

Yugoslavia

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1. HISTORY

The law of arrest of ships in Yugoslavia was governed by a Regulation enacted in 1940, and which was used until 1978, when the new Act now in force was promulgated.¹ The 1952 International Convention regarding the Arrest of Ships was ratified and promulgated in 1967.² The Law on Forced Execution was promulgated in 1978.³ Several other laws may be used and applied for certain details.⁴

2. PROCEEDINGS IN GENERAL

2.1. Precedents

Legal opinions of the higher courts expressed in their decisions are not binding on the judges of lower courts, although decisions of higher courts and legal opinions published by higher courts given in bench, or of Supreme Courts, do have influence on the opinions of judges.⁵

2.2. Courts and types of proceedings

Only the courts have power to arrest a ship on the application of a claimant, however, some other authorities have the right to prevent a ship from leaving the port or may arrest the ship *ex officio*.

Due to the fact that Yugoslavia is made up of six constituent

1. Maritime and Internal Navigation Act as amended (*Official Gazette*, SFRY, Nos. 22/77, 13/82, 10/83 and 30/85) (hereinafter referred to as MINA).

2. *Official Gazette*, International Agreements No. 12/67 (referred to in text as 1952 Convention).

3. Forced Execution Proceedings Act, Off. Gaz., No. 20/78 (referred to in text as FEPA).

4. Civil Procedure Act (referred to further in text as CPA), Conflict of Laws Act (CLA).

5. From Art. 377(1) of CPA "Given in bench" means collectively, by all the judges of a court.

republics, four of which have coast lines and sea ports, republican laws decide which courts have jurisdiction over applications for arrest. Although the names of the courts may differ from republic to republic, there are in fact four courts having jurisdiction over foreign sea-going ships in Yugoslav ports,⁶ as jurisdiction for foreign sea-going ships is based on *forum rei sitae*.⁷

The arrest of ships is governed by a special procedure, so-called "non litigious", and the order for arrest is issued under the name of "temporary provisions". Every arrest must be upheld by a final and conclusive judgment on the merits⁸ and it is only on the basis of such final judgment (or award) that it is possible to start proceedings for the sale of the vessel.

The official language of the court is the local language (although any other language used in Yugoslavia may be used) and all documents filed as exhibits must be translated by the court interpreter and attached.

There is no such process as discovery of documents, as all documents must be submitted both to the court and to the respondents.⁹

2.3. Advocates and powers of attorney

Although it is not compulsory for parties to be represented by advocates, in the case of foreign parties this is usual. The advocate must

6. Basic Court at Koper, District Economic Courts at Rijeka, Split and Titograd (Art. 873 MINA).

7. It may be mentioned here that the River Danube runs through Yugoslavia with many foreign ships navigating and arrest of river ships is possible under the same Act (MINA). Naturally other courts have jurisdiction in cases of arrest on the Danube or other navigable rivers.

8. Certain expressions cannot be translated and adequate equivalents do not exist in English legal terminology. "Temporary measures" is a special expression just like French "saisie conservatoire" which has been translated as "conservatory attachment", but "order for arrest" probably can be used too. The same applies to the term "non-litigious" proceedings, which, in this particular case means that the judge will fix a delay of 15 days in which the petitioner must take action (file complaint) before the appropriate court to validate the order for arrest or claim on its merits, in default of which the arrest will be null. The technical word for this is to "convalidate". As a matter of fact the arrest is usually a "prejudgment arrest". Provisions of MINA regarding the seizure of the ship in case of forced sale by the court are provided for in Arts. 881 to 897 and are slightly different from those on arrest.

9. Photocopies are usually submitted, while the originals are kept by the advocate, although they may be inspected by the judge if required.

present to the court a power of attorney, which is a simple document written on his client's letterhead, or on a special form provided by the advocate, in which latter case the form must be signed and stamped by the client.

The power of attorney does not have to be notarised or legalised. A telex or telefax power of attorney may also be temporarily accepted, however it depends on the judge as no special provisions exist in law about these forms of powers of attorney. However, a cable addressed directly to the court, with a copy sent to the advocate, will usually be accepted by the judge, provided it is confirmed within three days by registered letter.

Power of attorney issued by a lawyer (solicitor, etc.) representing the client will not be sufficient, as the power of attorney must be issued and signed by the claimant.

2.4. Application to the court

The so-called "non-litigious" proceedings take place before a single judge in contrast to the proceedings in the main action which are normally heard by a senate, consisting of a judge and two jurors.

The proceedings are initiated by a written application. The claimant becomes the applicant and the shipowner becomes the respondent.¹⁰ Rules regarding the proceedings are dealt with by the Maritime and Internal Navigation Act (MINA) and various other laws to which MINA refers such as subsidiary rules and regulations.¹¹

The applicant is required to file with the court¹² the following documents:

- (a) the application;
- (b) the Power of Attorney;

10. The expression claimant and applicant will be used with the same meaning.

11. Arts. 979–993 of MINA, however, Art. 867(5) of MINA refers to FEPA, which in turn refers to Art. 14 of CPA.

12. The relevant point in time is the actual filing of the application (or for that matter any written document) with the court, or the posting of a registered letter, in which case the date of the postmark is considered as the date of receipt by the court. Consequently there is no need to notify the other party, as it is the court which notifies the parties, although as already mentioned, the date of filing with or mailing to the court is considered to be the relevant moment.

- (c) any supporting documents (exhibits); and
- (d) state the reasons why an order for arrest is sought;
- (e) show the danger in the event of an order for arrest not being granted¹³;
- (f) amount of bail (security).

The amount of security must be calculated in advance by the applicant and stated in the application. It should include the claim, main action, interest (present and future), costs of arrest, costs of future main action, of forced execution (sale of the ship) and costs incurred by the ship while waiting for the judgment on the merits and judicial sale. If this calculation is not made, the judge will fix bail in respect of the claim only (quantum of claim).

Documents and exhibits may include:

- (a) copies of invoices;
- (b) order for goods and services signed by the master, or documents of delivery signed by the master;
- (c) extracts from the applicant's book-keeping, listing all invoices, payments and balance;
- (d) correspondence concerning payments, and reminders;
- (e) any other supporting document, such as disbursement accounts;
- (f) in the event of a claim by the crew, payroll sheets, etc;
- (g) in cases of damages in collision, salvage, etc., appropriate documents, such as survey reports, invoices etc.

An affidavit as to the amount claimed will not suffice and order of arrest will not be issued.

It is of the utmost importance that the full identity of the applicant and especially of the respondent, is stated in the application.

There is no action *in rem* in Yugoslavia¹⁴ and for this reason the correct identity of the parties must be given, as if they are not, this may amount to a procedural nullity. If and when it is established that the incorrect identity has been given, the application for arrest will be rejected or the order for arrest, if already issued, will be

13. Depending on whether or not the ship is from a contracting state to the 1952 Convention.

14. *Arrest of Ships—1* (1985), p. 53: "The arrest can only be applied for if the ship-owner is personally liable for the creditor's claim."

revoked. This may come about as a result of an objection made by the respondent,¹⁵ or even *ex officio*.¹⁶

2.5. Location of the ship and readiness to sail

The filing of an application and the granting of an order for arrest may only be made when the ship is in the port or at anchorage in the area over which the particular court has jurisdiction. There are no restrictions to the effect that a ship ready to sail may not be arrested.¹⁷

2.6. Time element

In the four courts mentioned above there are usually one or more judges dealing with maritime matters and they usually issue orders for arrest. It is even possible to obtain an order for arrest on non-working days or after office hours, but such an application should be notified to the President of the court in advance, and he will then appoint one of the judges to stand by, although not necessarily one of the judges usually dealing with maritime matters. The order for arrest is usually obtained on the same day as it is applied for, provided that the application is not made at the last moment during office hours, otherwise, at the latest, it will be granted the following day.

2.7. Decision by the court

The judge will issue the decision¹⁸ usually without hearing, but the judge may order a hearing at short notice.

15. When an objection is raised after the ship has been arrested the judge may request original documents from the ship, as those documents must be surrendered to the harbour master when the arrest is notified to the ship's master. In *Češka Statni Pojištovna v. China Ocean Shipping Co.* (DEC Rijeka in file II-R-I-17/85) the ship was arrested. As the applicant had not submitted documents showing that ship was owned by China Ocean, the court requested the documents from the harbour master and, upon finding that the ship was not owned by China Ocean, the court revoked the order for arrest and released the ship *ex officio*.

16. Yugoslav law does not recognise "beneficial ownership" or the "piercing of the corporate veil". This may be possible in criminal proceedings but not in civil proceedings.

17. The 1952 Convention provides: "... even though the arrested ship may be ready to sail".

18. The expression "decision" is used in "non-litigious" proceedings, while "judgment" is used in respect of the proceedings on the merits. As a matter of fact the "temporary measure" (order for the arrest) is called the "decision".

The decision is notified by the court to the harbour master, ship's master, ship's agents and usually to the customs authorities and port police. It is the harbour master who notifies the ship's master and takes into his custody the ship's documents, which are, according to the law of the flag, the documents necessary for a ship to sail abroad. The harbour master must draw up a crew list, a list of passengers etc.¹⁹

In the decision, the judge will usually grant an order, on the following lines:

(a) That depending on the contents of the application the ship shall not sail from the port or anchorage while under arrest, nor that she be sold or encumbered, etc.

(b) That the ship may be set free provided the respondent pays into court a fixed amount as security. The amount of the security is usually fixed in the same currency in which the claim is made. Instead of cash the law provides that some other valuables may be deposited, provided such valuables are readily transferable to the applicant if and when judgment is given. The applicant may state in his application that he will, without prejudice, accept some other kind of guarantee (such as P. & I. or bank guarantee).

(c) That the applicant must initiate proceedings on the merits within 15 days.

In principle the Yugoslav court in whose jurisdiction the ship was arrested will also have jurisdiction over the main action (*forum rei sitae*). However, if the parties have a valid jurisdiction or arbitration clause, the applicant is free to start proceedings on the merits according to the clause, although he must notify this in the file in which the order for arrest has been made and enclose proof that proceedings on the merits have been instituted.²⁰

The order for arrest remains valid for the period of time stated in the decision, but usually, if so requested, it will be declared valid until the judgment on the merits becomes final and enforceable.

2.8. Releasing the ship

Apart from putting up security in cash, it is usual for a bank guarantee, issued or confirmed by a first class Yugoslav bank, to be

19. Art. 990 in connection with Art. 890 of MINA.

20. Like a copy of the writ of nomination or arbitrator(s) and the documents containing the relevant jurisdiction or arbitration clause.

accepted by the judge, although this may depend on how familiar the judge is with foreign guarantees confirmed by a Yugoslav bank. However, if the applicant accepts the guarantee offered by the respondent, the applicant must notify the judge in writing and request the judge to release the ship. Where security is put up in cash, such deposit does not carry interest. The P. & I. guarantee will not be accepted by the judge if the applicant does not agree to it. There were cases, however, when a P. & I. guarantee had been guaranteed by a local insurance enterprise (back to back guarantee), and such guarantee was accepted.

Where there is a jurisdiction or arbitration clause, if security is paid into a Yugoslav court, a foreign judgment or award may cause inconvenience, in so far as the foreign judgment or award will have to be acknowledged in Yugoslavia in order to obtain payment out of the security.²¹ Likewise a guarantee by a foreign bank, if not confirmed by a Yugoslav bank, may present difficulties in enforcement as the Yugoslav court has no jurisdiction over the foreign bank or the proceedings abroad, and recognition of a Yugoslav judgment may have to be obtained.

2.9. Deposit and acknowledgement of the claim

The fact that a security or any other kind of guarantee has been given does not constitute an acknowledgement of the claim.²²

2.10. Jurisdiction and proceedings on the merits

The 1952 Convention confers jurisdiction on the court of arrest²³ and, as Yugoslav law applies *forum rei sitae*, it will have jurisdiction on the merits in practically every case,²⁴ unless some other jurisdiction has been validly agreed upon. It is submitted that the place of the office of a bank giving a guarantee, if the bank is situated in Yugoslavia, may also give jurisdiction.

The complaint (writ) for the main action may be served on the master of the ship, where the ship has been arrested, as the master is

21. Although the 1952 Convention provides for this in Art. 7(2) it is unknown in Yugoslav law.

22. Art. 5, *in fine*, of the 1952 Convention and Art. 985 of MINA.

23. Art. 7 of the 1952 Convention.

24. Art. 58 of CPA or Art. 492 of CPA.

considered to be the legal representative of the shipowner so long as the ship is not in the port of registry.²⁵

Lawyers have recently introduced the practice of filing the application for the arrest, together with the complaint, and requesting that the respondent be ordered to nominate a person in Yugoslavia as recipient of all notifications from the court. The advantage of this system is that it by-passes the very complicated, expensive and time-consuming process of notifying, through diplomatic channels, the defendant in the main action in person.

The complaint (writ) must be filed within 15 days and it is submitted that it is sometimes more convenient to file it at the same time as the application for the order for arrest is made, even though it might be withdrawn later, for if the ship puts up security or gives a guarantee and sails away it becomes difficult for the complaint (writ) to be served. Indeed some countries have declined to serve the complaint (writ) on the ground there was no multilateral or bilateral Convention for such service between Yugoslavia and that country.

Naturally, if the parties have a valid jurisdiction or arbitration clause in the agreement it is not necessary to include everything as stated above. The parties may agree to a jurisdiction or arbitration even after the arrest.

In fact, filing the complaint together with the application for an order for arrest may well prove useful for any later discussion regarding the jurisdiction of the local court.

A jurisdiction clause in a bill of lading is not usually considered valid. This may even apply to charter-parties. The reason being that a bill of lading is considered to be a unilateral document and the Yugoslav Civil Procedure Act provides for a written document to have been signed by both parties in order for there to be a valid jurisdiction agreement. Customarily no signature of the shipper or of the consignee appears on a bill of lading.

Even if the charter-party is signed by brokers, agents or the master, a jurisdiction clause does not necessarily represent a valid agreement, since Yugoslav law requires that, for such a jurisdiction clause to have effect, a special authority must be given in writing to the broker or agent and this is not usually done.²⁶

The provisions on arbitration clauses are slightly different as

25. HEC SRH File No. IV-S1-272/73.

26. Art. 90 of the Act on Obligations, in connection with Art. 91 and Triva, CPA, p. 252, para. 66/7 *in fine* (arg. *a contrario*).

Yugoslavia is bound by the 1958 New York Convention as well as a number of other agreements.

2.11. Action by shipowner

Upon receiving notice of the order for arrest, the master, who is considered to be the legal representative of the shipowner, may oppose the order. The application to oppose must be made in the local language and it is customary to return an advocate, as the ship's agents have no rights in the court.

As stated above, four of the six republics have sea coasts and there are slight variations in the ways in which an order may be challenged, since the courts in different republics apply the same federal law in different ways. In the Republic of Croatia the provisions of MINA are applied while in the Republic of Slovenia the provisions of the Forced Execution Proceedings Act (FEPA) are applied. Thus, in the former republic, the respondent may only appeal against the order, whereas in the latter the order itself may be challenged. Appeals are heard by the Higher Court, whereas the application to oppose is heard by the judge who issued the order for arrest and he may either uphold the arrest or set it aside.²⁷ However, there is a right to appeal against this decision which is dealt with by the Higher Court in chambers without there being a hearing, the court working from documents only. An appeal gives no power to stay the order. In the former Republic of Croatia there is no right to oppose, only a right to appeal.²⁸

The only expeditious way to have the ship released is to put up a security or get a bank guarantee issued by a foreign bank and confirmed by a first class local bank, or negotiate with the applicant for acceptance of a P. & I. or similar guarantee.

2.12. Time limit for applying to oppose or appealing

The time limit for opposing or appealing against an order for arrest is eight days from its notification by the court.

27. Basic Court at Koper File Rg-13/80 dd. 22.3.80, confirmed by Higher Court Koper CPG-15/80 dd. 17.4.80.

28. Economic District Court at Rijeka File V-R-I-22/85 confirmed by Higher Economic Court of SR Croatia File II-Pž-322/85 dd. 5.3.85. However EDC Rijeka dealt with the application to oppose the order in File II-R-17/85 dd. 18.2.85 as did EDC at Split in File IR-27/84 dd. 23.3.84.

2.13. Action by shipowner after arrest to obtain security for damages

Regardless of the right to oppose or appeal for the release of the ship, the respondent shipowner may request the judge to order a security in cash for damages if the arrest is subsequently found to be wrongful, and that the applicant be ordered to put up such security or guarantee. The applicant when so ordered may offer a deposit or other valuables²⁹ and he also has a right of appeal, but appeal does not stay the obligation to give security. The applicant is in the same position as regards the choice of security offered by the respondent.³⁰

2.14. Continuation of proceedings of arrest after termination of proceedings on merits

When, in the proceedings on the merits, the judgment or award becomes final and enforceable the court will, on the application of the interested party, decide further upon the proceedings in which arrest was ordered. Naturally, if the applicant wins on the merits, he will petition for the transfer of the security to himself or for the immediate start of proceedings for the sale of the ship. If the applicant loses on the merits, the respondent will petition either for the return of the security or the release of the ship.³¹

The respondent may claim damages for wrongful arrest, for loss of interests on cash deposit, costs of the guarantee, etc.

2.15. Court tax

There is a special court tax to be paid on applying for an order for arrest which is set according to the amount involved.³² The tax must be paid at the moment of filing the application, but a period of 15 days' grace may be obtained. Where the complaint (writ) in the main action is filed in Yugoslavia, a further tax is levied on both the

29. It is colloquially called "counter-guarantee".

30. Higher Economic Court SR Croatia File II-Pž-491/52-2 dd. 14.3.1985.

31. *The Cap Bon* [1967] 1 Lloyd's Rep. 543 would not arise in Yugoslavia as security obtained in arrest proceedings will be transferred after due proceedings for satisfying the judgment or award.

32. Court taxes differ very much from one republic to the other ranging from Din. 15,000 up to 100,000.

complaint and the judgment. A higher tax (usually double) is paid for an appeal.

2.16. Responsibility for wrongful arrest

This is not dealt with by the 1952 Convention as it was left to national laws. In the case of Yugoslavia the relevant law is FEPA, the *lex fori*.³³

Damages are set by the judge sitting alone, in the same “non-litigious” proceedings as the arrest. Damages which might be awarded if wrongful arrest is established are, to give some examples, interest on money deposited with the court by way of bail, the costs of a bank guarantee given as security or compensation for a charter fixture lost as a direct result of the vessel’s detention through arrest. The amount of damages must be proved to the satisfaction of the judge. There is no requirement on the party seeking to establish wrongful arrest to show that the arrestor had acted with malice. An appeal is allowed for either party.

3. THE 1952 INTERNATIONAL CONVENTION FOR THE ARREST OF SHIPS

Yugoslavia has ratified the 1952 Convention and we should now consider the situation concerning arrests of ships from contracting states and from non-contracting states.

3.1. Ships belonging to a contracting state

The 1952 Convention clearly states that a ship from a contracting state may only be arrested for the maritime claims stated in Article 1 of the 1952 Convention, apart from any rights or powers vested in any government or public authority.³⁴ Consequently, a ship from a contracting state may not be arrested for any other claim.³⁵

33. Art. 6, *in fine*, of the 1952 Convention and Art. 274 of FEPA.

34. Certain authorities have the right to forbid the ship to sail from the port, as in the case of oil pollution when such an order may be given by the harbour master, etc.

35. Manca, *International Maritime Law*, Vol. I, p. 102: “Article 2 states that a ship flying the flag of one of the contracting states may be arrested in the jurisdiction of any of the contracting states in respect of any maritime claim, but in respect of no other claim.” *NB*. Manca, considers a maritime claim to be only one of those enumerated in Art. 1 of the 1952 Convention, see *op.cit.* p. 96, and Kay Soehring in *Arrest of Ships-1*, (1985), p. 52.

It is submitted that, as soon as such a maritime claim is proved, an arrest should be granted and that there is no need to prove that there may be a risk if an order for arrest is not granted,³⁶ but this has not yet been decided. It is however more expedient to prove the risk.

3.2. Ships belonging to a non-contracting state

Article 8 of the 1952 Convention provides as to when a ship from a non-contracting state may be arrested and it prescribes two situations:

- (a) for maritime claims stated in Article 1 of the 1952 Convention;
- (b) in respect of any other claim for which the law of the contracting state in which the arrest would be made provides for an arrest.³⁷

In practice this means that a ship flying the flag of a non-contracting state may be arrested for any claim permitted by the *lex fori*, and, further (if the *lex fori* does not so provide), for any maritime claim arising out of Article 1 of the 1952 Convention.

3.2.1. Application under the *lex fori*

Yugoslav laws which could be applied are: the Maritime and Internal Navigation Act (MINA) and the Forced Execution Proceedings Act (FEPA).

MINA is the *lex specialis* which governs maritime matters, whereas FEPA applies in proceedings which are not specifically concerned with ships but may be applied to ships under the general law. Both laws use the same name for their particular proceedings, called

36. Although this has yet to be tested by the courts, it may only be a theoretical problem as, according to Yugoslav law, Art. 979 of MINA in connection with Art. 265 of FEPA state that the fact that enforcement must be effected abroad, does represent a risk. It will be different in the case of a ship from a non-contracting state.

37. Manca, *op. cit.* p. 109: "A ship flying the flag of a non-contracting state may be arrested in the jurisdiction of any contracting state in respect of any of the maritime claims defined in Art. 1, or in respect of any other claim for which the law of the contracting state permits arrest."

“temporary provisions”, and there is no difference, as may be found elsewhere, between arrest and interlocutory injunction. FEPA even provides for cases which have only been recently introduced abroad.³⁸

It is submitted that an applicant must show to the satisfaction of the judge that there is a danger of his claim being at risk if the order for arrest is not granted.

At first sight it may seem that a ship from a non-contracting state is in a better position, as the risk has to be proved, while, in the case of a ship from a contracting state it is not necessary. However, on the other hand, a ship from a contracting state cannot be arrested except for claims specified in Article 1 of the Convention.

MINA specifies the claims for which a ship may be arrested,³⁹ and they are practically identical to those in Article 1 of the Convention, except for 1(1)(o) and (p), although MINA also provides for arrests in such cases.⁴⁰

Limitation of liability applies also to foreign ships, but only if there is reciprocity.⁴¹

Recently, in the only existing commentary on MINA, it was suggested that the list of maritime claims stated in Article 877 should not be taken too strictly, but that FEPA should also be applied and that Article 877 of MINA should be regarded as containing examples only, and not as a limited list.⁴² This has not been tested yet in court but it would seem that it is not correct.

MINA and FEPA require the applicant to show that:

- (a) on the balance of probabilities he has a valid claim;
- (b) there is a possible risk that the respondent may conceal, sell, destroy or remove the assets and that the applicant

38. Injunctions like the *Mareva* have been known for a long time.

39. Art. 981 in connection with Art. 877 of MINA, specifies claims (in free translation): (a) damages due to collision; (b) deaths and injuries connected with the ship in question; (c) salvage; (d) contracts of employment of ships in question; (e) general average; (f) pilotage; (g) supplies to the ship; (h) building, repairs, docking etc.; (i) wages/salaries of the crew; (j) expenses incurred by master, shipper, contracting party or agent for the ship and/or shipowner or operator, in connection with the ship.

40. Art. 982, but to be applied to the specific ship only and not to a sister ship.

41. Art. 981, MINA. The Act on the Conflict of Laws in Art. 92 presupposes that there is reciprocity unless proved otherwise.

42. Prof. dr. Triva, writer of that part of the commentary on Art. 979 of MINA. However, Art. 981 of MINA is very precise in stating: “Arrest of the ship can be allowed only for claims specified in Art. 877, paras. 2 and 3 of, the present Act.”

national law and a ship repairer can exercise retention so long as he has possession of the ship.

The national law is similar to the 1967 Convention as regards the distinction between a possessory and maritime lien.⁴⁵ However, national law has no provision equivalent to that contained in Article 6 of the 1967 Convention.

The problem of ranking maritime liens and retention is not specified in the law, but the judge will probably be guided by the 1967 Convention (although it has not been ratified by Yugoslavia). The retention does not create a pledge and, for a ship repairer, it would be advisable for him to retain the ship and to apply for an order for arrest.⁴⁶

6. BUNKER ETC. ON A TIME-CHARTERED VESSEL

In principle the bunker (as well as other movables) which are owned by the charterer or, for that matter, by any third party, may be separated from the ship by order of the court, in special proceedings, and there is again *forum rei sitae*, if the ship is arrested.⁴⁷ The person requesting separation must adduce very reliable documents (bunker requisition, etc.) to succeed.

7. LIMITATION PERIODS AND PROCEEDINGS

The Conflict of Laws Act states: "As regards the time bar, the law to be applied is that which applies to the legal matter or legal action."⁴⁸ Consequently, the judge will have to determine which law governs the action on the merits, and then apply the limitation period according to that law.

According to MINA, maritime liens become time barred after one year in certain cases and six months in others.⁴⁹ In principle, the insti-

45. Art. 628 of the Act on Obligations.

46. Art. 216, MINA.

47. Art. 56 *et seq.*, FEPA.

48. Art. 8, CLA.

49. Arts. 232 and 233, MINA.

tution of any kind of proceedings with the court suspends the limitation period of the claims in question. A registered letter does not suspend the limitation period. However, a writ by itself is not sufficient to suspend the limitation period of a maritime lien, an actual arrest must be made, although in certain cases the registration of the writ will suffice.⁵⁰ Maritime liens are extinguished after the following:

- (1) on the claim being paid;
- (2) after one year, and in the case of debts incurred by the master, after six months;
- (3) on the sale of the ship in bankruptcy proceedings or by way of execution;
- (4) on the sale of the ship on condition that the change of ownership is registered, that the registration has been published in the official gazette and that this has been duly affixed on the special board in the court of the place where the register of ships is situated and that the claimant has not initiated proceedings for his claim within two months of the publication;
- (5) on establishing a limitation fund for maritime liens which can be limited.⁵¹

If there is a claim which is not a maritime lien, then the limitation period will have to be determined according to the nature of the claim. And it may happen that, in such a case, there is no necessity to arrest the ship in order to suspend the limitation period although this will depend on the applicable law.

8. SITUATION AFTER MARITIME LIENS HAVE BECOME EXTINGUISHED

There is no doubt that, when a maritime lien has been extinguished, the debt as such remains but without the privilege it attracted when secured by the maritime lien.

50. Art. 233(3) MINA. In the case of a Yugoslav ship, the registration of the writ being entered on the register of ships suspends even the time limit for maritime liens.

51. Arts. 232, 216 and 401, MINA.

It is submitted that, in the case of a ship from a non-contracting state, the ship may be arrested, under the provisions of FEPA,⁵² but such an arrest does not constitute a maritime lien,⁵³ and any maritime lien and mortgage shall have priority when it comes to the distribution of proceeds of the sale. However, it is submitted that a ship from a contracting state could not be arrested on the grounds of FEPA alone.

9. BANKRUPTCY

Yugoslav law provides for a so-called "right of separation" in bankruptcy proceedings, which means that if Yugoslav law applies to the bankruptcy then it is possible to separate all mortgages and all maritime liens. However, it is submitted, this only applies to those maritime liens for which the arrest has been effected. It does not apply to mortgages and the law of the flag will apply.⁵⁴

10. PRIORITY OF LIENS

MINA provides that the law of the flag applies to liens.⁵⁵ This means that the ranking of liens will be ascertained according to the law of the flag, while the arrest will be based on claims from the 1952 Convention or claims arising under MINA,⁵⁶ but when it comes to the distribution of proceeds the judge will apply the law of the flag and this may produce unexpected results.

MINA provides that liens from the last voyage⁵⁷ have priority over liens from earlier voyages, although liens for wages/salaries based on the same contract have priority as if they arose on the last voyage. One problem concerns the definition of "the last voyage"

52. However see No. 3.2.1 and note 38, above.

53. Not even a pledge (Art. 266 of FEPA).

54. Art. 996 of MINA and Art. 166 of the Act on Liquidation of Enterprises (*Official Gazette*, No. 41/80, 25/81 and 66/81).

55. Art. 996 of MINA.

56. Art. 1 of the 1952 Convention and Art. 877 of MINA.

57. Art. 229, MINA.

and it is submitted that the meaning given by Professor Berlingieri should be accepted.⁵⁸

11. ASSIGNMENT AND SUBROGATION

Yugoslav law distinguishes between assignment and subrogation, assignment being by virtue of the intention of the original creditor (assignor), while, in the case of subrogation, by operation of the law. Assignment involves the transfer from assignor to assignee of the claim as well as the maritime lien.⁵⁹ According to Article 9 of the 1967 Convention the same applies to subrogation. Yugoslav law is not explicit on this point, but it is submitted that the same applies.⁶⁰

In principle the judge will apply the law of the place of the offeror at the time of the acceptance of the offer.⁶¹

It should be noted that both the assignee and the subrogated obtain the right to sue in their own names as plaintiffs, thus making it necessary to attach to the first document submitted to the court the document proving the assignment or subrogation.

12. SEIZURE OF A SHIP IN EXECUTION OR SATISFACTION OF A JUDGMENT OR AWARD

There are special provisions regarding the forced sale of the ship. As regards a foreign ship, the creditor shall apply to the court and if the ship has not yet been arrested he must adduce evidence to the court that the debtor is the owner of the ship. However, if the ship has already been arrested, or as soon as the ship is arrested, the creditor

58. F. Berlingieri, "Ratifica delle Conv. Bruxelles 1952 in tema di urto e sequestro conservativo di navi", *Dir. Marittimo* 1978, p. 148: "...nell'ambito di uno stesso viaggio tutti i crediti che sono sorti nel corso della navigazione della nave, se questa è adibita ad una linea, della partenza da un porto capolinea all'arrivo nell'altro porto capolinea alla fine del viaggio semicircolare laddove, nel caso di impiego della nave in base a charter-party, occorre distinguere a seconda che la nave compia o meno un periodo di navigazione in zavorra: in caso affermativo, se la nave compie una navigazione in zavorra, per viaggio deve intendersi il viaggio circolare, o comunque alla navigazione compiuta con carico a bordo, deve aggiungersi la navigazione compiuta in zavorra per raggiungere il successivo porto di caricazione."

59. Art. 235(2), MINA.

60. According to Art. 235, para. 2, of MINA.

61. Art. 20, No. 20, CLA.

must file with the court the official documents by which, according to the law of the flag, the ownership and nationality is proved.⁶²

It should be noted here that the limitation of claims refers to the arrest of ships only and not to seizure in proceedings for the sale of a ship.⁶³

The creditor has to institute separate proceedings for the acknowledgement of a foreign judgment or award⁶⁴ and only after that can the proper proceedings for sale proceed. However, it is possible for the court in charge of the sale to rule on acknowledgement of the foreign judgment or award as a preliminary question. In that case the judgment or award is acknowledged only in respect of that particular case and has no general value.⁶⁵

The order granting an arrest cannot serve as basis for a sale as only a proper judgment on the merits is able to do this. As there can be no forced execution or sale without a final judgment or award this means that even a mortgage does not permit a sale. Such a sale may be possible if both parties agree and the proceeds are then paid into court or a joint account,⁶⁶ until the proceedings on the merits are final or until the parties negotiate an agreement on the distribution of the proceeds of the sale.

13. ARREST OF SHIPS FLYING YUGOSLAV FLAG WHILE IN YUGOSLAVIA

There is a special system for arrest of a ship flying the Yugoslav flag while that ship is in a Yugoslav port, although this does not apply to ships flying the Yugoslav flag but owned by foreign owners.

Due to the fact that all ships above a certain tonnage must be in social ownership only, i.e. they are not permitted to be in private ownership, a distinction must be made if the claim is based on a general claim or on a claim which is specified in Article 877 of MINA. In the case of a general claim, execution must be enforced

62. Art. 883, MINA.

63. Prof. Jakaša, *Textbook(Udžbenik)*, p. 439, No. 917.

64. Deliberation, confirmation.

65. Art. 101(5) of CLA.

66. Art. 83 FEPA, Art. 982 of Act on Obligations.

first out of other assets (including bank accounts) and only if payment is not obtained within 30 days does it then become possible to continue with the proceedings for the sale of the ship. However, if the claim is based on a mortgage or any of the claims specified in Article 877, then the sale of the ship is not contingent on the prior execution of other assets and sale proceedings may start immediately. This is to facilitate financing of ships by foreign banks etc.

14. LEGAL ASSISTANCE

The law provides for legal assistance by Yugoslav courts at the request of foreign courts.⁶⁷ The sort of assistance which a Yugoslav court might render to another domestic court or to a foreign court or tribunal might be the hearing of witnesses or experts and the recording of their statements. Yugoslav courts will give legal assistance to arbitrations conducted in Yugoslavia. As regards legal assistance for foreign arbitration it is submitted that, if foreign arbitrators may approach their local courts, then that local foreign court may, in turn, approach a Yugoslav court.⁶⁸

15. SHORT COMPARISON BETWEEN THE 1952 CONVENTION AND YUGOSLAV LAW

It may be of interest to compare certain provisions of the 1952 Convention with MINA and FEPA in cases of arrest of ships from non-contracting countries, and it should be pointed out that, on certain occasions, FEPA gives an even wider basis for arrest. In other words the applicant may apply for arrest not only according to maritime liens according to Article 1 of the 1952 Convention but also according to the general provisions in FEPA and these are very broad.

One should, however, bear in mind that if the maritime claim corresponds to the maritime lien, then, by arresting the ship the maritime lien is definitely established, provided the proceedings on the merits are won. However where the arrest of the ship is obtained by

67. Art. 181 of CPA and multilateral Convention such as the Hague Conventions of 1905 and 1954 as well as the many bilateral Conventions between Yugoslavia and other countries.

68. Art. 479, CPA.

virtue of the general provisions of FEPA, then there is no maritime lien, indeed, according to Article 266 of FEPA, there is no lien, no pledge at all. The lien must subsequently be established in separate proceedings.

For this reason an arrest based on FEPA should not be confused with an arrest made under MINA, at least they should not be regarded as being equal.

MINA has taken over certain provisions of the 1926 Convention relating to Maritime Liens and Mortgages, such as those in Article 2 regarding the accessories and freight.⁶⁹

In cases of change of ownership maritime liens are not extinguished.⁷⁰ Even in case of cancellation of the ship from register of ships, the maritime liens are not extinguished.⁷¹ Liens on river-going vessels follow the rules of the 1965 International Convention on the Registration of Inland Navigational Vessels (Protocol no. 2 concerning attached and forced sale of inland navigation vessels).⁷²

Article 1, 1952 Convention

The list of maritime claims is practically the same as that contained in Article 877, MINA. As stated earlier, if FEPA is applied a great number of claims are valid for arrest.

Article 2, 1952 Convention

This provision must be adhered to by Yugoslav courts as the Convention has been duly promulgated and all international Conventions duly promulgated are applied directly by the courts.⁷³

Article 3(1)(4), 1952 Convention

The same provisions have been incorporated in Article 982 of MINA and may be considered to be of the same effect.

Article 982(1) provides that any sister ship may be arrested when in the same ownership if the claim is based on a debt which is

69. Arts. 224, 226 and 227, MINA.

70. Art. 223, MINA.

71. Art. 236, MINA.

72. Art. 219, MINA and see Art. 11(18) of Annex No.1., Conv. 1965.

73. Arts. 210 and 219 of the Constitution SFR Yugoslavia (MINA is a federal law).

secured by a maritime lien or hypothec (mortgage) as stated in Article 877.⁷⁴

Article 982(3) reproduces practically Article 3(4), last paragraph, when a person other than the owner of the ship is liable in respect of a maritime claim relating to that ship.

With regard to the charter by demise (first part of Article 3(4)), this provision has been incorporated in Article 982(2), although it appears that the text of MINA extends the arrest to a ship owned by any kind of charterer (not only by demise). However, only in the case where, according to the law which applies as between the charterer and owner, is the charterer responsible to third parties. In that case a ship owned by such a charterer may be arrested. Although this appears quite promising, the situation is not that simple because the applicant should already be in possession of different documents, such as a charter-party between the charterer and the owner, in order to establish the applicable law and, in the event of a foreign law being applicable, he should also be in possession of a text of that law or an affidavit on that law (to the satisfaction of the judge) in order to prove the liability of the charterer *vis-à-vis* third parties. None of these are easily obtainable at short notice, which is usually the situation when a ship is to be arrested.⁷⁵

Article 3(2), 1952 Convention

The Yugoslav judge will examine the official document of registration to determine ownership. "Piercing of the veil" is unknown in Yugoslav law.

Article 3(3), 1952 Convention

This provision exists in Article 984. In para. 2 it is provided that reciprocity must exist between Yugoslavia and the country in which

74. In *Clipper Maritime Co. Ltd. Monrovia v. Faruk V. Ebubekir, Istanbul*, EDC Rijeka in file V-R-I-22/85-2 dd. 11.2.85 the claimant arrested the ship *Ebubekir* (owned by Faruk V. Ebubekir), in respect of a debt which Faruk V. Ebubekir owed as charterer of the vessel *Victorious*. This would not have been possible if the order for arrest had been applied for under FEPA.

75. Velkaverh, Thesis, 1985, is of the opinion that if the vessel is arrested for the debt of the demise charterer, then, if and when the demise charter expires during the arrest, the ship should be released as there is no longer any contractual relationship between the demise charterer and owner of the ship.

the security has been put up to the same extent as that country honours securities put up in Yugoslavia. Article 983 provides that, in case of security put up in Yugoslavia, no other court may arrest the ship. It provides furthermore that where limitation of liability is permitted by law the amount of the limitation fund represents the highest amount of security.⁷⁶

Article 4, 1952 Convention

The same applies according to the Convention and according to Yugoslav law regarding all kinds of arrest applied for by the applicant.

Article 5, 1952 Convention

There is practically the same provision in Article 983 stating that the court shall free the ship, provided sufficient bail or deposit is established.

However, there is no provision to the effect that persons in possession of the ship (Article I (o)(p)) may be permitted to continue trading. It is submitted that, in case of ships from contracting states this will have to be observed, but not necessarily in the case of ships from non-contracting states. However, in case of seizure of the ship for sale, such a voyage may be permitted.⁷⁷

The last paragraph of Article 5 was incorporated in Article 985.

Article 6, 1952 Convention

The provisions of Article 6 concord with the general principle of the *lex fori*. Liability for damages for wrongful arrest of the ship etc. is dealt with by Article 274 of FEPA.

Article 7, 1952 Convention

In principle Yugoslav law gives jurisdiction to the Yugoslav court according to *forum rei sitae*.⁷⁸ Since the Convention expressly confers

76. The limitation is not easily established as according to MINA, Art. 999, the law of the flag applies, however MINA applies if it is more convenient for the creditors.

77. Art. 897, MINA.

78. Art. 58, CPA, however, Art. 492 of the same Law may sometimes apply as *forum solutionis*.

such jurisdiction there is no problem. With regard to the cases enunciated under (a) to (f), jurisdiction is based on *forum rei sitae* as soon as the ship is arrested.⁷⁹

Article 7(2), 1952 Convention

The duty of the court, when it has no jurisdiction over the merits, to state, when ordering bail or security, that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a foreign court having jurisdiction, may be binding on the Yugoslav court, although this is not particularly clear from the relevant procedural rules and regulations. Besides, even if so ordered, it is not clear if the security will be automatically transferred to the successful applicant (and freed if the applicant is unsuccessful) or if the judgment or award will have to be acknowledged in Yugoslavia.

It is submitted that it will have to be acknowledged.

Article 7(3), 1952 Convention

Article 986, para. 2, provides a time limit of 15 days. This time limit may not be prolonged as it is a time limit fixed by law and not by the court. On the other hand if the arrest is based on FEPA then, according to Article 272, the time limit is fixed by the court and it may then be extended.

Article 7(4), 1952 Convention

The same provision exists under Article 986(3).

Article 8(3), 1952 Convention

Yugoslavia has not exercised this right.

Article 8(5), 1952 Convention

There is no such provision in Yugoslav law, but the problems regarding subrogation and assignment do raise some problems (see 12, above).

Article 9, 1952 Convention

Yugoslavia has not ratified any Convention regarding maritime liens and mortgages.

⁷⁹. Even a bank guarantee issued or confirmed by a local bank may provide for *forum rei sitae*, however, the jurisdiction clause in the contract may change this.

