



RUSSIN & VECCHI L.L.C.

INTERNATIONAL LEGAL COUNSELLORS
BRANCH OFFICE

SHIP ARREST IN THE RUSSIAN FEDERATION

Introduction

This article provides an overview of the law applicable to ship arrest in the Russian Federation and outlines the basis for jurisdiction of Russian courts to decide matters pertaining to ship arrests, as well as the procedures followed by claimants and the courts in petitioning for and determining issues of arrest.

General

There are several procedures that a claimant may follow in order to procure the arrest of a ship through a Russian court, whether a court of general jurisdiction or a State Arbitrazh Court¹, or in particular cases from an arbitration court (through private arbitration). The two predominant methods, which are discussed in further detail in this article, are procuring arrest as an injunction measure in court proceedings, and procuring arrest based on a maritime claim (out of action proceedings) as set forth in Merchant Shipping Code of the Russian Federation dated April 30, 1999 (*hereinafter – the “Merchant Shipping Code”*).

Applicable law

Russia is a party to certain international conventions pertaining to the arrest of ships and to maritime liens and mortgages. For instance, Russia is a party to the International Convention for the Unification of Certain Rules relating to the Arrest of Maritime Ships concluded in Brussels on May 10, 1952 (*hereinafter – the “1952 Convention”*). Russia joined the 1952 Convention on January 6, 1999 through issuance of the Federal Law “On the Russian Federation Joining the International Convention for the Unification of Certain Rules Relating to the Arrest of Maritime Ships” subject to the following reservations. Specifically, although Russia joined the 1952 Convention, it reserved the right to not apply the provisions of the 1952 Convention as follows²:

- to warships, war-subsidary and other ships owned by the State or used by the State solely for non-profit purposes;

¹ The Arbitrazh Court system in Russia should not be confused with private arbitration. The Arbitrazh Courts grew out of the Soviet system for resolution of disputes between State enterprises, and these Courts today have jurisdiction over most commercial disputes with participation of legal entities and individual entrepreneurs.

² The below list contains all reservations.

- to arrest of a ship under a maritime claim arising from disputes involving the title to or ownership of a ship, disputes between co-owners of a ship regarding the ownership, possession, employment, or earning of such ship (Article 1, Items “o” and “p” of the 1952 Convention). Russia further reserved the right to apply Russian legislation to such claims;
- to not apply Article 3, Item 1 of the 1952 Convention to the arrest of a ship within the jurisdiction of Russia pursuant to claims arising from a ship mortgage (Article 1, Item “q” of the 1952 Convention).

Russia is also a party to the International Convention on Maritime Liens and Mortgages, concluded in Geneva on May 6, 1993 (*hereinafter – the “1993 Convention”*). It joined the 1993 Convention on December 17, 1998 by issuing the Federal Law “On the Russian Federation Joining the International Convention on Maritime Liens and Mortgages of 1993” without any reservations.

The latest international legal act on ship arrests is the International Convention on the Arrest of Ships concluded in Geneva on March 12, 1999 (*hereinafter – the “1999 Convention”*), which has generalized the experience of applying the 1952 Convention. Although the 1999 Convention has not yet come into legal force, Russia has implemented some important provisions of this Convention, including its list of maritime claims, in its own domestic maritime legislation, specifically, the Merchant Shipping Code.

Thus, the main domestic Russian law that deals with ship arrests under specific maritime claims is the Merchant Shipping Code. Procedural requirements are contained in the Code on Arbitrazh Procedures of Russia (*hereinafter – the “Code on Arbitrazh Procedures”*) and the Code on Civil Procedures of Russia (*hereinafter – the “Code on Civil Procedures”*).

By the general hierarchical rule the provisions of the 1952 Convention as an international agreement ratified by the Russian Federation have higher priority than national legislation, i.e. Merchant Shipping Code, Code on Arbitrazh Procedures and Code on Civil Procedures in particular³. However, the 1952 Convention itself establishes certain rules determining limits of its application (art. 8 of the 1952 Convention):

1. *In regard to the ships flying the flag of a Contracting State.*

“The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State” (art. 8 para. 1). This means that in case of the arrest in the Russian Federation of a vessel flying the flag of a Contracting State the provisions of the 1952 Convention are applied, if they establish the order and rules of the vessel’s arrest, and if they are different from Russian laws. Therefore, the Merchant Shipping Code and Russian Procedural Codes can be applied only insofar as they do not conflict with the Convention.

³ Art. 15 para. 4 of the Constitution of Russia establishes this rule; it states the following: “The universally-recognized norms of international law and international agreements of the Russian Federation shall be a component part of its legal system. If an international agreement of the Russian Federation establishes other rules than those provided by law, the rules of the international agreement shall be applied.”

2. *In regard to the ships flying the flag of a non-Contracting State.*

In case an arrest is imposed in the jurisdiction of a Contracting State on a ship of a non-Contracting State, the rules established by laws of the Contracting State in which jurisdiction the arrest occurs should apply “...in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest” (art. 8 para. 2). Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this Convention any Government of a non-Contracting State or any person who has not, at the time of the arrest, established his habitual residence or principal place of business in one of the Contracting States (art. 8 para. 3). Therefore, Russian bodies adopting the decision on the arrest of a ship flying the flag of a non-Contracting to the 1952 Convention State may fully apply provisions of the Merchant Shipping Code in case of non-compliance with the 1952 Convention.

3. *In regard to the ship flying the flag of the Russian Federation.*

Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State or her flag by a person who has his habitual residence or principal place of business in that State (art. 8 para. 4). Thus, in case the arrest is imposed in the jurisdiction of the Russian Federation on a ship flying the flag of the Russian Federation (or being within the jurisdiction of Russia) under the claim by a person who has his habitual residence or principal place of business in Russia, Russian laws are fully applied, even if they contradict the 1952 Convention.

Conditions for Imposing Ship Arrest

1. *Maritime Claim*
2. *Person Competent to Claim for Ship Arrest*
3. *Ships Subject to Arrest*

1. Maritime Claim

The Merchant Shipping Code provides that a ship may only be arrested pursuant to the assertion of a specific maritime claim. There are 22 maritime claims enumerated in Article 389 of the Merchant Shipping Code, which corresponds to the list of maritime claims contained in the 1999 Convention. There are only 17 kinds of maritime claims provided by the 1952 Convention and the Merchant Shipping Code was adopted in view of the new Convention of 1999.

A maritime claim is asserted by filing a petition for arrest with a court⁴ and is defined as any claim arising out of:

- (a) damage caused during the operation of a ship;
- (b) loss of life or personal injury to a person which occurs either on land or on water, in direct connection with the operation of a ship;

⁴ See sections entitled “Jurisdiction” and “Procedure”.

- (c) a salvage operation or any contract on salvage;
- (d) expenses for measures taken by any person to prevent or minimize damage, including damage to the environment, if such a claim arises out of an international treaty of the Russian Federation, law or any agreement, as well as damage which has been caused or may be caused by such measures;
- (e) expenses for the raising, removal or destruction of a sunken ship or her cargo;
- (f) any contract for use of a ship;
- (g) any contract relating to the carriage of goods or passengers by sea;
- (h) loss of or damage to cargo, including luggage carried on a ship;
- (i) general average;
- (j) pilotage;
- (k) towage;
- (l) supply of provisions, materials, fuel, stores, equipment, including containers, for the purposes of the operation or maintenance of a ship;
- (m) construction, repair, modernization or re-equipment of a ship;
- (n) port, canal and other waterway dues;
- (o) wages and other sums due to the ship master and other members of the ship's crew from their employment on the ship, including costs of repatriation and social insurance contributions payable on behalf of the ship master and other members of the ship's crew;
- (p) disbursement expenses incurred in regard to a ship;
- (q) insurance premiums, including mutual insurance contributions payable by the owner of a ship or her bareboat charterer or on their behalf;
- (r) commission, broker's or agent's remuneration payable by the owner of a ship or her bareboat charterer or on their behalf;
- (s) any disputes as to the right of ownership or possession of a ship;
- (t) any disputes between two or more co-owners of a ship as to the use of the ship and distribution of profit;
- (u) a registered mortgage on a ship or registered encumbrance of the same nature;

- (v) any dispute arising out of a contract for sale of a ship⁵.

The presence of a maritime claim does not result in the automatic arrest of the ship. The claimant is required to introduce evidence to prove the presence of the maritime claim (agreements, bills, charters, correspondence of the parties, way bills, consignment note, charter, payment documents, correspondence between parties, etc.).

The law does not allow the arrest of a ship on the basis of “non-maritime claims,” which are allowed by the Code on Arbitrazh Procedures, such as claims of stockholders of a joint-stock company, which owns a ship, on payment of dividends, claims by banks to the ship owner on repayment of the credit, which are not guaranteed by a ship mortgage, etc.

2. *Person Competent to Claim for Ship Arrest*

The claim for a ship arrest may be signed by the claimant of the maritime claim himself or his representative. The authority of the representative should be proved by an appropriate power of attorney⁶.

3. *Ships Subject to Arrest*

The Merchant Shipping Code defines arrest of a ship as any detention or restriction in movement of a ship within the jurisdiction of the Russian Federation, carried out under a decision of a court, Arbitrazh Court or maritime arbitration court authorized by law to impose arrest on a ship to secure a maritime claim, except for seizure of a ship effected in execution of a decision of a court, Arbitrazh Court or arbitration tribunal which has come into legal force. The legislation establishes that a ship may be arrested even when it is ready to sail.

Under the Merchant Shipping Code procedure, a ship against which a maritime claim has arisen may only be arrested under the following circumstances: a maritime claim against a ship owner is secured by a maritime lien on a ship and is among the list of claims established by merchant legislation; a maritime claim is based on the mortgage on a ship or duly registered encumbrance of the same nature; a maritime claim relating to the right of ownership or possession of a ship; other cases when the owner (bareboat charterer) of a ship is liable for a maritime claim and owns a ship (is her bareboat charterer) at the moment arrest procedure commences.

However, there are some disputes about the legality of imposing arrest on a ship which is possessed by a bareboat charterer at the moment of the arrest procedures and when the maritime claim is addressed to the bareboat charterer. The party which lodges a complaint against the ship arrest states that the person who is responsible for the maritime claim was simply a lessee of the arrested ship. Therefore, in the opinion of the party opposing the claim, even if the claim of the plaintiff is in compliance with all requirements, under Russian legislation the claim should not be allowed at the cost of this ship. However, such arguments have been considered by courts to be groundless and not in compliance with current Russian legislation.

⁵ Article 389 of the Merchant Shipping Code.

⁶ See section titled “Power of Attorney” for more details.

The Presidium of the Supreme Arbitrazh Court of the Russian Federation (which is an authoritative source for lower Russian arbitrazh courts in regard to interpretation of the legal norms) confirms this principle under art. 3 para. 4 of the 1952 Convention, “when in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim.”

Sister ship(s)

In accordance with the Merchant Shipping Code, a sister ship is any other ship that is owned by the person/entity liable under a maritime claim who was, at the time the claim arose, the owner of a ship against which a maritime claim has arisen, or the bareboat charterer, time charterer or voyage charterer of such a ship. The Merchant Shipping Code allows the arrest of one or more sister ships under a maritime claim procedure. In order to arrest sister ships, a claimant must prove that there is a connection between the ship against which the maritime claim has been asserted and the entity (physical person or legal entity) liable for the maritime claim (at the time the claim arises, the person/entity who is the owner of the ship, or its charter under a bareboat charter, time-charter or voyage charter), and between the sister ship and this person/entity.

Jurisdiction

1. Adoption of a Decision to Impose Arrest on a Ship.

In accordance with art. 4 of the 1952 Convention a ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State, where the arrest is being imposed. In the Russian Federation “Court or appropriate judicial authorities” include courts of general jurisdiction, Arbitrazh courts and maritime arbitration courts authorized by law to impose arrest on a ship to secure a maritime claim⁷.

In this regard, however, particular disputes arise. Some persons state that the right to impose arrests is a prerogative of the state court authorities, and this function of the state judicial system is based on a principle of impossibility to assign this public function to private structures, and arbitration courts, in particular. In our opinion, such statements do not have reasonable grounds. According to the 1952 Convention any Contracting State can identify which bodies should be regarded as such judicial authorities. For instance, according to the RF Law “On International Commercial Arbitration” of July 7, 1993 Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation is among such arbitration courts. This Commission is authorized in Russia to adopt a decision to impose arrest on ships. The scope of this body’s authority is not as broad as the authority of general jurisdiction courts or Arbitrazh courts. It is limited by law: to cases that are subject to consideration by the Maritime Arbitration Commission. The Chairman of the Commission may, upon request, adopt a decision to impose

⁷ Art. 388 para. 1 of the Merchant Shipping Code.

arrest of a ship located in a Russian port, against *the other party to the dispute*⁸. Therefore, the public function is not assigned in full to the arbitration courts; they may execute this function only when the main dispute is subject to their jurisdiction due to the concrete agreement between the parties.

As to the jurisdiction of the courts of general jurisdiction and Arbitrazh courts, in practice Arbitrazh courts consider cases on injunctive arrests in regard to maritime claims based on economic disputes (between legal entities and/or individual entrepreneurs). Courts of general jurisdiction are able to impose arrests only in regard to maritime claims involving individuals, regardless of their entrepreneurial activity.

2. Consideration of Main Dispute (on the Merits)

1) When the arrest is imposed on a ship as a preliminary injunctive measure by Russian courts, jurisdiction to consider the main dispute belongs to the following bodies:

i) Foreign court or arbitration body. The Merchant Shipping Code provides that a ship may be arrested (based on a maritime claim) in order to obtain a security even if, in accordance with a jurisdictional clause or arbitration clause specified in a respective agreement or otherwise, the maritime claim pursuant to which a ship is arrested is subject to consideration by a court or arbitration body of another country. In such case, a Russian court would only have the authority to arrest the ship, but the main dispute would later be considered by the foreign court or arbitration body.

ii) Russian courts in cases under the 1952 Convention⁹ and procedural legislation of the Russian Federation. It can be the same court which imposed the arrest of a ship, or another Russian court, or the arbitration court located in Russia. (*in accordance with the principle of territorial jurisdiction*)

2) When arrest is imposed on a ship as an injunctive measure to the main action proceeding, the same court that adopted the decision to impose the arrest, shall consider the case on its merits.

Procedure

According to the 1952 Convention all procedural rules related to ship arrests, filing of applications to obtain a decision on ship arrest and other procedural issues in this regard are regulated by the law of the state, where the ship was arrested or the request for the arrest was made¹⁰. Since the Merchant Shipping Code does not provide procedural rules in full, the Code on Arbitrazh Procedures and the Code on Civil Procedures are applied, however only insofar as they are not in conflict with the Merchant Shipping Code.

⁸ Para. 4 of the Appendix # 2 to the Law “On International Commercial Arbitration” of July 7, 1993 “Regulations of the Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation.”

⁹ According to the art. 7 of the 1952 Convention.

¹⁰ Art. 6 para. 2 of the 1952 Convention - this provision allows to impose arrest on the ship only in the period of its physical staying under the jurisdiction of the particular state (Russian Federation) - is aimed to exclude so called “paper arrests,” i.e. the possibility to obtain the decision on imposing the arrest before the ship enters the port of the corresponding state, when it will not be physically under jurisdiction of this state yet.

1) Arrest as an Injunctive Measure in Action Proceedings

As stated above, an arrest may be imposed on a ship as an injunctive measure in Arbitrazh Court proceedings and courts of general jurisdiction. This is accomplished by filing a petition for injunction with the court at any stage of the proceedings (such application may be filed on the same date of filing a statement of claim and can even be incorporated into the statement of claim, or filed during the proceedings).

In order to procure arrest as an injunctive measure, the claimant must prove to the court that non-acceptance of the injunctive measure (arrest) would complicate the execution of the court's decision or make its execution impossible. The advantage of this approach is that in accordance with Russian procedural legislation, a petition for injunction must be examined and decided by a court of general jurisdiction on the day of its filing, and by an Arbitrazh Court - not later than the next day. This usually means that the request for injunction will be considered by the court without the opposing party having an opportunity to be present in the court. Moreover, a court's ruling on ship arrest as an injunction measure must be executed immediately.

The initiation of court proceedings in Russia requires a claimant to pay a state fee. The amount of this fee in property disputes is calculated as a specific percentage of the value of the claim and, therefore, can potentially be rather high. It is possible, however, to later recover court costs including the state fee from the opposing party should the claimant prevail in the case.

In addition, in Arbitrazh Court action proceedings a court may request a claimant to provide counter-security before deciding on a petition for injunctive measures, the amount of counter-security may not be less than half of the amount of the claim. If the claimant does not provide the counter-security requested by a court in time, this failure may become ground for denial of injunctive measures. A defendant has the right to provide counter-security to discharge injunctive measures by depositing money in the amount demanded by the claimant into a deposit account of the court, in which case the arrest order will not be granted or will be withdrawn.

2) Arrest as a Preliminary Injunctive Measure (Out of Action Proceedings)

Another option for arrest of a ship is to file a petition on arrest as preliminary injunctive measure *before* commencing the formal proceeding, based on a maritime claim as outlined above¹¹. There are no special procedural rules on the order of consideration of the petition on ship arrest in the Russian legislation; nevertheless, both Arbitrazh courts and courts of general jurisdiction can consider these petitions, following the procedures on injunctive measures in action proceedings (and the article of the Code on Arbitrazh Proceedings on preliminary injunctive measures for Arbitrazh court¹²), but taking into the account rules, established by the Merchant Shipping Code. As to the arbitration court, as it was mentioned before, it may consider such petitions in only one particular case¹³.

¹¹ See sections entitled "Ship Arrest Pursuant to Maritime Claims" and "Ships Subject to Arrest."

¹² Art. 99 of the Code on Arbitrazh Proceedings.

¹³ See section entitled "Adoption of Decisions to Impose the Arrest on a Ship /Jurisdiction."

The outline for this procedure in regard to Arbitrazh courts is as follows..

A petition for arrest of a ship under this scenario is to be filed with an Arbitrazh Court at the place of location of the petitioner, funds or other property in question, or at the place of violation of the applicant's rights¹⁴.

A petitioner is required to provide counter-security for the amount specified in its petition and to provide the court with confirming documents. A statement of claim related to the demand form a preliminary injunction is to be filed with the court within 15 days from issuance of a court ruling granting arrest of the ship as a preliminary injunctive measure. In case of a violation of this requirement, preliminary injunctive measures are to be canceled by the court which originally imposed them.

At the stage of preliminary injunctive measures a defendant may plead to discharge the preliminary injunctive measures in exchange for counter-security (by way of depositing money in the amount of the claim into a deposit account of the court).

3) Other options for arrest

It is also possible to seek the arrest of a ship in a Russian court by way of execution of a commission from a foreign (non-Russian) court. In order to accomplish this, there must be a treaty between Russia and the foreign state providing for execution of commissions within the territory of the Russian Federation. It should be noted that the official procedure for delivery of commissions from a foreign state to Russian courts is via diplomatic channels, and therefore, can be lengthy and complicated.

Russian legislation also provides for the arrest of a ship in a Russian court by way of execution of a relevant decision of a foreign (non-Russian) court. There must be an appropriate treaty between the foreign state and the Russian Federation governing execution of court acts. A complete discussion of the circumstances in which a Russian court will enforce a foreign court's judgment is beyond the scope of this article.

Wrongful arrest

When granting a ship arrest, a court is empowered to request security in the form of depositing money into the court's deposit account from the claimant for possible damage that might be caused to the ship-owner. In addition, if the arrest is later rejected by the court as wrongful, the ship-owner may file a claim in the same court for compensation for damage caused by wrongful arrest of the ship after the decision on rejection enters into legal force.

Power of Attorney

In order to undertake the execution of an arrest with bailiffs and to perform other relevant actions, a litigation Power of Attorney from the claimant is required. It should be signed by the

¹⁴ A "place of location... of other property" in the context of the ships arrest is understood as not the place of the ship state registration, but place of its factual location.

claimant's authorized representative, contain the company's seal, and be notarized, as well as legalized or apostilled (if a country is a party to the Hague Convention of May 5, 1961) by an authorized person and be accompanied by a notarized Russian language translation.

Since Russian courts have the authority to not consider a claim if it is believed that the claim is signed by an unauthorized person, it is recommended that the Power of Attorney be carefully prepared by a Russian lawyer to comply with all requirements.

Documentation

A petition for arrest, whether pursuant to the Merchant Shipping Code or as a request for injunctive measure in action proceedings, should be supported by supplementary documents evidencing the claim, such as contracts, invoices, charter-parties, and letters requesting payment. In order to submit documents to Russian courts, they should be legalized or apostilled by competent authorities, and a notarized Russian language translation should be attached. Usually originals or notarized copies of the documents must be presented to the court. Simple copies will not suffice.

Execution of Arrest

The court may simultaneously issue a writ of execution based on its ruling granting arrest. The writ of execution is then executed by court marshals (bailiffs). In accordance with legislation on execution procedure, the arrest is to be made no later than one month from the date the decree on commencement of execution procedure is served on the defendant, or in some cases at the same time as served. As noted above, if the arrest is granted as an injunctive measure, it should be executed immediately.

Release from Arrest

Based on a petition filed by an interested party, an arrest imposed as an injunctive measure may later be reversed or amended to provide for a different injunctive measure. Such petition may be supplemented with evidence confirming provision of counter-security by the defendant. It is possible for the arrest to be changed to other statutory injunctive measures by the court as a result of petitions by the claimant or defendant.

During the procedure for ship arrest as a preliminary injunctive measure, a ship may be released from arrest (and preliminary injunction measures canceled) on the basis of the court's decision based on a petition from a defendant providing sufficient counter-security by way of depositing money into the deposit account of a court.

Costs

Court costs:

As noted above, a claimant seeking to procure arrest in action proceedings must pay the state fee when filing a claim with a court.

Bailiff's costs:

BANGKOK • HANOI • HO CHI MINH CITY • MOSCOW • NEW YORK • PUERTO PLATA • SANTO DOMINGO • TAIPEI
VLADIVOSTOK • WASHINGTON, DC • YANGON • YUZHNO-SAKHALINSK

Bailiff's costs may include execution fee, expenses for the conduct of execution proceedings and remuneration of the bailiff. These costs depend on individual execution proceedings.

Attorney's fees:

In some firms, attorneys' fees are calculated on an hourly basis, in others, fees may be based on a fixed sum or contingency basis.

It appears from our recent practice that Russian courts currently prefer to impose arrest on ships as an injunctive measure in action proceedings as opposed to using the procedure established by the Merchant Shipping Code and Code on Arbitrazh Procedures.

November 2008

This article is only an overview of ship arrest topics and procedures in Russia. For concrete up-to-date legal advice or more information on the subject, please do not hesitate to contact our offices at the coordinates provided in the web-site and letterhead.

Natalia G. Prisekina,
Victoria Subocheva

© Russin & Vecchi, L.L.P.