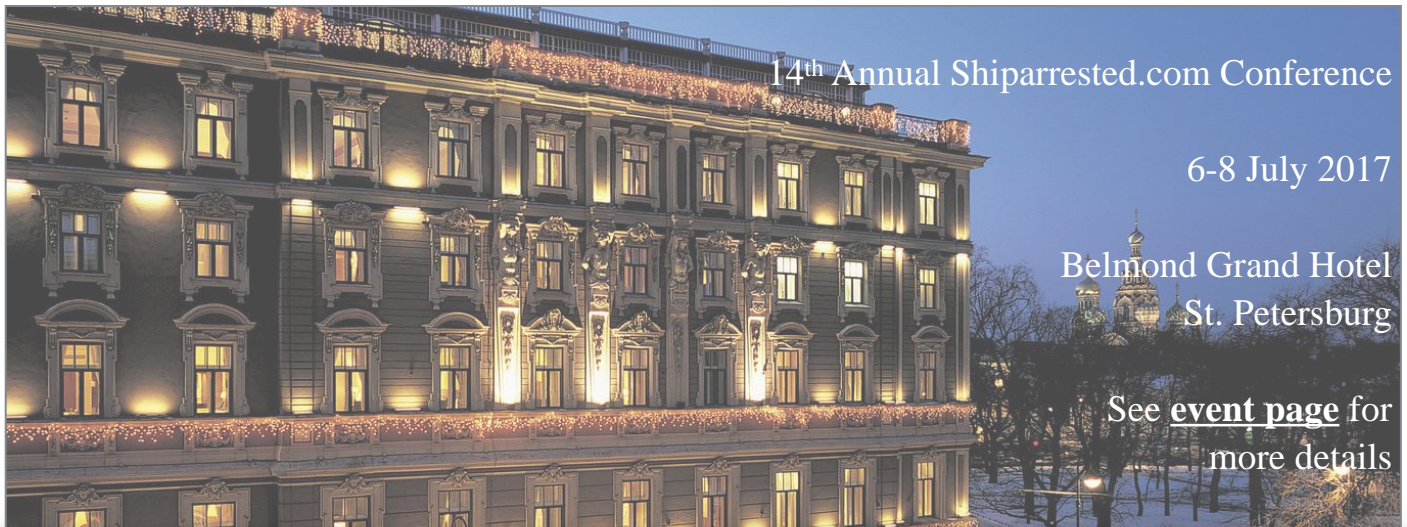
15-26 May 2017

See more details here on the [IML website](#)

For bookings or enquiries please contact:

Mr Alan Lim - alanlim@imlasia.org or

Miss Clare Brady - c.l.brady@soton.ac.uk



14th Annual Shiparrested.com Conference

6-8 July 2017

Belmond Grand Hotel
St. Petersburg

See [event page](#) for
more details

This newsletter does not purport to give specific legal advice. Before action is taken on matters covered by this newsletter, specific legal advice should be sought. On www.shiparrested.com, you will find access to international lawyers (our members) for direct assistance, effective support, and legal advice. For more information, please contact leigh.myers@shiparrested.com.

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