SLOVENIA

MARITIME LAW, JURISPRUDENCE AND THE IMPLEMENTATION OF INTERNATIONAL CONVENTIONS INTO THE LEGAL SYSTEM OF THE REPUBLIC OF SLOVENIA

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1. *Introduction*

The Republic of Slovenia became independent in 1991 as one of Europe's youngest maritime states, now going on the fast track towards EU as its future 16th member. Slovenia is a civil law country with the result that the doctrine of *stare decisis* is not observed. Slovenian maritime legislation is within the authority of the Slovenian Parliament (*Državni zbor*).

Maritime cases are taken before the District Court of Koper (*Okrožno sodišče v Kopru*)[1] and the Higher Court of Koper (Court of Appeal – *Višje sodišče v Kopru*). The right to appeal to the Supreme Court of the Republic of Slovenia (*Vrhovno sodišče Republike Slovenije*) is also provided on certain conditions.

According to Article 8 of the *Constitution of the Republic of Slovenia* (1991), national laws and other regulations must be in accordance with generally valid principles of international law and with international agreements (e.g. conventions) by which Slovenia is bound. Ratified and published international conventions are directly applied by the Slovenian courts.

Slovenia is a party to many international maritime conventions, however there are still many important conventions which have not been ratified. There are two possibilities for the implementation of international conventions into the legal system of the Republic of Slovenia. The first is ratification of the convention, while the second is its incorporation into marine legislation. The new 999-article Slovenian *Maritime Code (Pomorski zakonik)*, which entered into force on May 12th 2001[2], is still based on the ex Yugoslav *Maritime and Inland Navigation Act* (*Zakon o pomorski in*

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[1] Koper is the major Slovenian port at the Adriatic Sea.

[2] Off. Gaz. RS, No. 26/01.

notranji plovbi; hereinafter: MINA)[3], however, it regulates exhaustively virtually all areas of admiralty law, including law of the sea, safety at sea, registration of ships, liens and mortgages (*hypothecs*), contracts (e.g. carriage of goods and passengers, insurance), liabilities, collisions, salvage, general average, conflict of laws, etc. It is worth noting that the legislators have taken into account the recent developments of international maritime law.

The purpose of this article is to present a short summary of Slovenian recent maritime law and jurisprudence as interpreted by Slovenian courts. In particular, it deals with arrest of ships, maritime liens and mortgages, as well as carriage of goods by sea. Special emphasize is given on the implementation and interpretation of international maritime conventions.

2. *Arrest of ships*

2.1. Introduction

The Republic of Slovenia is a contracting party to the *1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (1952 Arrest Convention).* Thus, the 1952 Arrest Convention is applied in its original text whenever the ship to be arrested is flying the flag of a contracting state. On the other hand, if the 1952 Convention is not applicable, the provisions of the Maritime Code will be applied. The arrest of ships is regulated in Slovenia by two pieces of legislation: *the Maritime Code* and *the Enforcement and Security Act* (*Zakon o izvr_bi in zavarovanju – ZIZ*)[4]. The first is *lex specialis* governing maritime matters, whereas the latter applies in proceedings, which are not specifically concerned with ships but may be applied to ships under general law. Both Acts use the same name for their proceedings, called "temporary injunctions".

The new Slovene Maritime Code deals with arrest of ships in Part VIII (Execution process and the securing of claims on ships), Chapter IV, Section IV. It has almost entirely adopted the provisions of the 1952 Convention. Nonetheless, some provision are already based on the new 1999 Arrest Convention, as for example the enlarged list of maritime claims.[5]

2.2. Exercise of the right of arrest (1996, Court of Appeal, Cpg - 190/96)

A ship upon which a maritime claim is not asserted cannot be arrested, unless the debtor personally liable for a maritime claim is also the owner of the ship, upon which the arrest order is sought.

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[3] Off. Gaz. SFRY, Nos. 22/77, 13/82, 30/85, 80/89 and 29/90.
[4] Off. Gaz. RS, No. 51/98.
[5] Article 841 of the Maritime Code

In this case the Court had to decide whether it is possible to arrest a ship upon which a maritime claim is not asserted, and which is chartered by a person liable for a maritime claim.

Upon the motion of the creditor, the Court arrested the ship "M.", which was flying a Syrian flag. The debtor challenged the arrest order with an opposition, asserting that the arrest was not justified. According to the debtor, the arrested ship was not owned by him, but by a third party. Subject to MINA and also according to the 1952 Arrest Convention, that ship could not be arrested. The Court annulled the arrest order and released the ship, holding that the creditor was bound to pay to the debtor the amount of SIT 159.600,00 SIT for court expenses. The third party (the shipowner) was instructed to start proceeding for wrongful arrest.

The aforementioned decision was appealed by the creditor in the part, with which the Court annulled the arrest order and released the ship. According to the creditor, the substantive law was not applied correctly. In his view, Article 982 of MINA[6] was to the effect that if the debtor was personally liable for a maritime claim, the Court could arrest a particular ship, upon which the maritime claim had arisen, and also any other ship which was, at the time of arrest, owned or chartered by the debtor.

The Court of Appeal rejected the appeal of the creditor and confirmed the decision of the District Court. With regard to the objection of the creditor the Court of Appeal held that the issued arrest order was not justified. Subject to Article 982 of MINA and also according to the 1952 Arrest Convention, to which Slovenia and also Syria are parties, a claimant may arrest the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. Therefore, if the owner of a ship is liable for a maritime claim, the creditor can arrest any ship which is owned at the time of arrest by the debtor.

In that case the maritime claims had not arisen in respect of the arrested ship. That ship could have been arrested only if the debtor had been, at the time of arrest, the owner of that ship. It appeared that the arrested ship was chartered by the debtor.

2.3. Arrest of a ship, which is not sea going (1997, Court of Appeal, Cpg - 791/96)

A temporary injunction - arrest of a ship (yacht), which is situated in a marina, shall be effected in a manner that the arrested ship remains berthed within the waters of the marina. A yacht is not a sea going ship and therefore it shall be arrested on the basis of general law.

The main issue in this matter was who had to bear the expenses of the arrest proceedings (berth charges) of a pleasure boat, which was berthed in a marina. The

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[6] Article 948 of the Maritime Code

other issue was, which law was applicable in the arrest proceeding of a ship which was not categorized as a sea going ship.

Upon the application of the creditor, the Court granted an arrest order, banning the removal and any other disposal of a pleasure boat, which belonged to the debtor and was flying a German flag. Subsequently, the Court decided that the creditor should effect a deposit to cover the costs of the enforcement proceedings (berth charges) in the amount of SIT 3.000.000 SIT (DEM 30.000) within 8 days. The deposit was not made and consequently the yacht was released and the enforcement proceeding brought to an end.

The creditor filed an appeal against the Court decision. According to the creditor, the amount of the deposit was exaggerated. The claim secured amounted only to DEM 17.000 and therefore the deposit established by the court, which should have been paid by the creditor, was higher than the claim itself. According to the creditor, the establishment of such deposit was equivalent to a denial of judicial protection. Furthermore, the Court decision was not in accordance with Article 988 of MINA, according to which the expenses for the maintenance of the ship and of the crew, during the period of arrest, should be borne by the shipowner or by the charterer of the arrested ship, while only the expenses for the watching of a ship should be paid by the creditor.[7] The creditor also pointed out the provision in the arrest order, according to which the Court should annul the order for arrest and release the ship if the debtor provided security for the claim in the amount of DEM 20.000. According to the creditor, the debtor could still provide a security and thus obtain the release of the ship.

The Court of Appeal rejected the appeal of the creditor and affirmed the decision of the District Court. Reference was made to Articles 979, 980 and 988 of MINA. According to Article 979[8], the Court may, upon the application of the creditor, grant an order for the arrest of a ship and for the custody of a ship, to secure a monetary claim of the creditor. The arrest of a ship is deemed to be, in accordance with article 980 of MINA, a temporary measure (injunction), meaning any detention or restriction on removal of the ship from a port. Furthermore, the Court referred to the first paragraph of article 988 of MINA, according to which the expenses for the maintenance of the ship and of the crew, during the period of arrest, shall be borne by the shipowner or by the charterer of the arrested ship.[9]

It was held by the Appellate Court that according to MINA, the court can request a creditor to make a deposit for the maintenance of the ship and of the crew, if this is necessary, while the expenses incurred for the watching of the ship shall be borne by the creditor.

An order for a temporary measure of arrest of a ship, which is situated in a marina, can be effected only in a way, that the arrested ship remains berthed in a

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7 Article 953 of the Maritime Code.
8 Articles 945 and 946 of the Maritime Code.
9 Article 953 of the Maritime Code

marina. Berth charges, during the period of arrest, by nature include also the expenses for the watching of a ship, which has to be borne by the creditor on the basis of Article 988 (3) of MINA. [10]

However, according to MINA (Article 867)[11] if the ship is not qualified as a seagoing (capable of sailing on the sea, more than 12 m in length, more than 135 BRT) a temporary measure of "arrest" shall be issued in accordance with general law, therefore in accordance with the law governing the general enforcement and security proceeding. In the case at issue the arrested ship is not a sea going and therefore the provisions of the Enforcement and Security Act (ZIZ) shall be applied. The general law provides that berth charges are deemed to be costs of the enforcement proceeding and shall be firstly borne by the creditor, which must give an allowance for it in the amount and within the time limit established by the Court. If the creditor fails to give an allowance, within the established time limits, the enforcement proceeding will be brought to an end.

On the basis of the above and also taking into consideration other relevant circumstances (as for example the fact that the debtors were foreigners, with a permanent residence abroad, which can influence the duration of the proceedings and the expenses of the marina), the Court of Appeal held that the resolution with which the District Court requested the creditor to make a deposit in the amount of SIT 3.000.000 (on the basis of the Enforcement and Security Act (ZIZ) and in connection with Article 876 of MINA, was justified. According to the Court of Appeal the creditor should have expected that he would be bound to pay a deposit in the amount fixed by the Court. Furthermore, the disproportion between the maritime claim and the deposit is not relevant. The same is valid with the provision in the arrest order, that the vessel will be released upon the providing of a security by the creditor.

2.4. Arbitration clause in the arrest proceedings (1993, Court of Appeal, Cpg – 153/93)

The Court in the arrest proceedings cannot decide whether a Court where the creditor started proceedings on the merits, is competent to start proceedings or not.

According to Slovenian law (MINA and the Enforcement and Security Act), if the Court grants a temporary injunction of arrest of a ship (or other property in accordance with general law) before the beginning of a civil, executive or administrative procedure, the creditor must initiate proceedings on the merits within the prescribed period of time at the competent Court in Slovenia, or if the parties validly agree or have validly agreed to submit the dispute to a court of another State or to arbitration, before the agreed Court or arbitration. If the creditor fails to

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[10] Ibid

[11] Article 838 of the Maritime Code

commence the proceedings on the merits within the prescribed period, the Court shall, upon the request of the debtor, annul a temporary injunction and release the arrested ship (or property) .

The major issue in this matter was whether the Court in the arrest proceeding can annul an temporary injunction (an arrest order) and release the "arrested cargo" if the creditor does not commence proceeding on the merits in the "competent" court.

The parties to a contract of carriage stipulated an arbitration clause, according to which all disputes arising out of the contract of carriage had to be submitted to arbitration in London and adjudicated in accordance with English law. The creditor, while the cargo was already in a warehouse in a Slovenian port, requested the Court to grant a temporary injunction and arrest that cargo.

With a temporary injunction the Court ordered the debtor not to remove the cargo of 1.588 tractors and 87 trucks from the warehouse. The debtor's objection against the temporary injunction was rejected by the District Court. Subsequently, the Court issued another order requesting the creditor, as a condition for the maintenance of the arrest, to provide a deposit for the expenses of the arrest proceeding in the amount of USD 54.856,80 USD within 15 days. Having obtained a temporary injunction, the creditor started proceedings on the merits before a Slovenian Court.

The debtor appealed against the decision in which the District Court rejected his opposition against the temporary measure. According to the debtor, the Court should have annulled the arrest order, because the creditor has not started proceeding on the merits in the competent court. The creditor filed a suit in the Slovenian court, despite of the fact that the contract of carriage included an arbitration clause, according to which all disputes arising from the contract had to be submitted to arbitration in London and adjudicated in accordance with English law. In the debtor's view the Slovenian court was not competent and consequently the arrest order should have been annulled and the arrested property released.

The Court of Appeal rejected the objection of the debtor. It was held that in the arrest proceeding, the court could not deliberate whether the Court, where a lawsuit was filed, was competent to decide on the merits or not. Therefore, it was not possible to withdraw a temporary injunction on the basis that the Slovenian Court was not competent to decide on the merits. The latter has to decide as a preliminary question, whether it was competent to decide on the merits or not.

3. *Maritime liens and mortgages (hypothecs)*

3.1. Introduction

Slovenia has not ratified any of the three international conventions dealing with this matter. However, most of the provisions in the Slovene Maritime Code are based on the provisions on the 1926 and 1967 conventions on maritime liens and mortgages (hypothecs) .

According to Article 237 of the Maritime Code, maritime liens (which are called "privileges") are: (1) Court expenses incurred in the common interest of all creditors in enforcement and security proceedings; (2) claims arising out of employment of the master, crew and other person engaged on board; (3) claims for remuneration for salvage at sea and contribution of the vessel in general average; (4) claims for damages arising out of collisions and other accidents in navigation, as well as indemnities for damage caused to port appliances, docks and waterways; personal injury claims of passengers and crew; indemnities for loss of or damage caused to port appliances, docks and waterways; personal injury claims of passengers and crew; indemnities for loss of or damage to cargo and baggage; (5) claims resulting from contracts entered into or acts done by the master acting within the scope of his authority, away from the vessel home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the same time the owner of the vessel, and whether the claim is his own or that of ship handlers, repairers, lenders or other contractual creditors; (6) claims by shipping agents for representation of the ship owner, of the ship or of the crew.

The nature, ranking and priority of maritime liens is governed by the law of the flag.

3.2. Applicable law as to maritime privileges (1996, Court of Appeal, Cp – 850/96)

According to Slovenian law, a claim of a member of the crew for unpaid wages is secured by a maritime privilege. However, the existence of such privilege shall be determined by the law of the flag. All matters relating to the procedure of enforcement (procedural matters) shall be regulated by the law of the state where enforcement takes place.

The issue in this matter was whether the existence of a maritime privilege shall be determined in accordance with Slovenian law or subject to the law of the state of registration of the ship (law of the flag). The creditor (defendant) asserted that his claim for unpaid wages was secured by a maritime privilege and requested the Court to arrest the ship on which he was employed.

The arrest order, which was granted by the Court of the first level, was challenged by the debtor.

It was held by the Court that the defendant (creditor) had a claim against the ship "H.", which was secured with a maritime privilege. The change of ownership of the ship does not affect a maritime privilege and therefore the fact that the ownership of the ship had been changed did not affect the creditor's right to arrest that ship. The Court rejected the complaint of the debtor.

The plaintiff appealed the judgment, stating that the Court should have based its decision not only on the provisions of MINA but also on the provision of procedural law, to be found in the Enforcement and Security Act.

With respect to the assertions of the plaintiff the Court of Appeal held that the substantive law had not been applied correctly. The District Court had not taken into consideration the provision of Article 998 of MINA[12], according to which the existence

of maritime privilege for unpaid wages shall be determined by the law of the flag.

The fact that the defendant was employed on the ship in question was not opposed by the parties to the lawsuit. Therefore, according to the Court of Appeal, whether the claim of the defendant was secured by a maritime privilege, had to be established on the basis of the law of the flag of the ship, while all matters relating to the procedure of enforcement (procedural matters) have to be regulated by the law of the state where enforcement takes place, in the present case by Slovenian law (*lex fori*).

The arrested ship was flying the German flag. The Court Appeal held that whether the claim of the debtor was secured by a maritime privilege had to be adjudicated in accordance with German law. As a result of a wrong application of substantive law, the judgment was annulled. The matter was sent back to the District Court for a new deliberation. The Court of Appeal instructed the District Court to decide whether the claim was secured with a maritime privilege also in accordance with German law.

4. *Carriage of goods by sea*

4.1. Introduction

Slovenia is bound by the *1924 Hague Rules*. Unfortunately, the *1968 Visby Protocol* and the *1979 SDR Protocol* have not been ratified. Nonetheless, the Maritime Code provisions regulating the carriage of goods by sea are based on the *Hague-Visby Rules* as amended by the *1979 Protocol*.

4.2. Laytime - demmurage – freight (1995, Supreme Court, III. Ips 15)

MINA (as well as the Maritime Code) makes a distinction between laytime, prolonged laytime (demurrage) and extra lay time (extra demurrage). A shipowner is entitled to payment of demurrage only in case of a prolonged lay time (demurrage) or in case of an extra lay time (extra demurrage). The payment for normal laytime is included in freight.[13]

The parties to this dispute concluded a voyage charter according to which the shipowner was bound to carry a cargo of 1000 tons of coffee from the port of Cristobal in Panama to the Port of Koper. According to the charterparty, the cargo and the vessel should have been ready for loading in the port of Cristobal on 13th November 1985. The charterparty contained a clause stating that the loading of the ship should proceed "*as fast as the vessel can receive*". However, despite the

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[12] Article 961 of the Maritime Code.

[13] Articles 479 - 490 of the Maritime Code

agreement, only part of the cargo was ready for loading in the agreed port, whilst the remaining of the cargo was situated in another port. While already in the port of Cristobal, the defendant requested, and the shipowner agreed, to load the remaining of the cargo in the port of St. Thomas de Castilla. Subsequently, the shipowner filed a suit for the payment of demurrage.

The main issue in this matter was the establishment of the amount of demurrage, which had to be paid by the charterer (defendant) and secondly, whether the shipowner was entitled to the payment of an additional freight.

The District Court held that the defendant was bound to pay to the plaintiff the due amount of demurrage from the 11th of November 1985 until the end of loading operations. Furthermore, according to the Court, the plaintiff was entitled also to an additional freight as a result of the prolongation of the voyage. This judgment was subsequently affirmed by the Court of Appeal.

The defendant started proceedings for the revision of the judgment before the Supreme Court of the Republic of Slovenia. He alleged that the substantive law was not applied correctly and requested the annulment of the judgment. The Supreme Court made reference to the provision of MINA on laytime and demurrage. With regard to the time of loading MINA distinguishes between *laytime, prolonged laytime (demurrage)* and *exceptional laytime (demurrage). Prolonged lay time* commences with the end of the laytime and shall last half as long as the period of laytime. Until the end of the period of prolonged laytime the shipowner shall not refuse to load a cargo which is ready for loading aside the ship, even though the loading of such cargo may delay the departure of the ship beyond the duration of laytime or even prolonged laytime (demurrage). If the departure of the ship is delayed beyond the period of demurrage, the shipowner is entitled to payment of an exceptional demurrage, which is 50% higher than the demurrage payment. However, after the expiration of the period of demurrage, the shipowner can refuse further loading and sail with the loaded cargo. If the shipowner chooses not to do so, he is entitled to the payment of the extraordinary demurrage, unless he acted contrary to the instructions of the charterer.[14]

The shipowner is entitled to payment of demurrage only in case of a prolonged laytime or in case of an extraordinary laytime. The payment for a normal laytime is included in the freight. However, it can be agreed otherwise.

Subject to the voyage charter the ship should have become an arrived ship at the port of loading on 13th November 1985 and it was indeed ready at that date to load the cargo. The Supreme Court held that at that time the laytime started to run, but not the period of prolonged laytime, as was incorrectly held by the lower Courts. As already mentioned, the payment for laytime was already included in the freight and there was no need for a payment of demurrage. According to the Supreme Court the lower Courts had not applied the substantive law correctly. They did not separate the

[14] Ibid.

periods of laytime and prolonged laytime, for which demurrage is due. Furthermore, the lower courts held that the charterer was bound to pay demurrage from the moment of commencement of the period of laytime. As a result, the Supreme Court annulled the judgment in the part dealing with the payment of demurrage.

As the matter was sent back for a new decision, the Supreme Court instructed the District Court to define the periods of laytime and demurrage, taking into account the clause ("*as fast as the vessel can receive*"). According to the Supreme Court, laytime started to run when the vessel was ready to load in the port of Cristobal. The ship had to sail to the port of St. Thomas de Castilla upon request of the defendant in order to load the cargo which should have been loaded in the port of Cristobal. According to the Supreme Court, it was therefore necessary to count the call and the loading in the port of St. Thomas de Castilla as the continuation of the loading in the port of Cristobal and therefore, when calculating laytime and the possible demurrage, the entire period of loading in both ports had to be taken into account.

The defendant in the revision proceeding furthermore alleged that according to MINA demurrage payment should be made in advance for each day. If the shipowner did not claim the payment in advance, he would lose his right. The Supreme Court rejected this argument. It was held that if the amount of demurrage was not paid in advance, the shipowner would be still entitled to that payment and could claim it also afterwards. [15]

The Supreme Court affirmed the judgment of the lower courts in the part according to which the charterer was bound to pay an additional freight to the shipowner. It was held by the Supreme Court that the amount of freight was agreed for a normal voyage from the Port of Cristobal in Panama to the Port of Koper. The consequent order of the charterer that part of the cargo had to be loaded in the port of St. Thomas de Castilla prolonged the voyage. Therefore, the charterer was bound to pay an additional freight for the part of the voyage which was not contemplated in the initial agreement.

5. *Other issues: Authority of the master (1996, Court of Appeal, Cpg – 170/96)*

If an objection (complaint, opposition) against an arrest order is filed by the master or by the representative of the master, it is deemed to be filed on behalf of the shipowner. The master is a legal representative of the shipowner.

The issue in this matter was, whether an opposition against an arrest order, which was filed by the representative of the master, was deemed to be filed on behalf of the shipowner. The Court had issued an arrest order which was challenged by the

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[15] Article 482 of the Maritime Code.

debtor. The objection was filled by an attorney. The name of the shipowner was not clearly listed, moreover, in the head of the objection the attorney wrote the name of the ship. According to the first level court, a ship could not be a party to a lawsuit and therefore, an objection against an arrest order could not be filed on behalf of the ship. Consequently, the Court rejected the objection.[16]

The debtor filed a complaint against this decision to the Court of Appeal. In his view, the attorney who filed the opposition was given the power of attorney by the master of the arrested ship. Therefore, the Court should have taken into account Article 137 of MINA[17], pursuant to which a master is the legal representative of the shipowner. According to the debtor, an opposition, objection or complaint against an arrest order, which was filed by the master or by the representative of the masters, was deemed to be filed on behalf of the shipowner. This is true even if the name of the ship is mentioned in the complaint. Therefore, the dismissal of the complaint by the District Court was not justified and the Court should have started proceedings on the merits.

The Court of Appeal held that the decision was contrary to the aforementioned provision of MINA and to the provisions of the *Civil Procedure Act*[18]. According to the Court of Appeal, if the power of attorney is given to a third party (in this case an attorney) by the master, that third party is deemed to act on behalf of the shipowner. The Court of Appeal held that the complaint was filed on behalf of the shipowner and not on behalf of the ship. A shipowner can be a party to a lawsuit and furthermore, in this case it was also a party to the arrest proceeding.

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[16] According to the Slovene law a "*res*" cannot be a party to a lawsuit. "*Actio in rem*" is not allowed.

[17] Article 170 of the Maritime Code.

[18] New version – Off. Gaz. RS, No. 26/99.