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Maritime and Transport Law News

Newsletter of the International Bar Association Legal Practice Division

VOLUME 11 NUMBER 1 MAY 2015



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ARTICLES

Ship arrest procedure in Costa Rica

Due to our proximity to the Panama Canal, the rest of the world tends to ignore our piece of history within the maritime community. With fewer than 60,000km² of land, Costa Rica has three active ports. The main port is Puerto Moín in the Province of Limón, a town in the Atlantic Coast that receives over a million twenty-foot equivalent units (TEUs) a year. On the Pacific Ocean coast we have Puerto Caldera, with over 250,000 TEUs a year, and a third specialised port that is used only for sugar and derivative products, such as molasses and ethanol.

Ship arrests are regulated and governed by the International Convention Relating to the Arrest of Sea-Going Ships (Brussels, 10 May 1952) (the ‘Convention’) and are executed domestically as preventive or precautionary attachments. The Convention was ratified by Costa Rica in 1954 and has been in force and effect since then.

Although Costa Rica ratified the Convention, it made two important caveats. First, Costa Rica only recognises the arrest of a ship that is owned by the person or legal entity that appears as the actual registered owner at the time at which the arrest is filed. The Convention provides – without taking into consideration the identity of the actual owner of the vessel – that a claim can be filed against the owner of a ship at the time that the maritime claim arose (as per Article 3, paragraph 1 of the Convention). As such, under Costa Rican law a claimant cannot arrest a ship for maritime claims that arose under the control of a previous owner.

Secondly, under Costa Rican procedural law, the only courts with sufficient jurisdiction to determine the case upon its merits are those pertaining to the vessel’s flag or those in which the defendant is domiciled, with the following exceptions: (1) maritime claims related to disputes of which the subject matter is the title or ownership of any ship; (2) disputes between co-owners of any ship as to the ownership, possession, employment

or earnings of that ship; and (3) and the mortgage or hypothecation of any ship.

The preventive attachment under the Convention constitutes a physical arrest of the ship. Under the precautionary attachment process in civil proceedings, the claimant holding a legitimate maritime claim is compelled by law to post a cash bond equal to 25 per cent of the total value of the claim or 50 per cent for non-monetary pledges (such as letters of credit or bank warranties). The holder of a *título ejecutivo*, together with a formal ruling from a court of law, exonerates the claimant from posting any type of bond or warranty. Some examples of a *título ejecutivo* in Costa Rica are: public deeds; registered public deeds; judicially recognised documents; judicial admissions; final non-appealable judgments; promissory notes; and checks and invoices duly signed by the registered debtor.

Costa Rican law requires that the claimant filing a preventive attachment file the merits of the claim within one month following the arrest. It is imperative that a claimant complies with this requirement. Failure to do so could result in loss of the posted bond in favour of the alleged defendant. Likewise, although Costa Rica does not have a legal vehicle technically known as a *saisse conservatoire*, the precautionary attachment as regulated by our procedural Civil Code has the same effect, but is not as extensive as the United States Federal Rule B Attachment.

Some other aspects of Costa Rican arrest law deserve a mention. Costa Rican law allows the arrest of a ship irrespective of its flag, but considers the relationship between the debtor, sister ships or ships in associated ownership. As a procedural condition, there has to be a legal and economic link between the claim and the defendant, and proof of ownership or use rights must be presented to the court within one month following the precautionary arrest. The same principle applies to bareboat and time-chartered vessels.

Under normal circumstances, a vessel can be arrested within seven days from the

moment the file is delivered to a law firm, provided that all preparatory steps have been completed (ie, having possession of *prima facie* evidence that the claim is valid, consular apostille, official translations and a draft of the initial claim). On the filing of the preventive attachment, the court will issue an arrest notice to the harbour master, who executes the arrest.

Since Costa Rica follows a preventive or precautionary attachment process, in which posting a bond or counter-security is mandatory, the initial filing only requires sufficient evidence so as to create a presumption of the alleged maritime claim. However, within one month following the precautionary arrest, the claimant must file the merits of its claim and all the supporting legal evidence. All supporting documents have to be presented with all the formalities of the law (notarised, apostilled and translated into Spanish). As of today, no documents can be filed electronically. Any claimant with the intention to arrest

a ship in our country has to understand that Costa Rica is a civil law jurisdiction and formalities are just as important as the merits. Non-compliance with formalities can provide grounds for dismissal. As part of such formalities, the issuance of a judicial power of attorney appointing a licensed lawyer to represent the claimant is absolutely necessary.

In addition, there are the following particularities in the Costa Rican system:

- courts have acknowledged wrongful arrests, and a claimant bears the risk and consequences of arresting a ship without a just cause;
- courts also recognise the piercing and lifting of the corporate veil, but only under very restrictive circumstances and only in cases in which a criminal offence has been committed; and
- our courts do not allow the sale of a ship *pendente lite*.

Article 3.4 of the Arrest Convention in Italian case law: the debate continues

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Italy is a signatory to the Brussels Convention 1952 (the 'Convention').* If a ship is flying the flag of a state party to the Convention, arrest in Italy can be sought only with respect to maritime claims listed under Article 1.1. If the ship is not flying the flag of a contracting state, she can be arrested for Article 1.1 claims as well as any other claim for which arrest is allowed under Italian law. This includes virtually any credit or claim against the owner of the vessel, even those not mentioned in the list of maritime claims set out by Article 1 of the Convention.¹

Italian courts generally apply the Convention to ships flying the flag of a non-contracting state based on a rather extensive construction and application of Article 8.2.² However, an issue proving controversial is whether a ship arrest may be based on Article 3.4 of the Convention if the

claim is not secured by a lien. A few decisions³ have denied such arrests on the grounds that Article 9 makes it clear that the Convention does not create maritime liens, and that an arrest based on Article 3.4 in the absence of a lien, therefore, could not be subject to further enforcement against the registered owners and the ship.

A recent and detailed decision of the Court of Genoa⁴ opted for the full applicability of Article 3.4 in arrests arising from claims against the charterer. The judge pointed out (a comment that may sound rather questionable to many readers) that owners are 'aware of the likely employment of the ship' and can, therefore, foresee the liabilities arising from employment by the charterer. The Court went on to say that the owner should seek some form of protection from the risk of arrest, such as asking the charterer