ACTIO IN REM ANALOGY IN LITHUANIAN LAW

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KLAIPĖDA REGIONAL COURT JUDGEMENT C/C E2-319-613 / 2018

Plaintiff J.Sh.Tr., a company registered in Kitts and Nevis, which had an office in Turkey, brought a debt claim against **defendants Cr.S.** (registered owner) **and C.S.** (beneficial owner) for delivered fuel . The claim included a request to arrest the ship C. (under the Bahamas flag) in accordance with the provisions of the International Convention for the unification of certain rules relating to Arrest of Sea-going Ships (1952 Arrest Convention)*.

Based on the Article 7 of the 1952 Arrest Convention, the court heard the case.

**(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts <...>*

2. Defendants Cr.S. and C.S. asked the Court to release the ship from arrest and accept a Letter of guaranty (LOG) issued by the P&I Club as a preliminary injunction.

Plaintiff requested the Court not to change the interim measures and to leave the ship arrested. The court agreed on plaintiff's position and did not accept LOG.

→ The ship was first released from the arrest after the defendants transferred money into deposit account of the court as preliminary injunction.

3. The defendants submitted to the court a statement, which includes, that:

- The plaintiff was not an actual fuel supplier but a broker;

-The defendants were not fuel buyers → The contract for the fuel supply was concluded with D.I.H., who had made a separate charter agreement with the shipowner.

- The fuel was purchased by agent S.S.T., who acted on behalf of D.I.H.

- According to charter agreement, M.S.I. guaranteed for D.I.H.

- Defendants had not been aware of the purchase of fuel. They became aware of the alleged debt for fuel only after the ship was arrested in the port of Klaipeda.

4. The Klaipėda Regional Court added third parties D.I.H. (Liberia), S.S.T. (Liberia) and M.S.I. (Turkey) to the case.

The court did not succeed to deliver documents to D.I.H. and S.S.T., while M.S.I. got the documents delivered from the court, but did not submit its response to the claim.

5. On January 15, 2019, the court dismissed the claim. The plaintiff appealed to the Court of Appeal of Lithuania.

SUMMARIZING THE MAIN ASPECTS OF THE CASE:

1) The Plaintiff was not an actual supplier but only a fuel supply broker;

2) The requirement to pay for the supplied fuel was made not against the contractor of purchase agreement (the charterer), but against the shipowner;

3) The shipowner was not informed about the fuel purchase agreement and the alleged debt;

4) All the parties in the dispute had no connection with the port State;

5) According to the Article 7 of the 1952 Arrest Convention the Court had jurisdiction to arrest the ship and also to investigate

LETTER OF GUARANTY (LOG) ISSUED BY THE P&I CLUB AS A PRELIMINARY INJUNCTION

Initially, the court refused to accept the LOG of the P&I club and refused to remove the arrest from the ship.

→In Lithuania this case was the first one, when the creditor, on whose request the ship had been arrested, asked the Court not to accept LOG as a preliminary injunction.

→In general, very small number of legal maritime disputes has been hold Lithuania.
As a rule, ships with a non-Lithuanian flag in Klaipeda are asked to be arrested by trustworthy participants of the maritime transport market, who are familiar with the role of the International Group of P&I Clubs.

→According to the common practice, after a ship has been arrested, a shipowner or other person submits a Letter of Guaranty (LOG) issued by one of the P&I clubs. Then a creditor declares to the Court their acceptance of the LOG as a guarantee, after which the arrest of the ship is removed.

→In this case, the plaintiff's attempts to abuse these civil procedural

PROPOSED METHODOLOGY TO ANALYZE ANALOGOUS DISPUTES:

- to determine whether a Court has the right to arrest or otherwise restrain a ship, which sails under a flag of another State;
- to determine whether a Court has jurisdiction to hear a dispute between parties, that have no legal ties with the State of Lithuania;
- to determine, which State's law should be applied;
- to determine, whether a creditor's claim is justified;
- to determine, whether a limitation period shall be appllied on request of parties.

ESSENCE OF THE ACTIO IN REM

1. In this case, the plaintiff sued the shipowner for fuel debt recovery arguing, that charterers, who entered into a fuel purchase agreement, acted as shipowners' agents in favor of the shipowner.

→Since the defendants had never concluded any purchase agreements with the plaintiff, they could not, a priori, breach the fuel purchase agreement and the defendant had no obligation to pay for the fuel allegedly delivered to the vessel.

2. If the Court had ruled, that the plaintiff actually supplied fuel to the charterer and they had to respond under the ***actio in personam***, could such recovery be directed to the ship?

→ In my opinion, such recovery from the value of the ship would breach Article 62 of the Lithuanian Law on Merchant Shipping, which determines the list of maritime claims.

LEGISLATION ON SHIP ARREST IN LITHUANIA

1. Code of Civil Procedure of the Republic of Lithuania (hereinafter referred to as – CCPRL), which came into force on 01.01.2003;

2. Law on Merchant Shipping of the Republic of Lithuania (hereinafter referred to as LMSRL), which came into force on 18.10.1996;

3. Law on International Treaties of the Republic of Lithuania, which came into force on 09.07.1995.

4. 1993 International Convention on Maritime Liens and Mortgages (hereinafter referred to as 1993 Convention), which came into force in Lithuania on 29.10.2002;

5. 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships (hereinafter referred to as 1952 Arrest Convention), which came into force in Lithuania on 08.08.2008.

3 RELATED LEGAL INSTITUTES ESTABLISHED IN LITHUANIA

- *privileged claims;*
- *maritime liens;*
- *maritime claims.*

During analysis of maritime claims and bringing arguments for it, it is necessary to determine the type of a claim, since the three types include different theoretical and practical aspects on arrest of ships in Lithuania.

According to the Article 62, Paragraph 2 of LMSRL, claims secured by mortgage and other following claims must have the first priority of satisfaction:

1) claims of the staff of the manager of a ship in respect of labour relations, claims for compensation for mutilation or other injury to health, also for loss of life and claims for damage resulting from death or injury of a passenger;

2) claims relating to port dues;

3) claims for salvage remuneration and general average contributions;

4) claims for compensation of losses arising from collision or other accident at sea, damage to port works and other property and aids to navigation;

5) claims arising from the acts of the master of the ship, by virtue of the powers conferred on him by this Law, for the preservation of the ship and the continuation of the voyage;

6) claims in respect of loss or damage to cargo or luggage;

7) claims in respect of payment for freight and other charges due for the carriage of goods by sea.

Comparing the list of privileged claims (Article 62, Paragraph 2 of LMSRL) with the list of maritime claims (Article 1, Paragraph 1, of 1952 Arrest Convention) the differences are well recognized →

According to Article 62 Paragraph 2 of LMSRL, claims arising from shipbuilding are not regarded as privileged claims. This difference is problematic deciding applicable law.

Effect of mortgages, “hypothèques” or charges in regard to third parties shall be determined by the law of the State of registration (Article 2 of 1993 Convention)

Article 4, Paragraph 1, of the 1993 Convention provides the incomplete list of maritime liens, while Article 6 identifies that other maritime liens may be determined by the law of the State of registration.

- Maritime liens, arising from social rights of seafarers according to the Article 4, Paragraph 1, Point a of 1993 Convention are essentially privileged claims according to Article 62 Paragraph 2, Point 1 of LMSRL, as well as claims for compensation for mutilation or other injury to health, also for loss of life both on land and in the open sea whenever they are related to the use of a ship (Article 4, Paragraph 1, Point b of 1993 Convention).
- Claims for compensation for salvage (Article 4, Paragraph 1, Point b of 1993 Convention), regulated also by the Article 62, Paragraph 2, Point 3 of LMSRL).
- Claims for port, canal dues, other navigator and pilot fees (Article 4, Paragraph 1, Point d of 1993 Convention) in part also fall within the Article 62, Paragraph 2, Point 2 of MSARL.
- Tort claims arising out of physical harm and damages that were suffered during use of a ship, with an exception to requirements for damages and loss of on-board cargo, containers and personal items of passengers (Article 4, Paragraph 1, Point e of 1993 Convention) conforms with the provisions of the Article 2, Paragraph 4 of LMSRL

Comparing the Article 4, Paragraph 1 of the 1993 Convention with the Article 1, Paragraph 1 of the 1952 Arrest Convention, it can be stated that the mentioned maritime liens are identically defined in both Conventions.

It is evident from the brief analysis, that privileged claim, defined by LMSRL, in Lithuanian law is analogue to maritime lien regulated by the 1993 Convention.

However, not all maritime claims, which entitle to arrest a ship, (Paragraphs 1 and 2, Article 1 of 1952 Convention) are defined as privileged claims in LMSRL and provisions on maritime lien of 1993 Convention.

In Lithuania, as well as in other western countries, arrest of a ship as a legal institute, is related to the possibility to satisfy the mentioned claims and settle the debts in the future from the received funds following the sale of the ship.

On the other hand, as the international maritime practice shows, the institute of arrest became an additional and very important measure for ensuring settlements on time between various participants of the maritime industry.

The actio in rem doctrine within the common law countries is closely related to the classic civil law of the Roman empire due to the fact that only the Roman empire provided the fair value and completeness of a judicial protection to the said right.

Even though continental law states do not apply *actio in rem* doctrine, the essence of the arrest of ships has little difference. The economic goal of a creditor remains the same – to recover their money.

→ Therefore, application of ship arrest without a possibility to recover money after selling the ship shall be seen as an instrument of fraudulent

In Lithuania, as well as in continental-law countries, it is possible to distinguish the following cases for the arrest of a ship.

→For example, disputes on ownership rights of a ship, when a defendant is an entity based in Lithuania.

This legal situation does not differ from arrest of other items used as a preliminary injunction for creditor claims. In this case, the preliminary injunction is applied in accordance with the rules of the Civil Procedure Code of Lithuania.

WELL AS OTHER ITEMS, HAVING A LEGAL STATUS OF PROPERTY, MAY BE SUBJECT TO THE FOLLOWING TEMPORARY SAFEGUARD MEASURES, WHICH ARE REGULATED BY:

defendant (Article 145, Paragraph 1, Point 1of PCRL);

- entry into public registry for the restriction to transfer the right of property (Article 145, Paragraph 1, Point 2 of CPCRL);
- arrest of property rights to a ship, belonging to the defendant and currently held by the defendant or third parties (Article 145, Paragraph 1, Point 3, of CPCRL);
- Detention of a ship belonging to the defendant (Article 145, Paragraph 1, Point 4 of CPCRL);
- Appointing of a ship's administrator (Article 145, Paragraph 1, Point 5 of CPCRL);
- Restriction towards the defendant to take part in the deals or take specific actions (Article 145, Paragraph 1, Point 6 of CPCRL);
- Cease of realization of a ship, following an action for annulment for the arrest of the said ship (Article 145, Paragraph 1, Point 9 of CPCRL);
- Obligation to carry out actions relating to the ship and denying the possibility for the damages to occur or increase (Article 145, Paragraph 1, Point 12 of CPCRL);
- Other measures provided for in the law or applied by the court and if the court would deny to enforce the measures for the enforcement of the judgement would become really difficult or even impossible (Article 145, Paragraph 1, Point 13 of CPCRL).

CERTAIN PECULIARITIES, THAT ARISE OUT OF TERRITORIAL JURISDICTION :

1. When a debtor – a person that falls within the jurisdiction of Lithuania – is insolvent and insolvency proceedings against him have been started:

→ In this case, the entire property of the debtor, including the sea-going ship, is arrested by the district court based on the place of registration of the defendant (Article 9, Paragraph 2, Point 5 of Enterprise Bankruptcy Law of the Republic of Lithuania).

2. When a debtor is not insolvent:

→ In this case, a ship may be arrested, and the debtor may be subject to civil proceedings based on the address of the head office of the debtor and the current location of the ship, as long as the ship is currently staying at the Port of Klaipeda in Lithuania.

3. the debtor and the creditor concluded an arbitration agreement.

→In this case the power to apply a preliminary injunction, including ship arrest, is relegated to the Vilnius District Court based on the Article 27, Paragraph 1 of the Law on Commercial Arbitration of the Republic of Lithuania.

FORMER AND CURRENT SHIP-OWNER DOES NOT HAVE ANY RELATIONS WITH LITHUANIA, EXCEPT FOR THE FACTUAL PLACE OF STAY OF

Two legal situations should be observed separately:

a) the parties have entered into an arbitration agreement;

b) the parties have not entered into an arbitration agreement.

CAN A SHIP BE ARRESTED IF THE SHIP IS UNDER A FLAG OF A STATE THAT HAS NOT RATIFIED THE 1952 CONVENTION?

defendant, that has no permanent residence in the Republic of Lithuania, might be heard based on the current place of their property (Article 30, Paragraph 2 of CCPRL), and Article 30, Paragraph 8 of CCPRL,

- →A claim for settlement of damages, occurred due to collision of ships and for settlement for recovery and support and rescue in the open sea, as well as all other cases, where the dispute arises due to legal relations raised out of carriage by sea, may be heard in Lithuania based on the current location of the ship of the defendant or the port of

CONCLUDING…

1. A clear and transparent mechanism to regulate arrest of sea-going ships has been formed since the ratification of the 1952 Arrest Convention and 1993 Convention in Lithuania. Essentially all of the ordinary courts in Lithuania have jurisdiction to arrest sea-going ships as a preliminary injunction to secure claims in civil proceedings or commercial matters.

2. No collisions were found between national legislation regulating the arrest of sea-going ships and international maritime conventions ratified in Lithuania. Not recognition of the status of the privileged claim arising out of shipbuilding according to LMSRL may be noted as the only exception.

3. Court shall release a ship, when a financial security was payed or another type of guarantee was provided. It is preferable to accept financial guarantees of the International Group of P&I Clubs.

Thank you for your attention

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