Compensation of damages related with wrongful arrest and detention of ships in Ukraine

There are numerous articles devoted to the procedure and problems related to arrest of ships in Ukraine, but the question of indemnification of damages which may be caused to Owners (beneficial owner, bareboat or time charterer) in connection with arrest or detention of their vessel has not been thoroughly covered yet.

This article focuses on the main aspects that must be considered by the Owners, who decided to bring to Ukrainian court their claim for recovery of damages caused by a wrongful arrest or detention of their vessel on the territory of Ukraine.

Depending on the approach to the issue of compensation for damages caused by a wrongful ship arrest one can define two groups of countries.

The first group includes countries where the Owners to compensate damages need not only to prove that the arrest was wrongful, but that the person who initiated the arrest, acted with gross negligence, in bad faith or intentionally abused his rights. These are Belgium, Greece, Italy, USA and France.

The second group includes countries where it is enough for the Owners to provide the court with evidence that the claim of the person who applied to the court for the arrest of the ship was not allowed. This group includes such countries as Germany, Denmark, Poland, Norway, Finland, Sweden and Ukraine.

At first, I would like to turn to the international legal instruments that are binding for Ukraine in the question of protecting interests of the Owners who suffered damage from unreasonable arrest of their vessel.

One of the main instruments is the International Convention Relating to the Arrest of Sea-Going Ships *(Brussels, May 10, 1952)* (hereinafter – the Convention), which is mandatory for Ukraine since 16.05.2012.

According to Article 6 of the Convention “All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for”. Therefore the Convention in this regard refers to the provisions of Ukrainian legislation.

Ukrainian law has special provisions aimed to protect interests of the Owners who suffered the above losses. We are talking about Article 46, which is contained in Chapter 4, Section 2 of the Merchant Shipping Code of Ukraine (hereinafter – MSC Ukraine), according to which "the person upon the demand of whom the vessel has been arrested, is liable for any losses inflicted on the vessel's owner or bare-boat charter as a result of a wrongful arrest of the vessel or providing excessive security to a marine claim". However, by virtue of the provisions of point 1 Article 14 (1) of MSC Ukraine this article can be applied only to the vessels flying the flag of Ukraine which are very few in number these days.

Without going deep into the procedure of ship arrest in Ukraine, it should be noted that nowadays in the majority of cases arrests in Ukraine are carried out as a security for a claim which is considered by Ukrainian court on its merits. Also, commercial courts impose arrest on ships as precautionary measures before filing a lawsuit.

If the ship is arrested to secure a claim in civil proceedings, one should be directed by the norms of the Code of Civil Procedure of Ukraine (hereinafter – CCP of Ukraine), which regulates the issue of damages caused by measures securing the claim.

The matter goes about Article 155 (1) of the CCP of Ukraine which states that "In case of cancellation of the measures of the claim securing, entry into legal force of a decision on denial to allow the claim or a ruling on termination of proceedings or dismissal of the claim without consideration, the person against whom the measures securing the claim were taken is entitled to recover damages caused by a security for the claim".

Thus, if a ship was arrested as a security for the claim and later such claim was dismissed by the court, the court closed proceedings (e.g. due to the plaintiff's refusal from his claim), or left the claim without consideration (e.g. as a result of a deliberate repeated default of the plaintiff in the trial), the Owners may apply to the court with a claim for damages caused by the wrongful ship arrest.

It should be noted that not all the grounds serving to close proceedings or dismiss the claim without consideration may serve as grounds for the Owners' claim. For example, one of the reasons for the closure of proceedings in accordance with Article 205 of CCP of Ukraine is the conclusion of a settlement agreement between the parties to the dispute. It would be right to study thoroughly the causes of making such an agreement and its conditions to determine the legality of a claim for damages caused by measures securing the claim as there may arise a situation in which the settlement agreement in fact satisfies the plaintiff's claim to the Owners. Article 207 of CCP of Ukraine, for example, considers cases where the parties have agreed to submit the dispute to an arbitral tribunal as a ground for leaving the claim without consideration. In case the parties to the dispute have concluded such an agreement after the opening of court proceedings, one shall take into account results of consideration of the plaintiff's claim by the arbitral tribunal. If the arbitration court satisfies the plaintiff's claim to the Owners, it is unlikely that the fact that the claim was left without consideration by the state court can be considered as the basis for the Owners to bring a claim to the person who applied for the ship arrest.

If the ship is arrested within the commercial court procedure, one should be guided by the provisions of the Code of Commercial Procedure of Ukraine.

Court practice indicates that ships are arrested by commercial courts both within precautionary measures procedure (prior to filing a claim) and as a security for the claim.

According to Article 43-10 (1) of the Code of Commercial Procedure of Ukraine "In the event of termination of precautionary measures, or in the event of waiver of claim by the applicant, or in the event of entry into force of a decision whereby a lawsuit was rejected, a person against whom

preventive measures were taken shall be entitled to compensation for damages caused by the application of such measures".

Therefore, the Owners who suffered damages in connection with precautionary measures have less grounds to bring a claim than in civil proceedings. This includes cases where the applicant, for example, has not appealed to the court within 5 days from the application of precautionary measures by the court, or when the court has not accepted such a claim, or if the plaintiff lost his case.

As regards the compensation of losses caused by securing of the claim, the Code of Commercial Procedure of Ukraine unfortunately does not contain any specific rules on this subject. One may try to compensate this gap by using the analogy of law – namely, the provisions of Article 43-10 (1) of the Code of Commercial Procedure of Ukraine – given that measures securing a claim and precautionary measures have common nature. This follows from Article 43-3 (3) of the Code of Commercial Procedure of Ukraine which states that "after the submission of a lawsuit by the plaintiff precautionary measures shall act as measures to secure the claim".

In case of arrest of a vessel flying the Ukrainian flag the Owners should additionally rely on the above mentioned provisions of Article 46 of MSC of Ukraine, regardless of the fact whether such detention was imposed in civil or commercial proceedings.

So, at what stage the Owners may bring a claim for losses suffered due to the wrongful ship arrest?

In Article 43-10 (4) of the Code of Commercial Procedure of Ukraine it is stated that: "In cases provided for in paragraphs 2-4 of Article 43-9 of the Code as well as during the examination of the case the commercial court may resolve the issue of compensation for damages caused by the application of precautionary measures". In other words, this article enables the court to compensate the Owners' losses in the frame of the same dispute where the ship has been arrested. Again, I think these provisions should be applied by way of procedural analogy in cases where the ship has been arrested to secure the claim. This is an optional rule and it does not contain a ban for submission of a separate claim by the Owners.

The CCP of Ukraine does not contain similar rules and from the content of Article 155 (3) thereof one may conclude that claims for damages caused by measures securing the claim can be brought by filing a new separate claim. The said norm reads as follows: "The subject of a pledge shall be returned to the plaintiff if a claim for damages has not been filed within two months after the occurrence of the circumstances defined by part 1 of this Article (these circumstances have been already mentioned above)".

Thus, the losses caused to the Owners by the ship arrest imposed in civil proceedings should be compensated by way of bringing a separate lawsuit, whereas the commercial procedure, apart from the said option, also provides a possibility to bring a claim before the court renders a decision on the case merits or passes a ruling on closing the case.

Notwithstanding the above stated, I believe it would be more reasonable for the Owners to bring a separate lawsuit as at the time when an action of the person requesting the ship arrest is considered by the commercial court, the Owners are not likely to know the full amount of losses involved and are unlikely to collect proper evidence.

Article 153 (4) of the CCP of Ukraine and Article 43-3 (4) of the Code of Commercial Procedure of Ukraine entitle the court to require that a person applying for the ship arrest shall make a deposit with the court account so that any losses caused by such arrest could be indemnified in the priority order out of the deposited funds However, it should be noted that in practice Ukrainian courts seldom

ask to make such a deposit.

Nevertheless, if the court obliges an applicant to make a deposit for his arrest application to be allowed, the Owners should bear in mind that Article 155 (3) of the CCP of Ukraine grants them a 2-months period for filing a claim from the date of occurrence of one of the events specified in Article 155 (1) of the CCP of Ukraine so that subsequently they could satisfy their demands at the expense of the deposit. The Code of Commercial Procedure of Ukraine does not prescribe such a term and thereby jeopardizes the ability to allow the claim at the expense of the deposit in case the Owners bring a separate claim because by that moment the deposit can be already returned to the person who made it.

It should also be noted that according to Article 80 (1) of the MSC of Ukrainian a vessel may be detained at a seaport by the Harbor Master until the Owners provide a sufficient security for the maritime claim:

- on request of a person having a maritime claim that based on a general average, salvage, contract of cargo carriage, collision of vessels or damage inflicted in other way;
- on a maritime claim of the port that has arisen based on damage to port facilities, other property and navigation equipment located in the port;
- on a maritime claim of the central executive authority implementing state policy in environment, who realize state policy on environmental control that based on violation of the requirements of the law of Ukraine on environmental control.

In case of a wrongful detention of the vessel by the Harbor Master the Owners should bring an action against the initiator of the detention and refer to para. 2 of the above Article which says that the persons who have demanded the detention of the vessel shall be held liable for the losses incurred by wrongful detention.

Article 91 of MSC of Ukraine also entitles the Harbor Master to detain the vessel in the following cases:

– the vessel is unfit for sailing; the requirements regarding her loading, supplies, manning the vessel have not been met; other deficiencies and drawbacks of the vessel that may endanger the safety of navigation or the health of people staying on board the vessel, or the environment;

– non-observance of the requirements to vessel’s documents;

– established dues, charges and penalties have not been duly paid;

– decision of the state authorities concerned (customs bodies, sanitary and quarantine services, fishing control bodies, Ministry of the environment control and nuclear safety of Ukraine, border service).

If the vessel was wrongfully detained by the Harbor Master in line with the grounds prescribed by Article 91 of the MSC of Ukraine, it should be determined at first who was the initiator of such detention. If the vessel, for example, was detained by the Harbor Master in connection with a relevant decision of the state authorities, the latter shall be held liable for any losses caused thereby. However, if the Harbor Master detained the vessel under a wrongful assumption that the vessel did not have necessary documents, the Harbor Master shall be then a responsible person.

A vessel may also be detained in the Ukrainian port by the law-enforcement agencies, which happens quite often, and in this case the Owners shall be guided by the provisions of Article 1176 of the Civil Code of Ukraine.

Also, a vessel may be arrested by the state executive officer in the frame of enforcement proceedings. If the Owners find such arrest to have been imposed illegally, the Owners' claim for damages shall be based on the provisions of Article 1174 of the Civil Code of Ukraine, which says that: "The damage inflicted to a physical person or legal entity as a result of illegal decisions, actions or inactivity of the official of the state government, governmental body of the Autonomous

Republic of Crimea or local self-government under implementing their authorities shall be indemnified by the state, the Autonomous Republic of Crimea or the local self-government body irrespective of the guilt of this official".

The question is whether the Owners can file a claim for compensation of losses to the Ukrainian courts. The answer is positive. If the defendant is located on the territory of Ukraine, the Owners may apply to the court at the place where the defendant is located according to the general rules for determining of the court jurisdiction. If the defendant is not a Ukrainian resident, one shall be guided by the provisions of Article 76 of the Law of Ukraine "On International Private Law" – namely, paragraphs 3 and 7, whereby the courts can accept and consider any disputes with a foreign element in cases of damage compensation if it was caused on the territory of Ukraine and / or if the action or event which has given rise to a claim took place on the territory of Ukraine. The Owners may also apply to the court situated at the place of property of the defendant – non-resident. It should be noted that the aforementioned provisions cannot be applied if any international agreement applicable to the case provides otherwise.

The answer to the question about applicable law to such a dispute is contained in Article 49 (1) of the Law of Ukraine "On International Private Law", whereby "the rights and responsibilities for the obligations that arise as a result of the infliction of damage shall be determined by the law of the State, where an action or any other circumstance which gave rise to a claim for damage took place". As far as the losses (damage) are caused to the Owners on the territory of Ukraine, the Ukrainian court will be guided by Ukrainian law, even if the Owners and responsible person are both non-residents of Ukraine.

What is implied by the Owners' losses referred above? According to Article 22 (2) of the Civil Code of Ukraine losses include: 1) losses incurred by a person as a result of destroying or damaging of a thing, as well as expenses a person has incurred or have to incur in order to restore his violated rights (real losses); 2) income a person could have received under normal circumstances if his right had not been violated (loss of profit).

The Owners' real losses may include costs associated with extra port charges, supplies during the vessel's standby, crew wages, penalties paid in connection with untimely fulfillment of obligations, and other expenses the Owners would not have incurred if their ship had not been wrongly arrested or detained.

The Owners' expenses related with issuing and maintenance of a bank guarantee, which they presented to the court or Harbor Master against the release of the vessel from arrest or detention can be also attributed to the Owners' real losses. Without going deep into the procedure of the vessel's release from arrest against presenting of a bank guarantee, it should be noted that in civil proceedings such a procedure takes place at the stage of substitution of a type of a security for the claim (Article 154 of the CCP of Ukraine). The commercial proceedings do not deal with this question at all.

Loss of profit can be expressed, for example, in non-receipt of the freight due to cancelation of the charter party because of the arrest or detention of the vessel, or in connection with the inability to use the vessel by the Charterer under the time charter party (off-hire).

The Owners shall bear in mind that the court while considering the question of compensation of losses will be assessing the measures taken by the Owners to reduce or avoid such losses. If the Owners' action/inaction contributed to the losses, the court may reduce the amount of compensation or even reject the claim. Therefore, the Owners should attempt to release the vessel from arrest or detention and try to minimize their losses.

In this regard it may be of some interest to mention the Resolution of Higher Commercial Court of Ukraine dated 20.08.2009. Plaintiff filed a claim for losses that he had suffered as a result of the application of precautionary measures imposed by the commercial court on request of Defendant in another case. Higher Commercial Court of Ukraine came to the following conclusion: the fact that Plaintiff did not appeal the actions (precautionary measures) of the first instance court testifies about the Plaintiff's gross negligence which entailed the losses.

Illustrative is the decision of the Commercial Court of the Autonomous Republic of Crimea dated 22.11.2012 which was later upheld in the result of appeal and cassation review. In the subject case the vessel was detained by resolution of the Harbor Master of Yalta commercial sea port on the demand for payment of port charges, which was later found to be unlawful in the administrative proceedings. The vessel's detention lasted more than 3 months. The Owners sued port authorities for recovery of the cost incurred in connection with the crew maintenance, purchase of food supplies and fuel, payment of port dues etc.

The court fully recovered from Defendant the Owners' costs for port dues paid during the period of the vessel's detention.

As to the crew wages, the court dismissed such claim on the basis that the Owners have not provided the evidence of the fact that the crew was in labor relations with the Owners and failed to prove the need for the involvement of all crew members during the period of detention.

The court also rejected the Plaintiff's claim for reimbursement of the costs for food and fuel supplies since, according to the court, Plaintiff has not proved that such costs were made by the Owners and connected exactly with the said vessel.

Also, the Owners demanded for the loss of profit expressed in the fact that the detention of the vessel led to the breach of the sale agreement and, as a consequence, the Owners sold the vessel at a lower price. The court fully allowed that claim and collected from the Yalta port the difference between the original and actual sale price of the vessel.

The above case shows us that the Owners as a plaintiff shall take a scrupulous approach to the question of proving their losses – i.e. collect and document their losses from the very moment of arrest or detention of the vessel. The Owners should engage qualified lawyers at the early stages of the incident as it may influence the success of the entire case.

An essential attribute for holding the defendant liable for losses is the presence of cause-and-effect relation between losses and actions / inaction of the defendant which the plaintiff must prove. If the court finds the absence of such connection, the claim will be denied. The following scenario may serve as an example. A vessel called the Ukrainian port for loading. During the loading operations the Harbor Master, on request of a person having a maritime claim related with the carriage of cargo, issued a resolution for detention of the ship (as it turned out later, the detention was wrongful). By virtue of the provisions of Article 81 of the MSC of Ukraine the Harbor Master may detain the vessel until the court renders a decision on the ship arrest, but no more than 3 days. Given that the mentioned person failed to present a court ruling on the ship arrest, the Harbor Master in 3 days cancelled the detention, but at that moment the vessel had not yet completed the loading operations.

Though the detention was wrongful, it did not affect the length of the vessel's staying in port and, therefore, the Owners had no grounds for claiming any losses in this regard. In other words, there is no cause-and-effect relation between the Owners' losses (expenses) and actions of the above mentioned person.

It should be noted that in such category of the claims not only the Owners but Insurer, who have compensated the Owners' losses caused by a wrongful arrest / detention of the vessel, may act as a plaintiff.

In summary of the above it shall be stated that the Ukrainian courts are rarely faced with claims for compensation of losses suffered by the Owners in connection with a wrongful arrest or detention of the vessel. However, it does not mean that the Owners should refrain from bringing such claims. Although Ukrainian law has certain gaps in this subject, it still provides the opportunity to compensate losses incurred by the Owners.