

RECENT DEVELOPMENTS IN ESTONIAN SHIP ARREST PRACTICE

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1. Legal Basis for Ship Arrest in Estonia

- Estonia is a Party to the following international conventions:
 1. International Convention on the Arrest of Ships (1999) which specifies maritime claims and the principles of arrest of ships (hereinafter: **Arrest Convention**);
 2. International Convention on Maritime Liens and Mortgages (1993) which specifies maritime liens;
 3. International Convention on Civil Liability for Oil Pollution Damage (1969) and amendments;
 4. Convention on Limitation of Liability for Maritime Claims (1976).
- Ship arrest in Estonia is additionally governed by Estonian Law of Maritime Property Act (hereinafter: **LMPA**) (1998) and Estonian Code of Civil Procedure (hereinafter: **CCP**) (2006).

- A ship can be arrested to secure a maritime claim or a maritime lien, irrespective of the flag of the ship and the nationality of the debtor. § 78.2 of LMPA - ship may be arrested on the basis of a maritime claim, stated in § 78.1.
- There may be claims against the shipowner, being not maritime claims, for instance a claim arising from loan agreement. Although Estonian court had in one case required a presence of maritime claim in order to arrest a ship of the respondent, a claim arising from any contract should be secured by arrest of vessel (presuming that Estonian court has general jurisdiction to solve a dispute).
- However, in a recent case (2017 in civil case No 2-17-7049 in the claim of Atlas Baltic OÜ vs Dennis Maritime OY) the court arrested the vessel ANNIKA BENITA for a claim of an agent arising from acknowledgement of debt by the operator which had not been agreed with the owner of the vessel. This arrest has been partially challenged (in part where the claim is not connected with ANNIKA BENITA and where the claim is not secured by a maritime lien) and we are awaiting for guidance by Tallinn Circuit Court.
- Therefore, arrest of the vessel of respondent for a claim being not a maritime claim, may not be excluded in Estonia.

2. Maritime Claims and Maritime Liens

- It is important to distinguish maritime claims from maritime liens. All maritime liens are maritime claims, but only few maritime claims are maritime liens.
- The following claims in Estonia are secured by a maritime lien:
 - 1) claims for wages and other sums due to the master, officers and other members of the crew in respect of their employment on the ship, including costs of repatriation and social security contributions payable on their behalf;
 - 2) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
 - 3) claims for reward for the salvage of the ship;
 - 4) claims for port, canal, and other waterway dues and pilotage dues;
 - 5) claims which arise out of direct damage caused by the operation of the ship other than damage to cargo, containers and passengers' effects carried on the ship.

- It is therefore important to mention that a great number of maritime claims – such as supply of goods, materials, provisions, bunkers, equipment; rendering several services to the ship for its operation, management, preservation or maintenance; construction or repair of the ship; towage – are not secured with maritime lien and therefore the arrest of a ship in connection with these claims is not always possible, for instance if shipowner or charterer responsible for the claim has been changed.
- Maritime lien transfers together with a ship upon transfer of the ship, regardless of whether the acquirer of the ship knew of the encumbrance of a ship with a maritime lien; a maritime lien also transfers with a ship upon a change of location of the registration or change of the flag of a ship.
- A maritime lien securing a claim extinguishes after one year has passed from the creation of a claim secured by maritime lien or if maritime lien arises from unpaid wages, after one year has passed from a claimant leaving a ship.

3. Permissibility of Ship Arrest

Arrest is permissible of any ship in respect of which a petition is filed with a court for securing a maritime claim if:

- 1) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected;
- 2) the demise (bareboat) charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected – **NOTE: time and voyage charterers are excluded due to the understanding that the arrest of a ship in respect of claims against the demise (bareboat) charterer is an exception to the general rule according to which a ship may only be arrested in respect of claims against the shipowner and it is not desirable to widen that exception;**
- 3) the claim is based on the restricted real rights established on the ship;
- 4) the claim relates to the ownership or possession of the ship;
- 5) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien.

Permissibility of Ship Arrest

- Arrest is also permissible of any other ship or ships which is or are owned by the person who is owner of the ship, or bareboat charterer, time charterer or voyage charterer of the ship in respect of which the maritime claim arose, except if the claim arises from a dispute concerning the right of ownership or possession of a ship.
- In case No 1-17-7049 the claimant as agent submitted in the arrest application also claims against the „fleet“ of the operator, owned by separate legal entities. This is not in line with the above mentioned rule.

- Estonia does not acknowledge piercing and lifting of the corporate veil. The claim must be against the person who is owner of the ship, or bareboat charterer, time charterer or voyage charterer of the ship in respect of which the maritime claim arose, however claims secured by a maritime lien may be submitted also against other legal entities.
- However, as the recent case of ANNIKA BENITA shows, the courts may also grant arrest if the claim, not secured by maritime lien, is against operator as a debtor who has given a debt certificate allowing the arrest of the vessel. Further court practice should clarify that such approach is not in accordance with the law.
- It is possible to put a second or third arrest on the ship which has already been arrested in Estonia.
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4. Jurisdiction of Estonian Courts

- According to § 95 of CCP maritime claim may be submitted to the court of according to the place of ship or home port of ship. Therefore Estonian court may have special jurisdiction in maritime claims even if place of respondent is in foreign country.
- This is in accordance with Article 7.1 of Arrest Convention, according to which the courts of the state in which the arrest has been effected shall have jurisdiction to determine the case upon its merits, unless the parties agree or have agreed to submit the dispute to a court of another state or to arbitration.

Permissibility of Ship Arrest

- Jurisdiction of Estonian court is not precluded even if Estonian courts seems not to have jurisdiction to hear a claim arising from a maritime lien pursuant to Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter Regulation).
- Pursuant to Article 3 of the Regulation in principle the competent court is the court of place of business of defendant. But pursuant to Article 71 (1) of the Regulation this Regulation shall not affect any conventions to which the member states are parties and in relation to particular matters, govern jurisdiction. Therefore the Arrest Convention shall be treated as *lex specialis* and the Regulation shall not be applied. The Regulation does not prevent the applicability of rules on jurisdiction arising from the Arrest Convention.

- According to subparagraph 3 of § 382 of CCP, if a vessel is in Estonian port, it may be arrested regardless of the place of solving the dispute, either in state court or arbitration court abroad (if such agreement has been concluded). It is even not important that statement of claim would have been submitted to appropriate court or arbitration court as that may be done later according to the deadline determined by the court, which had arrested ship. The court would demand proof of submitting the claim to the competent court or arbitration court.
- This is in accordance with Article 7.3 of Arrest Convention, according to which in cases where a court of the state in which the arrest has been effected does not have jurisdiction to determine the case upon its merits, such court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent state court or arbitral tribunal.

5. Arrest Procedure

- In order to arrest a ship in Estonia, a well founded application must be submitted to the court, a state duty must be paid (currently 50 EUR) and a counter-security must be given of at least 5% of the value of the claim.
- The court may demand a higher counter-security (normally it is 15% of the sum of the monetary claim). It is possible to make an application to the court to pay the counter-security within a reasonable time after the arrest (normally the judge would grant up to 7 days). If the counter-security is not paid within the given time, the arrest would be lifted.
- The sum of counter-security used to be capped at 32 000 EUR, but the National Court has recently found that in ship arrest cases this cap is not applicable in National Court Case No 3-2-1-140-13 in the claim of Lamda Maritime Holdings Sp. z o.o. against Philadelphia Navigation Limited.

- In order to submit an application for the arrest, we would need a power of attorney (may initially be scanned copy), signed client agreement (may initially be scanned copy) and prepayment for our legal services and for the fees and security (normally 15% of the claim) which may be demanded by the court.
- In practice it is possible to submit documents proving the arrest of the vessel in English, but court or other party may require a translation of documents later on. It is possible to submit the application and all supporting documents electronically without an apostille, but the court may later require originals or apostilled documents, depending on the case.

- After the arrest, the substantive claim must be filed within the deadline given by the court, which is up to 30 days. If the claim is not filed within the deadline given by the court, the arrest shall be lifted.
- If a ship is arrested, it is possible to release the ship from the arrest by giving a sufficient security for the claim (to transfer the sum indicated in the arrest order to the account of the court or give a bank guarantee acceptable to the court). The guarantee is normally sufficient if it covers the claim, expected arrest costs and foreseeable legal costs adjudged in favour of the other party.

Security

- It is advisable not to give a bank guarantee as security, as this must be submitted as unconditional (can be executed before the end of the dispute). Letters of undertakings of P&I Clubs are not accepted, if not agreed by the claimant.
- In case of wrongful arrests the security paid and any additional damages may be demanded by the defendant in separate proceedings from the party who wrongfully applied for arrest of the ship. In a recent case No 2-16-2195 in the claim of Philadelphia Navigation Limited vs Lamda Maritime Holdings Ltd, the damages for wrongful arrest have been adjudged in the amount of 4.949.008,32 EUR, which is being executed in Poland by using European Enforcement Certificate.

Sale of Ship During Proceedings

- It is possible to sell the ship during the time of the proceedings. An application may be made at any time when it is evident that the defendant does not put up security. Normally the sale of the ship would take place within 6-12 months as of the arrest of the ship.

The money received from a compulsory auction of the ship shall be distributed in the following order:

- 1) the expenses connected with the forced sale and seizure of the ship, and expenses which the state incurs for removal of the ship from the waterways in order to secure safe navigation;
- 2) claims secured by a maritime lien;
- 3) claims secured by a maritime mortgage;
- 4) other claims (including maritime claims).

If the ship is arrested by several parties and there is a dispute regarding distribution of the proceeds of the sale, it must be decided in separate proceedings pursuant to the claim of the applicant. We have successfully represented a credit institution in proceedings regarding division of the proceeds from the sale.

Some Recent Cases from Our Ship Arrest Practice in Estonia

– SAMRAA ALKHALEEJ (case no 2-13-6467, Lamda Maritime Holdings Ltd vs Philadelphia Navigation Limited)

- In February 2013 the oil tanker SAMRAA ALKHALEEJ was arrested for an alleged claim of 4,4 MEUR arising from alleged breach of chartering agreement.
- There was a dispute if the charter agreement was under English High Court or London Maritime Arbitration jurisdiction
- A guarantee for alleged claim 4,4 MEUR (apostilled, notarially certified and original document) was given by British Arab Commercial Bank plc to Harju County Court with a clause that the sum will be released by the end of proceedings, if successful.
- The arrest was substituted with a guarantee, but challenged by the Claimant, demanding unconditional guarantee;
- By the time the case was appealed to National Court, the oil tanker had been under arrest near the Port of Tallinn for over 8 months and caused a small oil spill.
- The sum of 4,4 MEUR was transferred to the National Court to release the vessel (in addition to the valid guarantee).
- The vessel was released and the court demanded counter-security of ca 0,5 MEUR from the claimant which was not given. The guarantee was returned and the sum of 4,4 MEUR was also released.
- A claim was submitted to deem the arrest of the vessel unlawful, which was satisfied in the sum of 4.949.0087,32 EUR. Execution of judgment is under way in Poland (location of the legal entity who applied for arrest of the vessel).

Some Recent Cases from Our Ship Arrest Practice in Estonia

– TOOLSE (case No 2-14-61146, AS Eesti Telekom, Teliasonera International Carrier AB vs OÜ Morobell)

- Fishing vessel TOOLSE broke a cable in November 2014 near Estonia of two telecom companies, who submitted a claim to the Court.
- Since the vessel had been sold short, two other vessels of the same debtor (Estonian company) were mortgaged to secure the claim for 90 000 EUR each.
- The debtor claimed that it is not responsible for the braking of the cable and breaking of the cable 50 m below sea surface is not proven. Harju County Court agreed and did not satisfy the claim.
- Tallinn Circuit Court found that the owner of the vessel which passed the cable at the time when the communication in cable broke, must be liable for the damage since:
 - cables don't break themselves and the weather can't be responsible for breaking the cable;
 - the vessel was the only vessel at the place of brokening the cable;
 - the speed of the vessel decreased at the coordinates of brokening the cable.
- The court found, that the owner of the vessel is liable for the damage and the claim was fully satisfied.

Some Cases from Our Ship Arrest Practice in Estonia

– FLUCTUS

- The barge built in Estonia was arrested by the shipyard to secure its alleged claim for additional costs for the sum of ca 300 000 EUR after termination of the contract which was demanded as security to lift the arrest. We represent the owner of the barge.
- The claim of the shipyard appears to be clearly unfounded (invoices did not specify „additional“ repairs made and there was an agreement between the parties that the repair works should be finalized for an agreed sum and ownership of the barge transferred to the owner).
- The vessel was released in exchange for transferring the sum of 300 000 EUR to the Harju County Court account.
- Arbitration proceedings are under way in Stockholm Arbitration Institute on the merits of the case.

Some Cases from Our Ship Arrest Practice in Estonia

- ULS FERRY 1 (cases 2-16-17878 and 2-16-18230)
- In November 2016 the vessel „ULS FERRY 1“ was arrested in Tallinn at the Port of Bekkeri by the agent (claim with waterways fees ca 125 000 EUR), the Port of Bekkeri (claim of ca 50 000 EUR) and the Port of Sillamäe (claim of ca 25 000 EUR).
- On 22.12.2016 by a compromise agreement, all claims (including crew salary claims) were satisfied.
- The vessel was allowed to leave the port by all creditors, even before the court lifted the arrest, to another port in Tallinn for taking to pieces as scrap metal.

Some Cases from Our Ship Arrest Practice in Estonia

- ANNIKA BENITA (Atlas Baltic OÜ vs Dennis Maritime Ltd, case no 2-17-7049)
 - Vessel was arrested by the agent based on acknowledgement of debt of the operator of several vessels. Acknowledgement of debt allowed arrest of all vessels which had been operated by the same operator.
 - The claims were not submitted only against the arrested vessel, but also against other vessels operated by the same operator
 - The sum of 65 000 EUR was transferred to the account of Harju County Court to release the vessel from the arrest.
 - The arrest was challenged in regard to the amount of claim and request was made to return part of the sum transferred (relating to debt before the agent in connection with other vessels).
 - The appeal has not yet been decided by Tallinn Circuit Court.

Thank You for Your attention!

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