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LEGISLATIVE PROSPECTIVE OF THE ARREST OF SHIPS IN MONTENEGRO

ABSTRACT

In the existing legislative process, the Montenegrin judicature faces a series of questions imposed by the practice of arresting ships. Legislation tries to respond to them by innovating the current regulations, based on the 1977, i.e. 1998 Maritime and Inland Navigation Act (MINA), and by taking into consideration the achievements of foreign, similar jurisprudences and legislations, as well as of international conventions. The proposed solutions in the draft of the Maritime Navigation Act represent a certain change in legislative systematization of the legal institute of temporary measure of ships arrest.

KEY WORDS

arrest of ships, national legislation, International Arrest Conventions

1. INTRODUCTION

The temporary measure of the arrest of ships, based on the provisional, repressive-preventive judicial protection, is put into effect before the executive title obtains the quality necessary for the compulsory execution,[1] by virtue of prohibiting the ship to leave the port,[2] because of the anticipation[3] of security for legally-based, pecuniary or non-monetary demand of the claimant. Although the ships are, according to their proprietary-legal characteristics, physical, mobile,[4] durable and assembled objects,[5] because of the relatively high value concerning the acquiring, transfer, limitations or the loss of real rights, a deed book regime is applied to them, which is analogue to the regime of realties.[6] It is the same with the regime of execution, by which it is immanently encroached on the interests of the third persons.

With the security, temporary measures can be demanded and implemented before and during civil or administrative proceedings, or upon completion of these procedures, until the claim, which is secured, is not settled. This is done under the condition that the court gains the assurance that the claimant's demand probably exists, in the phase in which there is still no final executive title and that there is danger threatening its future realization. Without the danger of thwarting the compensation by voluntary disposals of the defendant, the creditor does not usually expose themselves to a particular risk because of waiting for the decision to be executed, by which their request for the legal protection in the merits is satisfied.[7] The establishing of appropriate assumptions and particularly the real substantial legitimacy of parties according to the rules of strictly formal legality in the right jurisdiction presumes the factual protection, although without absolute legal effect, by effecting the arrest with prompt and coordinated proceeding within the specificities of different legal systems. Therefore, in the countries of the *Common Law* system a ship can be arrested because of a maritime claim and the owner of the ship to which the claim refers does not even have to participate in the procedure.[8] Such approach to this subject has been created by predomination of the Anglo-Saxon *theory of personification* of the ship, which considers her an offender (the "wrongdoing" *res*) and a defendant in the *in rem* procedure.[9]

The process rules in executory proceedings must be particularly inspired by striving for a fast, economical and efficient acting that will, conforming to the nature of the endangered claim which should be secured, determine the quintessence of the temporary measure, by which an exploitation of the ship as undisturbed as possible will be ensured, even during the executory proceedings, in order not to contradict the necessity of navigation. However, the temporary measure should not exhaust the contents of the claimants-aspired substantive legal authorization, for it would otherwise represent a premature complete realization of this claim, for which – during the requesting of this security measure – there is no supposition; the objective of temporary measures is not the realization of the claim, but rather the security of its future realization.[10]

The above stated imposes the need of ensuing the foreign legislation, judicature and jurisprudence, with the purpose of identifying legal voids and redacting oversights, and striving for solutions established by international conventions, which should be adopted in internal legislation, for the purpose of its perfecting.

Nevertheless, in spite of the fact that legal issues in relation to temporary measures of the arrest of ships have been present for quite a long time in the foreign jurisprudence, still the internationally and legally accepted uniform system of execution on ships does not exist.

2. REGULATION OF TEMPORARY MEASURE OF THE ARREST OF SHIPS WITHIN THE CONTEXT OF INTERNATIONAL COMPARATIVE LAW AND THE LAW OF INTERNATIONAL CONVENTIONS

After the Congress of Berlin (1878), when Montenegro obtained Bar (Antivari) and its littoral, it had to adopt the Maritime Law which was in force in Dalmatia, in other words, Book II of the French Law of Commerce.[11] By introducing the French *Code de Commerce*, its provisions of execution on seagoing ships came into force. Thus, the title of Book II of the *Merchant Code* is: "On the arrest (detention) and the sale of ships" (Arts. 197 – 215). This regulation had prescribed that the ship "guaranteed" for the debts of the owner, but the arrest was regulated as a phase of the settlement of creditor's claim by ship selling, which could still have been avoided by giving a security for the settlement of claim. During Austrian-Hungarian sovereignty new regulations were not brought in this subject matter. The legal theory and the Austrian--Hungarian practice took French regulations as outdated rules of a procedural meaning. Therefore, in the Kingdom of Yugoslavia, during the work on a special legal arrangement of the maritime law, in 1940 the *Regulation of execution and security on ship for pecuniary claims and of temporary orders referring to ship* was enacted. This Enactment represented a legal unit with the 1939 *Regulation with legal force on real rights on ship and on maritime liens*, with the *Regulation on constitution of ship register* and the *Regulation on registrations of real rights on ship and on relative procedure* of 1940.

For the execution on ships the corresponding application was established of general orders (Arts. 1 to 68) and the orders relating to the execution on physical, movable objects (Arts. 208 to 240) of the 1930 *Law on execution and security*. In section III of the Regulation, in "Temporary orders" (Art. 32), the possibility of determining the temporary order of the arrest of ships (prohibition of navigation) was explicitly predicted, which could have been carried out instead of, or apart from the temporary order of watching the ship.

The stated enactments of internal legislation have successfully regulated this material in some aspects, although the basic 1939 Regulation was rather ambiguous and unintelligible because of its incomplete contents and referring to other legal enactments. The remaining three enactments came into force in 1940, and these regulations had been applied after the war as legal rules, until MINA came into effect.[12]

On the international plan, the consequences of particular legislations and legal system differences regarding the temporary orders in proprietorship disputes, and especially in cases of arrest and watching of the ships as means of security have induced the *Comité Maritime International* to take into consideration the problem of arresting seagoing ships, at a Conference in Antwerp, in 1930. However, only the Diplomatic conference in Brussels on 10 May 1952 rendered the international *Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships,* which came into force in 1956. This represented a very significant achievement in the arrangement of the subject matter, considering the fact that the Convention in Montenegro is always applied directly in cases to which it refers, although the internal law will take over its provisions. However, the arrest of ships will be more widely regulated by the domestic law, especially regarding the procedure.[13]

Considering the fact that by the year 1963 the Constitution had been provided for the passing of such enactment, the Committee of the Yugoslav Federal Assembly proposed a work on the drawing up of the *Naval Code*. As afterwards the work was prolonged, after passing of the 1974 *Constitution*, a possibility of passing the legislative act in the form of the code was cancelled, so that the legal text was adopted under the title "*Maritime and Inland Navigation Act*".[14]

This Act was passed on 22 April 1977, and went into effect on 1 January 1978, (Off. Gazette of SFRY Nos. 22/77, 13/82, 30/85, 80/89, 29/90, Off. Gazette of SRY No. 34/92). MINA regulated this subject matter in the Part Eight – "The procedure of execution and security on ships": in Chapter IV, Vol. 3, "Temporary measures".

The new *Maritime and Inland Navigation Act* (Off. Gazette of SRY No. 12/98) from 1998, passed in a different state-juridical framework, regulated this subject matter also in Part Eight – Arts. 906-1032 which contain minor, mostly terminological differences in formulations regarding the 1977 Act. MINA was published in the Official Gazette of 6 March 1998, and after becoming effective, the validity of the 1977 Act of the same title was terminated.

According to contemporary economic tendencies, the necessities of judicature and new state-legislative system, the arrangements for passing a new legal enactment in the subject matter of shipping were in course, already for a longer period of time. In relation to the Constitution of Montenegro (Off. Gazette of Montenegro No. 1/2007 of 25 October 2007), Article 9

(Legal order) is significant, according to which the confirmed and published international contracts and the generally accepted rules of the international law are the consisting part of the internal legal order, and have the precedence over the domestic legislation, so that when they regulate the relations differently from the domestic legislation, they are applied directly. Also, according to Article 145 (Accordance of legal regulations), the law must be in accordance with the confirmed international contracts. Therefore, the *Arrest Convention*, according to its legal force, is stronger than the law. Furthermore, if the international contracts contain provisions of procedural nature, these procedural regulations (conventions) have more power than the procedural regulation of internal law. Therefore, substantial regulations in the *Forced Execution Proceedings Act* (FEPA) will not be applied if the convention prescribes substantial regulations contrary to FEPA. The same treatment would also refer to the bilateral contracts, because there is no distinction made between multilateral and bilateral contracts.[15] The stated formulation of Article 9, besides generalization, according to the principle of supremacy, is on the way of ceding the precedence of legal enactments to the international law and EU legal system (*acquis communautaire)*.

Pursuant to the Working Program of the Montenegrin Government, the Commission of the Ministry of Maritime Affairs and Traffic prepared already in 2003 a draft of the *Maritime Navigation Act,* based on the *Maritime and Inland Navigation Act*. According to the draft of the *Maritime Navigation Act,* some provisions of the current *Maritime and Inland Navigation Act* were defined more precisely, new formulations were proposed where practice had shown that the current ones had been surpassed and that they were not following contemporary trends, and to a certain extent the harmonization with international standards and conventions was made (ISM Code, STCW Convention, etc.), with the use of experiences of some other maritime states. The obligation of up-keeping the proclaimed sailing schedule in liner shipping, and the agent's right to a reward, have been explicated in particular, as well as introducing the provisions of mandatory pilotage, conditions for ship seaworthiness and the issuing of certificate of safety manning for all ships engaged in international navigation by the Port Master's Office, that performed the ship registration in the register. Thus, the role of the administrative proceeding is underlined. However, the provisions of MINA that were taken in the draft of the *Maritime Navigation Act* should be reconsidered for the purpose of eliminating the ambiguities in their contents and meanings, and the upgrading of appropriate provisions with the solutions from international conventions and the EU *acquis communautaire*.

The 1999 *Arrest Convention* contains 17 articles and the system of principles that are considered as rationally balanced between the interests of legitimate claimants and shipping companies that are looking for the world of trade without unnecessary limitations. The Convention contains changes which could be more or less important, depending on the relative national law, while it contributes to overcoming the difference between the civil concept of *Saisie conservatoire* and the *Common Law* concept of arrest *in rem*, as well as to overcoming of imprecisions of the 1952 *Arrest* Convention. The voids contained in the 1999 Convention can cause that many states, which consider the implications of its provisions, refuse the ratification or accession. The evident weaknesses and positive step-outs of the Convention are represented by the following characteristics:

The list of "maritime claims", regardless of the introduction of new claims categories in Article 1 (1) is "closed", before it could have been considered "an open-ended list", which is the heritage of the *Common Law* admiralty jurisdiction that deprives the new Convention of flexibility which an "open list" would provide, i.e. the generalized definition of maritime claims. Also, the new Convention changed the formulation and stylizations of the existing maritime claims, so that they are clearer and more coordinated with contemporary conventions of maritime law, first of all with the 1993 *International Convention on Maritime Liens and Mortgages*.

A significant change regarding the jurisdiction on the merits of maritime claim in relation to the 1952 Convention, which only gives the jurisdiction on the merits in the country in which the arrest is effected, in case that the claim has arisen in that country - exists in the 1999 *Arrest Convention*, in which the authorization for arrest and the jurisdiction are automatically given to a state in which the arrest for maritime claim is realized, except in cases when the parties validly agree to some other jurisdiction, or the courts of that country refuse to accept the jurisdiction in merits, if it is allowed by the law of that country and if the court in another state accepts the jurisdiction.

The arrest of ships for foreign maritime liens different from those existing under the *lex fori* will not be permitted (Art. 3 (1)(e)). It permits arrest only for maritime lien which is "granted or arises" under the law of the state where the arrest is applied for.[16]

Provisions on sister-ship arrest (Art. 3 (2)) allow only the arrest of any other ship or ships which are at the moment of arrest of the same legal ownership, and not of the same *beneficiary ownership* of the "offending ship" – which is opposed to the former practice.

The definition of "arrest" (Art. 1(2)) includes any detention or ship movement limitation determined by the authorized judicial body in the state, according to

the order *Mareva injunction* from the English, i.e. Canadian Law. Specific legislative rights of ship detention, i.e. the prevention of sailing out by the foreign state, its government, by any dock/harbour and other public authorities, are recognized by international conventions, rather than merely under domestic laws and regulations (Art. 8(3)).

Statutory rights *in rem* are recognized more clearly, considering the fact that the Convention determines the arrest of ships in countries in which the action *in rem* is allowed in comparison to maritime claims created by both owners and *demise* charterers (Art. 3(1)(a) and (b)).

The new Convention determines that the security for the carrying out of release of the arrested ship is limited in an adequate way to the ship value (Art. 4(2), 4(5)(b) and 5(1)(a)), and not to the amount of the claim. The party can also diminish, change or cancel the security. The new Convention contains more detailed provisions on the right of the court that decides upon the filing of the application for temporary arrest of ships, to condition the arrest of ships with the claimant's provision of countersecurity for the damage that could have arisen for the operator/respondent from the determination or execution of a measure. Counter-security can be ordered to the claimant also as a condition, for the indemnity over consequences of wrongful or unjustified arrest or an excessive security which was requested and given (Art. 6(1) and (2)).

The examples in which the re-arrest is allowed are explicit.

On the basis of the stated, until now the Convention has not made any progress sufficient to convince the states that are not members of the 1952 Convention to join it, i.e. to convince the signatories of 1952 Convention to renounce it and ratify or accede to the 1999 Convention. The Convention is expected to come into effect within 6 months upon the 10^{th} ratification. The following states have agreed to assume obligations by the Convention: Bulgaria (21 February 2001), Estonia (acceded on 11 May 2001), Latvia (7 December 2001), Spain (7 June 2002), Syria (16 October 2002), Algeria (7 May 2004), and Liberia (16 September 2005). The Convention was also signed by Denmark on 10 August 2000, Ecuador on 13 July 2000, Finland on 31 August 2000, Norway on 25 August 2000 and Pakistan on 11 July 2000. Active participation of China, Russia and the US delegations at the Conference might influence in a way that these countries may, in spite of the low level of ratifications of other maritime conventions, consider this Convention sufficiently non-contradictory to recommend it to their national legislations, i.e. to give effect to its provisions. If a sufficient number of countries incorporate the appropriate provisions of this Convention in their national legislatives and advance the harmonization of international maritime law that way, the relative subject matter will have less ambiguities and the world of seaborne trade will make substantial improvement.

3. CONCLUSION

The arrest of ships implies the existence of a series of legal suppositions, relations and jurisdictions, and its successful effectuation presumes the finding of the way through specific characteristics of different legal systems, according to the rules of strict process legitimacy, for reasons of avoiding the consequences of procedure imperfection, or the inequity of legislative solutions. According to the achievements of the jurisprudence, the necessity of judicature and the new state legislative organization, preparations for passing a new legislative act in maritime matters are still underway in Montenegro.

According to the draft of the *Maritime Navigation Act*, which was presented by the Montenegrin Ministry of Maritime Affairs and Traffic in 2003, certain provisions of the *Maritime and Inland Navigation Act* are defined more precisely, and partly new ones suggested, where the practice has shown that the current ones were surpassed and that they do not follow contemporary trends, and to a certain extent, specific harmonization has been performed with international standards and conventions, using experiences of some maritime countries.

The principles of urgency, efficiency, process economy, i.e. procedure instance, especially owing to the trend of intensive passing of new, compatible, legislative acts in different legislation spheres of Montenegro, can be considered as perfected, to a certain extent.

The mentioned draft of the *Act*, nevertheless, has not brought any innovations regarding the list of maritime claims and their nomothetical systematization, definition and compliance with provisions of the 1999 *Arrest Convention*. However, the question that arises is whether it would be useful to reach into the complex of regulations of MINA, FEPA, *Civil Proceedings Act* (CPA) and Conventions, and to pass a complete system of temporary measures for ships, which is what the 1999 *Arrest Convention* apparently approaches. The processing of all norms regarding the temporary measures on ships, with the minimum reaching for the subsidiary legal regulations and referring to them with as great consideration as possible of specificities of maritime legal relations, is imposed as an entirely logical and appropriate solution; as the legal procedure rules in relation to land registry and deed book legal regime often meet incompatibilities with the maritime legal relations, which could not even be supposed and therefore the same must be surpassed with legal difficulties and exemptions.

It is important to consider the established solutions of the 1999 *Arrest Convention* which innovates many provisions of the 1952 Convention, rendering them more contemporary, more logical and coherent, even simpler and clearer with regard to possible changes of MINA. This Convention adopts to a greater extent the principles and rules of the English i.e. the Anglo-Saxon legal system in case of the arrest of ships, and thus, the proposed changes in relation to national maritime legislature are especially relevant and potentially far-reaching. Also, the EU *acquis communautaire*, regardless of perspectives in relation to the accession to EU, has to be included in the domestic legislation, i.e. it is necessary to intensively direct the domestic legal system towards the compliance with EU regulations.

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SAŽETAK

ZAKONODAVNE PERSPEKTIVE ZAUSTAVLJANJA BRODOVA U CRNOJ GORI

Iako potreban shodno dosezima jurisprudencije, judikature i novog državnog i legislativnog ustrojstva, novi temeljni zakonodavni akt u materiji pomorstva u Crnoj Gori još nije donijet. Radnim tekstom Zakona o pomorskoj plovidbi, koje je crnogorsko Ministarstvo pomorstva i saobraćaja predložilo 2003. godine, preciznije su definisane neke odredbe Zakona o pomorskoj i unutrašnjoj plovidbi, dijelom su predložene nove gdje je praksa pokazala da su važeće prevaziđene, te, u izvjesnoj mjeri, izvršena usaglašavanja s međunarodnim standardima i konvencijama, uz korištenje iskustava nekih pomorskih država. Važno je razmotriti i sve ustanovljene aspekte rješenja Arrest Konvencije iz 1999. koja mnoge odredbe Konvencije iz 1952. osavremenjuje, čini logičnijim, koherentnijim i jasnijim. Međutim, nova Konvencija usvaja u većoj mjeri načela i pravila anglosaksonskog pravnog sistema, čime su predložene promjene po nacionalno maritimno zakonodavstvo posebno relevantne i potencijalno dalekosežnije. Takođe je acquis communautaire EU neophodno uključivati u domaću legislativu, intenzivno usmjeravajući domaći pravni poredak ka usklađivanju s regulativom EU.

KLJUČNE RIJEČI

zaustavljanje brodova, nacionalna legislativa, međunarodne Arrest konvencije

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