

SHIP ARREST IN MONTENEGRO

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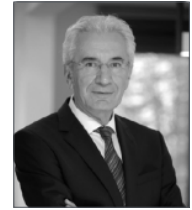
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1. Please give an overview of ship arrest practice in your country.

According to Montenegrin law the arrest of ships is one of the “interim measures/temporary injunctions” that ensures future collection of due and outstanding debt which is the subject of a dispute.

The arrest of ships is governed by a special procedure, non-contentious proceedings and the arrest order is issued under the name of “interim measure”. Every arrest must be upheld by a final and conclusive judgment on the merits, and the forced sale of a ship is possible only on the basis of such final judgment (or award).

Marine and Inland Navigation Act (*the Official Gazette of FRY Nos. 12/98, 44/99, 74/99 and 73/2000*; the “MINA”) governs the interim measures against the vessels. It is a *lex specialis* in regard to interim measures for ship arrests. However, where MINA is silent on certain issues related to ship arrest, the Enforcement and Conservatory Measures Act (*the Official Gazette of Montenegro Nos.br. 36/2011, 28/2014, 20/2015, 22/2017, 76/2017, 25/2019* ; the “ECMA”) is applied to fill in the lacunae in the law.

Prior to instituting civil proceedings, compulsory enforcement or administrative court proceedings, the court may, for the purpose of securing the pecuniary claim at the request of the creditor, issue any measure to achieve the goal of such enforcement and in particular to prohibit the alienation or other disposal of the vessel, order the guarding of the vessel and issue the ship arrest warrant.

If the law court issues an arrest warrant prior to institution of civil proceeding, compulsory enforcement or administrative court proceedings, the creditor is under duty to provide evidence within 15 days upon the issuance of the ship arrest warrant that it had commenced civil proceedings, compulsory enforcement or administrative court proceedings.

The goal of the ship arrest is to make available to the creditor assets of the debtor for future compulsory enforcement. Arrested ships may be released if another security is given in lieu thereof. The other security may be money deposit, bank guarantee, P&I Club or other corporate letter of undertaking or other values available for enforcement/collection if accepted as such by the creditor. Monetary deposits and bank guarantees are always accepted.

In the premises, it is possible to obtain the ship arrest or obtain the release of an arrested ship pursuant to accepted international standards and laws of Montenegro.

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

International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952 (Brussels Convention) is applicable in Montenegro and consequently MINA is mostly set out in line with the said Convention. Sea-going ship is defined as a vessel intended for sea-going navigation, exceeding 12 meters in length and with GT greater than 15, or authorized to carry more than 12 passengers. Montenegro has made reservation to apply domestic rules for disputes as to the title to or ownership of any ship (Article1, paragraph (1)(o)).

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

The ship may be arrested only under the authority of the court for maritime claim with the purpose of security of the claim but other Authority can order detention of the ship such as Harbor Master Office exercising Port State Control. It is worth noting that in 2011 the Maritime Authority of Montenegro joined the Paris MoU as a cooperating member with the prospect of becoming a full member in the future. The Customs Office authorities and the Criminal Court may order temporary

detention of a ship for the purpose of their proceedings and under restricted terms provided in other laws or other international conventions applicable. It is not the arrest in the sense of the Brussels Convention and MINA.

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

The prohibition of alienation and disposal as a specific measure or alternative to ship's arrest exists in Montenegrin law as a security measure related to maritime claim with the court order to make such entry in the Ship Register in Montenegro. Hence, possible alienation of the ship by the defendant against such prohibition has no legal effect whatsoever.

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

A ship can be arrested for:

Maritime claims as provided by Article 1 of the Brussels Convention¹⁹⁵² but when Convention is not applicable for all other claims notwithstanding to the nature if there is no reciprocity between Montenegro and the state of the flag. Because of the urgent nature of the ship arrest procedure, examination of the existence of reciprocity by Montenegrin Court is rarely done, and as a consequence thereof the court usually allows arrest for such ship practically for any type of claim. However, as a general note, only a ship owned by a person liable for the claim (action *in personam*) can be arrested in Montenegro meaning that action *in rem* is not allowed under Montenegrin law. Exemption to that rule is prescribed by Article 1021 of MINA which provides, *inter alia*, that a ship may be arrested also for the purpose of securing the contractual right of pledge or the maritime lien of a foreign law. It goes that a ship may be arrested in Montenegro regardless the change of the title over a vessel when such a claim is secured with a maritime lien of a foreign law (Commercial court of Montenegro Case file I. br. 9430/12 MV Arion Good News Holidays, UK vs Constellation Cruise Holding, Panama).

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

Yes.

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

Yes.

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

The concept of sister-ship arrest applies in Montenegro in the spirit of the Brussels Convention and the same is provided for in MINA that the applicant may arrest any ship owned by the person against whom the claim is directed but no other ship than the particular ship in respect of which the claim arose may be arrested in relation to the claim regarding the ownership, mortgage, hypothecs or other like charges attached to a ship.

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

There is no restriction to arrest the vessel as regards bareboat and time-chartered vessel. In this regard MINA does not depart from the Convention.

There is a certain ambiguity in regard to time-chartered vessel for the bunker supplied to the chartered vessel not paid by the charterer to the supplier. There is no sufficient case law established so far in Montenegro to give judge guidelines and the court could be strayed and led to the conclusion that such claim is against the owner of the vessel.

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

This matter is not regulated by MINA but such possibility does exist in other laws and in our experience the court has never required a counter-security as a precondition for ship's interest in

order to arrest a ship or for maintenance of already ordered arrest. Further, the claimant would have to prove in any case the existence of the claim. ECMA provides for a possibility that the creditor may post counter-security for the damage that could be occasioned to the debtor by rendering and enforcing the interim measure but this is done very rarely in practice.

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

No, there is no difference from the procedural point of view.

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

Montenegro has not ratified any convention relating to maritime liens. Until 2019 the MINA was the only source of law governing the priority of claims in Montenegro. The said law is brought in line with the MLM, 1926 but the country has never accessed to this Convention. The recently adopted Law on the Manner of Registration of Ships and in Rem Rights over Ships was prepared in the spirit of MLM, 1993, although Montenegro has not acceded to this Convention yet. It goes that for the net proceeds of sale, the creditors rights shall be settled by the priority rank defined by the Convention. Such maritime liens shall not be extinguished by a change of the owner of a ship, unless otherwise specified by this law. The said law recognizes maritime liens as both substantial and procedural rights and it was adopted in order to allow the Montenegrin shipowners, who are obliged to register their ships with the national registry, to secure long-term financing for acquiring their ships as the banks were refusing to finance such acquisitions before the mortgage institute has been introduced by the national law.

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

That depends on the contents of the file and supporting documents all of which must be officially translated.

If the claimants have traced the vessel movement and prepared the documents as instructed before vessel's arrival in Montenegrin waters, no more than one day is required to sort documentation and prepare the application, but the official translation of the relevant documents may turn to be time consuming. However, the applicant must put forward a claim meeting the standard of lower level of proof of its existence and be well-grounded (*fumus boni juris*) and that should be observed as the best guidelines in preparing supporting documentation.

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

Yes. No special form is required to grant a POA to our law firm which authorizes our Law Office to handle the case. The POA is required to be signed by a duly authorized company officer.

Apart from POA all documents and evidence supporting the claim against the debtor are also required by the court including agreements, vouchers, invoices and survey or inspection report by a surveyor or inspector in relation to the damage, and nature of the claim, etc. If the arrest is based on a mortgage, the mortgage document and the appropriate petition for foreclosure, it is prudent to provide the latest excerpt from the Ship's Register.

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

Application for arrest must be in original/hard copy because electronic filings with the court are not possible for the time being. It is recommended that the original of POA be submitted. However, while pending receipt of the original POA, copy of POA may be transmitted by facsimile or scanned POA via e-mail which would suffice to lodge application for arrest.

No other documents are required in original but the court may order presentation of original if in doubt or on explicit demand of the debtor.

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

That is subject to the nature of the claim and some other factors, but the court shall have jurisdiction to determine the case upon its merits in any of the cases specified in detail in the Brussels Convention 1952, under Article 7, paragraph (1). In general terms and unless otherwise agreed by the parties to the dispute, the Montenegrin court shall have a jurisdiction to decide on the merits subject to any conflict of law provisions prescribed by the national legislation. In this context, the arrest of ship may be deemed as a precautionary measure in order for the Claimant to be able to successfully enforce the future judgment. Once the Claimant obtain the final, binding and enforceable judgement or the Arbitration award he will be able to initiate the forced sale of a ship if his claim was not properly secured otherwise in the meantime (LoU executed by the P&I Club, bank guarantee, court deposit, etc.). In the event when a ship is not already arrested, the court will order (ex officio) a seizure of the vessel to prevent her from sailing out in another jurisdiction. It is also noteworthy that in line with Article 1051 of MINA the Montenegrin courts are exclusively competent for trials in disputes arising in the course of and regarding a forced sale of ships being carried out by the Montenegrin court.

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

It is very simple and expeditious procedure. The shipowner may deposit the amount of money or other valuables with the court as ordered by the court in which case the vessel will be set free by the judge without application of the parties in dispute by issuing release order for the ship. The release order can be served to the master through Harbor Master Office to whom the power is presented to act for and on behalf of the court and the release order may be sent by facsimile transmission in order to speed up the release of the vessel.

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

There is a peculiarity in Montenegrin law in regard of security needed for the release. The court may order the deposit only in the amount for which the applicant had made probable the main claim and according to the standard of lower level of proof of claim but without costs and interest thereon, which is very difficult to assess in the early stage of proceedings. That means the court shall not determine the nature and amount of other security met in practice in other jurisdictions but this peculiarity can be easily overcome in practice with one advantage that the claimant cannot be exposed to the risk to be sued for excessive security sought and its consequences.

It is worthwhile to note that deposit with the court as ordered by the court pursuant to provision provided in MINA is without doubt a top-quality security, but may turn out to be a heavy burden for the owner and is rarely done in practice which is reflected in the practice of Montenegrin Courts.

The court shall play an active role and determine the nature and amount of the claim only in case regarding the default in discharging the agreement between the Parties when the ship has been arrested in respect of any maritime claim enumerated in Article 1(1)(o) and (p) allowing vessel to continue trading.

19. Does security need to cover interest and costs?

Restriction imposed on the court as described under point 18. above cannot prevent the applicant and shipowner to negotiate the acceptability or otherwise of any form of guarantee less burdensome for the debtor and if they reach an agreement the applicant must notify the judge in writing and request the judge to release the ship from arrest and that shall be accepted by the judge and considered as good security. Naturally, such security if offered and accepted shall cover the amount of claim plus interest and costs.

When the interest of Montenegrin persons is involved, they will usually accept foreign bank guarantees for the amount of claim plus cost and interest as agreed between the Parties if confirmed by Montenegrin bank because if not confirmed by the Montenegrin bank, may cause difficulties in enforcement as the Montenegrin court has no jurisdiction over the foreign bank, and recognition of a Montenegrin judgment may have to be obtained.

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

The court cannot force the applicant to accept P&I Letter of undertaking or Letter of guarantee or in combination with P&I Club's bank but irrespective of that we have always instructed our clients without exerting pressure to consider acceptability of first class P&I Clubs of the Group who have always honored their obligation and their Letter of undertaking, which is the advantage in most circumstances to release the vessel or preventing arrest and in its wording total liability is composed of such sum or sums as may be adjudged, inclusive of interest and costs.

Local insurance companies are not prone to issue back to back guarantee when a P&I guarantee had been issued by foreign P&I Club and another disadvantage is that P&I Club cannot post security for an un-insured claim. However, in some cases we have attempted to convince the P&I Club to post guarantee to the satisfaction of our clients exploiting the possibility that each Club may define circumstances when it can issue letter of undertaking for liabilities outside the scope of P&I insurance cover against counter-security from its Members.

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

The ship can be released from the arrest by order of the same judge that granted the arrest upon the occurrence of one of the causes that permit a discharge of an arrest order under Montenegrin law described hereinabove, and the release time usually takes no more than few hours on the same date of application for release subject to official hours of the court.

22. Is there a procedure to contest the arrest?

Yes. The time for appealing an order for arrest to the court of appeals is 8 days from its notification to her master, who is considered to be the legal representative of the shipowner.

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

After the arrest the claimant must start proceeding on the merits within 15 days if the Montenegrin court has jurisdiction for hearing the entire action on the merits, but if the parties have agreed to submit the dispute to the jurisdiction of particular court or arbitration tribunal other than that within whose jurisdiction the arrest was made the single judge in his discretion may grant a period of 30 up to 60 days to the claimant to start proceeding thereafter and if the action or proceedings are not brought within the time so fixed the defendant may apply for the release of the ship or of the bail or other security provided.

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

Yes, although that matter is not regulated by MINA. The claim for indemnity can be instituted pursuant to The Law on Obligations and Torts against the applicant inflicting loss who wrongfully arrested the ship. The claim for indemnity should be placed in the separate proceeding. There is not sufficient case law so far whether the complaint for damages for wrongful arrest can be placed in the same arrest proceeding as known in other jurisdictions.

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

The court will not acknowledge the piercing and lifting of the corporate veil. Such institute does exist in corporate law but is not applicable for maritime claims because pursuant to the provision of MINA the court will acknowledge the Owner/Operator as the key person who is liable for obligation arising from navigation and use of the vessel for intended purpose.

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

This matter is not regulated by MINA, 1998 pursuant to which the compulsory sale of the vessel must be performed at public auction in rather lengthy court proceeding which must be properly advertised inviting all known creditors. Therefore, the ECMA being a subsidiary source of law which

provides pendente lite sale of other assets in certain circumstances is not applicable in the case of arrested ship or seized in execution or satisfaction of the judgment.

Due to the above said limitation a way was found by instituting the sale of the vessel, somewhat similar to the institute of “pendente lite” but not on the application of parties in dispute or involved either in the sole discretion of the court. For that purpose recently promulgated Law on Safety of Navigation provides that Harbor Master may apply with the court for sale of the vessel “pendente lite” in the court proceeding if her master and the crew abandoned the vessel without being replaced by the Owner or Operator within time left to hire additional crew as per Certificate of Minimum Safe Manning, and as such presenting actual or potential danger for safety of navigation, port facilities or environmental risk as the case may be.

As regards the question how long does it take to sell the vessel “pendente lite” there is not sufficient case law so far, but we may say for certain that will be the shortest and most simplified and expeditious way of proceeding for enforced sale of the vessel experienced in Montenegro.

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Mr. Milosevic spent a year practicing at Ingledew Botterell law firm, The North of England P&I club in England and Lloyd's insurance Market in 1989, specialization in international maritime law. He started his law practice in 1978 and has worked as an in-house attorney for several Belgrade-based shipping companies prior to launching his career as a practicing lawyer in 1991.

He is managing partner at Law Office Milosevic. As a lawyer he has concentrated on international commercial matters, including shipping and insurance law, both Serbian and international.