



Arresting bunkers in Spain

Jordan November 2022

ARIZON ABOGADOS SLP





When do we opt for arresting the bunkers?

When we have a claim against a party who is not the ship registered owner and that party is the owner of the bunkers on board, typically when the ship is time chartered.

Arresting a ship is by far much simpler procedure than arresting bunkers.

Today, we shall guide you through the process we face when arresting bunkers.



Can we use the 1999 Ship Arrest Convention to arrest the Bunkers?

- The wording of the 1999 Arrest Convention refers to Ships, not to cargo, nor to bunkers on board. Therefore, the Convention cannot be used to arrest bunkers.
- The definition of a ship in the 2014 Spanish Shipping Act is found in Art. 56, which reads:
 - Vessel is understood as any vehicle with a structure and capacity to navigate the sea and to transport people or things, which has a continuous deck and a length equal to or greater than twenty-four meters.*
- Article 57 Boat

A vehicle that does not have a continuous deck and a vehicle with a length of less than twenty-four meters, provided that, in both cases, it is not qualified by regulation as a minor unit based on its propulsion or use characteristics.



- To arrest the bunkers we need to resort to the same procedure that we use to arrest cargo or arrest moneys in Spain.
- The first question is to determine whether Spain is competent for any such arrest.
- If we are before a EU relationship, we must examine this in the light of EU law.

RB I-bis (Recast Regulation)

Provisional, including protective, measures

- ***Van Uden Maritime BV , C-391/95***
- ***Article 35***

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.



If the matter is not purely an EU matter, then a different regime applies:

LOPJ: Organic law of Judicial Order

Article 22.6.

The Spanish Courts will be competent when it comes to adopting provisional or preventive measures with respect to persons or goods that are in Spanish territory and must be fulfilled in Spain. They will also be competent to adopt these measures if they are competent to hear the main issue.



First difficulty we find is, Can the measure be requested before the Bunkers arrive in Spain?

Before the enactment of the shipping act in 2014 we could not seek the arrest of a ship in Spain before the ship arrived to the relevant Spanish port. Before such arrival the Court would say I am not competent to deal with this matter.



Article 471 of SSA

Competence

1. The court that has objective jurisdiction to hear the main claim or that of the port or place where the ship is located or the one to which the ship is expected to arrive, at its discretion, shall be competent to decree the preventive arrest of a ship. of the actor requesting the adoption of the precautionary measure. However, if the ship does not arrive at the expected port, the court of said port will lose its jurisdiction.

Before the arrival of the bunkers in Spain, the Court is likely to sustain that it has no competence to deal with the application.



Another difficulty.

Is the matter subject to arbitration or litigation?

It has long been determined under Spanish law that marine matters are subject to the competence of the commercial Court.

However, after the Introduction of the Spanish Arbitration Act, Art 8.3 and LOJP, where the matter is to be heard by arbitrators, the Court competent to take precautionary measures is the First Instance Court.

This has created a clash between views as to whether marine matters subject to arbitration are to be dealt by the Commercial Court, or the First Instance Court.

Let us know deal with the merits of such application.

When dealing with Ship Arrest in Spain we have the 1999 Arrest Convention that deals with most relevant parts of the application.

The Application of the 1999 Convention results in the arrest of a ship by the mere allegation of a maritime claim. Where a the Convention is not available we have to resort to the general law on precautionary measures:

- *Fumus boni iuris*
- *Periculum in mora*
- *Security*



- Fumus boni iuris

Fumus boni iuris is a Latin phrase, used in European courts, meaning `presumption of sufficient legal basis` (literally meaning `smoke of a good right`), **prima facie case**.

Therefore in contrast with the Arrest Convention where a mere allegation suffices, here we have to prove we have a prima facie case against the opponents.



- **Periculum in mora, translated as danger in delay**, it may become the most difficult element of the application to obtain a successful response by the Court.
- If tomorrow you go to the Court to try to arrest the funds I have in a bank account you will face an impossible task, it is to prove that time to take measures against me will put at peril your right to collect payment from me in the future...
- Taking measures against one party in advance to having the resolution of the dispute on the merits is a restrictive course of action unless something justifies such move.



- In the Ship Arrest Conventions the legislator has codified the right to a ship arrest regardless of the existence of a **periculum in mora**. This explains that you can arrest a ship even if the owners are massively solvent to pay for the claim at the time of the arrest or thereafter.
- How would you justify the **periculum in mora** in respect to the arrest of bunkers?
- Our view is to explain the Court that the movement of bunkers offers greater risks for creditors than the movement of ships by one ship Companies. Bunkers disappear much faster than ships, therefore the risk is higher.





- Security
- For ship arrest in Spain used to be 10% of the claimed amount.
- After the SSA was introduced the amount can be from 15% to 30%, normally is 15%.
- Here we have some room for Court discretion and therefore it may well be that the Court uses lower standards than for ship arrests or higher.



vodafone ES 20:31 29 %

Vessel Voyage Position Port Calls




Bulk Carrier MT 

~~QUINTANA ROO~~ CEUTA [ES]

ATD:30 Aug 12:31 UTC-4 ETA: 13 Sep 04:00 UTC+2

Travelled: 13d 1h Remaining: 7h 29'

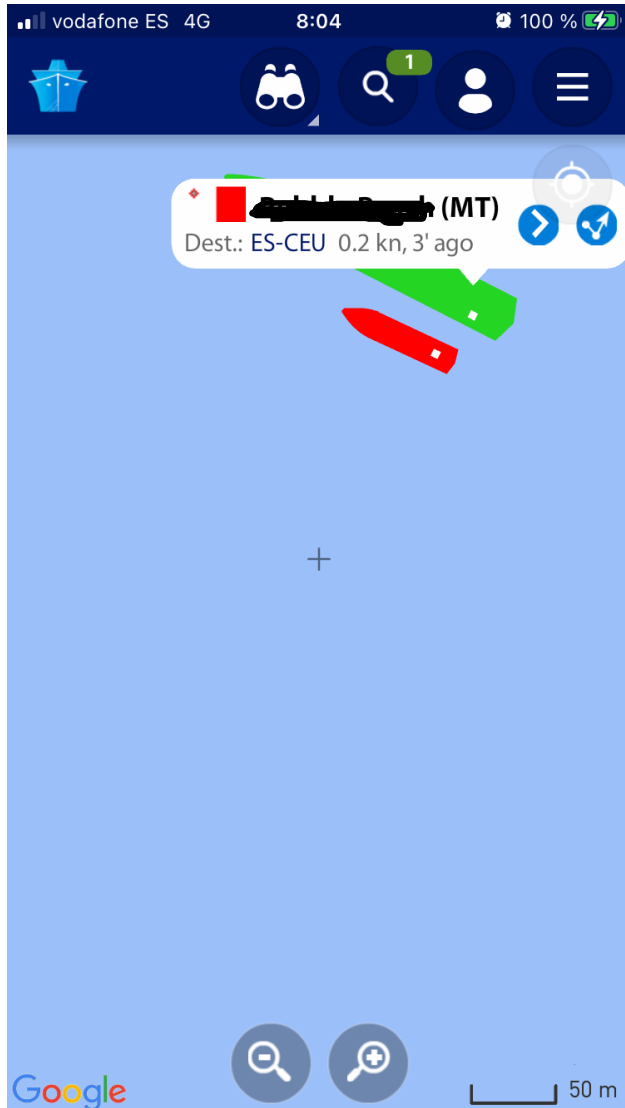
Status: **Underway using Engine**
Received: **2' ago** ●
Speed: **12.5 kn**

 **Access Plus 24** will expire in 13 hours and 30 minutes. >

Flag: **Malta**

Call sign	IMO	MMSI
9H1152	9505059	25505

Length x breadth	Year built
180.0m x 28.26m	2012



We presented the application at 08:30 in the morning, then the ship had been loading bunkers for 3 hours, and we did not know she was close to leaving the port, she got new bunkers on board in a record time of 4 hours.

The Court agreed to the *Fumus Boni Iuris*. However, it held that to prove the ownership of the bunkers on board could not be proven merely by an email of the P&I Club who stated that according to the intel obtained the bunkers belonged to the debtor. This was not sufficient in the view of the judge to prove ownership.

We flagged the client that Ceuta port is a hostile port with ship arrest, it is a port where the security demanded is high, and that ownership of the bunkers could become an issue if no objective evidence was provided.



Proving the ownership of the Bunkers

PROPERTY AND RISK

Title to the Products shall pass only when the Buyer has paid for the Products and paid all other sums due to the Seller under the relevant Contract or other Contracts.

We have the same scenario with a Paris Arbitration Award that we wish to enforce against the Respondents Sellers.

We need to Hunt down a shipment belonging to Sellers and apply for the arrest of the goods.



Conclusions:

We have to celebrate how simple arresting a ship has become compared to the arrest of any other property of a given debtor.

Bunkers in Spain can be arrested. However be aware of the difficulties that such action entails.

It is submitted that other Courts in Spain may not be as restrictive as the Court of Ceuta in the case we have cited.

The most significant difficulty for the arresting party is proving the ownership of the bunkers at the time of the arrest.

This information is not publicly available, and even if you manage to obtain the arrest order, if the ownership of the bunkers does not rest with the debtor, damages may result from the real owner of the bunkers appearing to contest the arrest /order / application.



Then my question to you is:

How difficult is it to arrest bunkers in your jurisdiction?

Thank you very much!