RUSSIA: BACK TO THE PAST IN SHIP ARREST PROCEDURE

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INTRODUCTION

There was a time when it was very easy to arrest a vessel in Russia and then to sale it for a very small price (even before any court order or judgment, just under the order of the Bailiff). Orders were based both on national statutes (if the dispute is to be determined by Russian court) and terms of the 1952 Convention, if the arrest is for any of the maritime claims listed in the Convention. Unfortunately, there were a lot of cases where a sort of abuse or misapplication took place. Contemporaneously, the practice of correct application of the 1952 Convention (arrest under maritime claim without any additional evidences/hearings) had still been set up and successfully formed as a part of the Russian law.

After several "headline-making" cases where arrest of sea-going vessels was used as an instrument of illegal change of the ownership of the vessel in question or as a method whose aim was exposing the opponents to financial restraints or difficulties, the Russian legal society eventually woke up to opposing the legal scenario of manifestly wrongful arrests.

In 2010-2011 several new statutes were implemented so as to rectify legislation gaps leading to obvious injustice. The court practice has been changed too. Nowadays, any security measure sought by the plaintiff is *prima facie* considered by the Court as an exposure of the defendant owner to inadequate pressure, unless cogent evidence to the contrary is adduced by the applicant. (so called "presumption of bad faith").

The same changes have been introduced into the sphere of maritime arrest and now we are going ahead to the particulars of the earliest practice adopted by the Russian legal system in relation to arrest of the vessels.

The interesting fact that accompanies all the abovementioned changes - the legislation has not significantly changed for the past years but all changes are based on the legal practice (construction of statutes by the Courts) only.

CHANGES IN SHIP ARREST PROCEDURE

In accordance with article 6 of the International Convention relating to the Arrest of sea-going ships (Brussels, May 10 1952 – hereinafter «Convention») «The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for».

In Russian legislation such special rules might be found in Chapter 8 of Code of arbitration proceedings of Russian Federation ("CAP") and in Merchant Shipping Act of 1999 ("MSC"). These two acts contradict each other: MSC's rules are based on Convention rules by virtue of which the arrest is allowed if the claim against which such arrest is being sought is in the list of maritime claims specified in the Convention. CAP contains rules of usual court proceedings where the nature of the claim does not matter.

The benefit of last official comments of Russian High Courts is that the judges are not bound to go into the substance of the claim. Now the doctrine of "Maritime Claim" is commonly accepted and there is no need to prove the claim on its merits. The obligation is just to show that a maritime claim exists that it is plausible.

However, it is not enough just to show a maritime claim in order to have a vessel arrested in Russia. The previous formal procedure has changed to the full discretion of the Judge. Now the applicant should prove the following facts in order to arrest the vessel:

1. The claim in question is a listed maritime claim. The list of maritime claims of MSC is almost the same as in the 1952 Convention.
2. The vessel is owned or bareboat-chartered by the Defendant. The court might demand to provide a documentary proof of the proprietary interest in the vessel. It is clear that for the most of the applicant it is very difficult to do, if possible at all.
3. The vessel has entered the territorial waters of Russia. Confirmation from the agency company or from the port authorities would suffice.
4. The amount of the claim is adequate to the value of the vessel and possible losses of the shipowner caused by the arrest. Arrest as a measure for securing the claim that is significantly less than the value of the vessel is unlikely to be allowed. The applicant is at times ordered by the Court to adduce the assessment of the vessel's market value. Practically it is quite difficult for the applicant, who might turn to be not quite good at such business, to assess the vessel's value and provide such assessment to the judge.
5. There should be adduced cogent evidence that in absence of imposing such security as arrest enforcement of the final award/court decision will be impossible or very difficult. This is the most usual reason for rejecting application for arrest. Evaluation of the facts and evidence of such "impossibility or difficulty" is carried out by the Judge. There are no firm recommendations as to how to succeed in this matter but I would like to mention that the arguments like "defendant has no other property at the territory of Russia" and/or that "vessel is a movable property and it might easily leave territory of Russia" are usually not accepted by the Courts.

It is very important to note that in case of brining petition for arrest of seagoing vessels the applicant might be ordered by the court to provide counter-security in the amount equal to the amount of claim. It is always at the discretion of the judge whether to order counter-security or not but if it is ordered then the applicant must provide it. Otherwise, the application for arrest will be dismissed. The order for arrest of the vessel will be not issued until ordered counter-security is received and accepted by the Judge. The counter-security needs for compensation of possible losses which the shipowner might suffer if the arrest itself proves to be wrongful.

Demand for counter-security might be avoided if the claim has been filled with competent Russian court and the arrest of vessel is sought as a security within the existing court procedure. Here I wish to stress that the Russian Courts very often disregard arbitration agreements like "Arbitration in London" (without exact name of the arbitration or procedure of appointment of arbitrators) and eventually agree to assume substantive jurisdiction over the claim against which the arrest is sought.

SHIP ARREST BY ARBITRATION INSITUTES

Among hundreds of Arbitration institutes existing in Russia I should highlight one special maritime arbitration – Maritime Arbitration Commission at Moscow (as a part of Chamber of Commerce and Industry of Russian Federation).

The reason why I mention it here is a special power granted to MAC by a Federal law to arrest sea-going vessels. None of Arbitration institutes in Russia is empowered to impose injunction on any property and/or order any security measure in terms of arrest

The Chairman of MAC might issue order for arrest if , as expressly set out in arbitration agreement, the substantive claim are to be determined in MAC . The order becomes valid upon its signing.

Practically it will be quite difficult to detain the vessel in the port by means of this Order only. The applicant has to fill it with the local Bailiff who is the only person empowered to physically detain the vessel in a particular port. The most common mistake of the applicants is that they try to deliver this order directly to the shipowner or to the Harbor master. Such steps are absolutely ineffective and will be the waste of time and money.

Thus, in the situation where the courts are anxious of the vessels being wrongfully arrested (which is the reason why they require enormous number of documents and exhibits) application to MAC for the issue of order of arrest is a workable alternative and good solution to the problem. However, such application to MAC is always subject to express arbitration agreement in which the disputes fall to be determined by MAC itself.

RELEASE OF VESSEL BEING UNDER ARREST

There are three ways how to release a vessel being under arrest (before final judgment on the merits of the dispute has been issued):

1. The first way is to appeal to the Court of Appeal and, and if failed, further to Cassation Court. This way is useful for the court orders since order of MAC is not possible to appeal. The pleadings might be based on breach of the abovementioned new criteria of arrest or objection against the maritime essence of the claim. No complaints based on the merits (e.g. argument that there was no debt) are allowed (due to the essence of maritime claim). In any case, this procedure is not very fast (from 2 weeks up to 1 month) but this is the most popular way.
2. The second variant is to lodge required deposit to the court that issued order of arrest. In case of arrest under MAC order there is a practice of lodging of deposit directly to the plaintiff (not to the MAC). This is the quickest way since the vessel will be released as soon as the Judge has accepted the required deposit.
   Russian law recognizes the following forms of security:
   - Lodging Cash deposit into the account of the court (only few of the courts have such deposit account, especially for currency deposit).
   - bank guarantee (of Russian bank)
   - letter of comfort (usually Russian company or citizen)
   - other financial instrument.
     Letters of undertaking of Insurance companies / P&I Clubs usually are not accepted.
     It is Judge who decides the relevance of the proposed counter-security and usually arguments/objections of the plaintiff are not important for making decision. Otherwise MAC always takes note on arguments on the plaintiff who is entitled to reject proposed deposit.
3. The last way is to fill to the court petition demanding provisions of counter-security by the applicant. If Judge accepts such petition then it might order the applicant to provide a counter-security against possible losses caused to the defendant by the wrongful arrest of the vessel. If applicant fails to provide such counter-security then the vessel will be released immediately on without prejudice bases.

ENFORCEMENT OF FOREIGH COURT DECISIONS

If the application for arrest of vessel registered has been rejected by Russian court then the claimant has a good chance to enforce the final decision/award against the vessel that is owned by Russian defendant.

If you win in arbitration then most probably you will enforce it in Russia since Russia is a party to the New York Convention of 1958. It is easy to enforce it in St.Petersburg/Moscow and more difficult in regions. For instance in St.Petersburg it takes 1 month, but in regions it takes 3 months and 3 hearings to persuade a Judge to enforce an award. It is easy to shorten this period and to have the enforcement quicker made if to comply during the arbitration not only with the Rules of arbitration (as it usually happens) but also with Russian procedural rules (especially in respect to notification, language of notification and main principles of Russian law).

Situation is, however, more difficult if the judgment of the foreign Court is to be enforceable. If there is special treaty between Russia and the country of the foreign Court with regard to reciprocal recognition and enforcement of the judgments then foreign decision is enforceable in Russia. But if there is no such special treaty then such decision is unlikely to be recognized and enforced.

For example, there is no reciprocal treaty on legal assistance in civil cases between Russia and UK (as well as the USA). So there is no chance to recognize and enforce decision of any UK court (including High court) on the territory of Russia against any property of Russian defendant. In my experience, the most of the "jurisdictional clauses" of shipping lines / corporation refer the disputes between the parties to the High Court of England and Wales. As an example, enforcement of the High Court decision against the property located in Russia, such decision would become valueless.

There are only 31 countries that have such special agreements with Russia (e.g. Cyprus, Spain, Italy, Greece, Turkey, China, India).

Decisions of Cyprus courts are the most favorite for the enforcement in Russian practice since most of them are recognized and enforced in Russia.

Conclusion

1. *It is quite difficult to succeed with arrest of the vessel in Russia. There is a total discretion of the Judge and huge list of requirements. In addition to the maritime nature of the claim the applicant should prove the reason of the arrest and adequacy of the amount of the claim to the value of the vessel.*
2. *Arrest proceedings are not quick to complete (collection of original documents + translation) and possible additional requirements from the Judge (additional documents).*
3. *Release of the vessel that was arrested is difficult procedure that may take up to 1 month.*
4. *There is the only one maritime arbitration institute – Maritime Arbitration Commission at Moscow that has sufficient power to arrest vessels and other assets of defendant as long as there is express arbitration agreement providing for MAC. Such order is more difficult for enforcement rather then the order of ordinary court.*
5. *Before commencement of any court proceedings against Russian defendants it is recommended that the plaintiff checks whether there is a treaty between Russia and country in which the foreign Court is located. Otherwise there is a risk of failing to enforce such decision.*