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Precautionay Seizure of Civil Ship

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Abstract: Noting that many pending cases in the maritime and river sections of the courts concern the seizure of commercial ships, we intend to study in detail this institution of maritime law. This approach is due to the fact that the few Romanian law-writers, and especially the practitioners, who have approached the subject, have referred in particular to comment and interpretation of existing rules in the Commercial Code and the Civil Procedure Code, not considering the relationship between other institutions of maritime law and seizing the ship. In our opinion the mentioned institution of law can not be examined thoroughly without prior investigation of what is the ship which is subject to seizure. Moreover, the ship is at the heart of all legal research on shipping. The concept of ship has been controversial since the seventeenth century, with the first regulations that led to the development and adoption of commercial codes, and it is still controversial today. We can say that the diversity of opinions, expressed both in the legal literature and legal practice, on the concept of ship, is largely due to the technical progress of shipping in modern times, this transport mean benefiting from exceptional facilities to ensure a safely water transport of goods and people.

Keywords: judicial seizure; commercial code; precautionary seizure

Ship's weapons are rapidly evolving, that being hard to imagine only a few decades ago, as a result of technology development in general, which has influenced the construction of ships. Given that, due to shipping specificity, capable of transporting large quantities of goods on all continents, oceans, seas, rivers, waterways, etc., but mostly because of the low cost of transport, in recent years most exports and imports are made using commercial ships. In light of these realities, it appears that the laws of many states, even of some naval powers, had not the same rate of change, remaining on outdated regulations about the notion of ship and its legal nature, which has created difficulties, in particular of practical nature, in application of regulations relating to the ship's seizure, with more emphasis on the precautionary seizure. In the latter part of last century, there have been made great efforts in the maritime conferences, prior to the adoption of conventions in the field, to give definitions of the ship as clear as possible, but some states, for various reasons (conservatism, commercial interests, etc.), either disregarded the regulations stated in conventions or added to these definitions various elements, which made difficult the theoretical interpretation of maritime law institutions, because all these have the ship as subject of their regulations. The situation is further complicated when the dispute is on ships under the flag of non-contracting states of maritime conventions.

As the theme of this paper is the seizure of civil ship, the analysis of institutions mentioned is to be made in detail, on another occasion.

Precautionary Seizure of Civil Ship

The concept of precautionary seizure is different in maritime law and in common law, as subject to seizure has a different legal nature than other goods subject to seizure.

Under procedural rules the precautionary seizure is a secondary or incidental measure established outside the trial, being however in connection with it.

In most European law, the precautionary seizure is regulated differently from judicial seizure, distinguishing between conditions that may be required as well as between the establishment procedure, but nevertheless there are some national laws in which the measure to seize the commercial ship subject to dispute is taken by judicial seizure. In Romanian law, art. 596 of the Civil Procedure Code[1] makes a clear distinction between the two forms of seizure. For example, the judicial seizure is the appointment by the court of a person who is entrusted with managing and maintaining the property seized for the duration of the trial, and therefore the reviewers of texts consider that this type of seizure is autonomous precautionary. The application of judicial seizure can be requested by litigants, but also by their creditors, in accordance with art. 974 of the Civil Procedure Code. With contentious nature, the request of judicial seizure is settled under procedural rules of common law and also by judge's order. This latter procedure may be used only in situations of emergency and it is temporary. It should also be noted that in the text referred is made a distinction between precautionary seizure and executory seizure.

The precautionary seizure is a measure to ensure the substance of the case and the executory seizure is a measure of enforcement the court decisions on the substance of the case.

Under the provisions of art. 1718 of Civil Code[2] the precautionary seizure may be applied in order to fulfill the obligations personally assumed by the person, with all its tangible and intangible, present and future assets.

This means that all creditors can call a penalty against debtors of bad faith which would have the intention to dispose of property, thus damaging them. More clearly, the seizure consists in making the assets unavailable to debtors to be sold after obtaining a writ of execution by creditors.

Substantive Place in Domestic Law

Commercial Code[3]

The Commercial Code still in force was adopted at a time when trade and shipping were in an early development phase, and this explains why this important institution of maritime law is briefly covered in a few texts. The precautionary seizure is regulated under the art. 910-911 which provide that a creditor is entitled to proceed to the seizure of a ship or to an individual part of it, owned by the debtor.

By examining these texts results that in their content there are regulations relating both to the procedural and substantive law, also referring to other provisions of the Civil Procedure Code.

[1] Civil Procedure Code of 09.09.1995, republished;
[2] Civil Code of 1864, Official Gazette No. 271 of 24.12.1864;
[3] Commercial Code of 10.05.1887, published in the Official Gazette no.126 of 10.09.1887, which has not yet entered into force;

It may be noted that these regulations do not contain a definition of precautionary seizure, as would be normal.

Nor in Romanian specialized legal literature the precautionary seizure has not been defined.

This default has been covered by the 1952 Brussels Convention[1] defining the precautionary seizure as "restraining a ship with the authorization of the competent authority for ensuring maritime claims, but by no means seizing a ship to enforce a title".

In the new Civil Procedure Code of 01 June 2010, under the provisions of art. 939 the precautionary seizure is generally defined as meaning "the unavailability of traceable tangible or intangible assets of the debtor, being in its possession or in possession of a third party, in order to assert them when the creditor of a sum of money will obtain an enforceable title". Art. 947 of the Code does not give a definition of the precautionary seizure of the ship, making instead a reference to the provisions of art. 939 and of international conventions relating to the seizure of ships, to which Romania is party.

Returning to the analysis of the Commercial Code regulations, we should note that the procedural rules are laid down in art. 908-911, completed with the provisions of art. 595 et seq. of the former Civil Procedure Code[2].

According to art. 908 completed with the provisions of Civil Procedure Code, the conditions of approval for precautionary seizure request are:

1. The request for setting the precautionary seizure must be taken concomitantly or after the introduction of the substance case based on civil delictual or contractual liability;
2. The submission of a security;
3. The precautionary seizure must be ordered of tangible assets of debtors.

The same text, in disagreement with the new Civil Procedure Code, provides that the court that has jurisdiction to resolve the request for the establishment of precautionary seizure is the Court, which decides in the Counsel Chamber, without summoning the parties. Ending of the measure will be ordered if the debtor "makes the consignment for the amount, capital, interest and expenses for which that seizure was established".

In art. 911 is just a reference to previous articles[3].

Civil Procedure Code[4]

Former Civil Procedure Code

The former Civil Procedure Code regulates the precautionary seizure in art. 591-596. Under the provisions of art. 591 only the creditor who has not an enforceable title, but whose claim is proven by written note and is payable may require this measure. Also, the creditor may require the precautionary seizure if it proves that has filed an action on the substance of case and submits with the request for

[1] International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships - Brussels - 10.05.1952, to which Romania acceded by Law No. 91 of 01.11.1995, published in Official Gazette no. 255 of 08.11.1995;
[2] Article 908 – „Seizure or attachment will be requested only by giving a security, unless the seizure or attachment request is made under a bill of exchange or other promissory note or note payable to the bearer marked no protest";
[3] "The assets can be seized in cases and after the formalities laid down in art. 907 and 908".
[4] Civil Procedure Code of 09.09.1865, in Official Gazette no. 200 of 11.09.1865, republished and amended by Government Emergency Decision no.138/2000.

seizure a security of half of the amount claimed. There are situations in which the court may order the establishment of seizure even if the claim is not payable when the debtor has diminished by his acts the assurances given to the creditors, or has not given the assurances promised, and where is possible for the debtor to avoid the prosecution or to conceal or to dissipate its assets. In these cases, the creditor must prove that has a written note certifying the claim and that has filed an action.

For approving the request the creditor must submit a security whose amount is fixed by the court.

The request is to be addressed to the court that judges the case and that decides urgently, in the Counsel Chamber, without summoning the parties, by enforceable conclusion, setting a deadline date and the security, as well as the amount of that security[1].

The court conclusion may be under appeal within 5 days of notification. The appeal shall be urgently and in particular heard, summoning in short term the parties[2].

The precautionary seizure may be ended if the debtor gives sufficient security to cover the claim. Also, the measure may be ended if the main request under which the seizure was ordered was canceled, obsolete or rejected[3].

New Civil Procedure Code

Precautionary Seizure of Civil Ship in the New Civil Procedure Code

In Title IV Precautionary measures - Chapter I, the Romanian legislator regulates the precautionary seizure.

In Section 1, entitled General Provisions - article 939 gives the definition of precautionary seizure within the meaning of the above mentioned. By making a comparison between the texts of the former and the new code can be easily seen that the legislator took over, with very small completions, the previous regulations. It should be noted that all articles have a title, summary and clearly expressing the content of the text, which is especially beneficial for law practitioners.

Quite remarkable are the regulations of Section 2, entitled "Special provisions regarding the precautionary seizure of civil ships". The legislator, having not at disposal a new regulation of substantive maritime law, a new maritime code or at least a new maritime commercial code, taking account of controversial issues revealed by legal practice and specialized legal literature, understood to regulate by special provisions the precautionary seizure of civil ships. It is a first step made primarily in order to harmonize national legislation in this field with European legislation and international conventions to which Romania is party. However we have to note some omissions or formulations which in our opinion are not correct.

Firstly, we have to note that neither this time was given a clear definition of the precautionary seizure of civil ships. Such a clarification of the concept is the more needed as its default was revealed even by the few authors of maritime law in Romania. Considering that the first article in this section[4] states that "the provisions of this chapter shall apply by complying with international conventions on seizure to which Romania is party", we can not understand why the authors of the project of law and the legislative body have not taken over at least the definition in the 1952 Brussels Convention. Also, can

[1] Art. 592 of the Civil Procedure Code 1865 with subsequent completions;
[2] Art. 592 of the Civil Procedure Code 1865 with subsequent completions;
[3] Art. 593 of the Civil Procedure Code 1865 with subsequent completions;
[4] Art. 947 - Civil Procedure Code of 01.07.2010 - published in the Official Gazette no. 485 of 15.07.2010;

not be ignored the incorrect title formulation of art. 947 as “The right to seize a civil ship” provided that the content of the text states that only “a creditor may require the establishment of precautionary seizure”.

So the creditor can not seize a civil vessel, the right belonging only to the court to that the creditor requests the precautionary seizure. If the legislator intended to give this title to the text in order to specify that only the creditor may require the establishment of precautionary seizure, then the correct formulation, in our opinion, not only for accuracy but also to match the content, should be “The right to request the establishment of precautionary seizure”.

Article 948 is entitled “The establishing of seizure” "- but the conditions of establishing the seizure are not under this text but in art. 940.

As well, the title of art.952 - "Transfer of seizure" - can be confusing, because the text clearly states the possibility that court to order the seizure of another ship. Not only can the title cause confusion, but also the failure of the text to specify that the seizure may be ordered of another ship owned by the debtors and not of a ship in general. In the text under art. 953, the formulation that “the creditor of the legitimate owner of the bill of lading may proceed to seize goods represented in the bill of lading” on board a ship” is also misleading, because the creditor may not proceed with the seizure, having only the possibility to require the establishment of precautionary seizure. In art.955 we believe that the formulation of text skipped the word “navigation”, thus being not to understand what the legislator wanted to say by “ensuring civil safety”.

This article is entitled, "Urgent measures", without showing what they are. The more clarification was necessary as the competent court under the provisions of art. 949 can be a regular court which has no sea and river sections in which specialized judges are supposed to work. It is possible that when ships are in ports as, for example, Tulcea, Braila, Sulina, etc., a judge in that court to take by judge’s order measures which can affect trade and transport, traffic inside the port or even the safety of civil navigation in that port.

By a closer look at the provisions of art. 956 we can note that this text should not be included in Section III – “Special provisions regarding the precautionary seizure of civil ships”, because the measure to temporary stop the ship leave by the Harbour Master is an administrative measure governed by special law and not a civil procedural measure.

We appreciate that it was more important that in this section to be regulated the concept of maritime claim, a “sine qua non” condition of the establishment of precautionary seizure.

The conclusion can be no other from that: in Romania there are no law-writers specialized in maritime and river law. This reality is the consequence of the fact that in faculties of law the maritime and river law is not studied, and therefore judges and prosecutors are not really specialized.

Competent Court[1]

Unlike the former Commercial Code, which provides in art. 908 paragraph 2 that the Court has jurisdiction to decide on precautionary seizure, the new Civil Procedure Code, under the

[1] On these issues see the considerations in the works “Legal liability in maritime boarding”, Alecu Alexandrescu, Constanta 2002, and “Treaty of Maritime Law ", Alecu Alexandrescu, Ciprian Alexandrescu, Galati 2006;

provisions art. 949[1], establishes the jurisdiction to the court of the ship's place, regardless of the court to which has been filled or will be filled the action on substance. This provision is related to the provisions of the same Code - Title III, Chapter I, which regulates the substantive jurisdiction, that in the article 93 paragraph 1 letter b provides that the Court judges in first instance the requests concerning civil navigation and activity in the ports. To ensure rapidity of the establishment of precautionary seizure, the legislator has provided in art.948 a derogation from the provisions of art.119 which provides that the accessory requests are judged by the competent court for the main request even if the are subject to substantive or territorial jurisdiction of other courts or specialized section or of a specialized court.

Interdiction of Seizure[2]

The ship ready for departure may not be seized. The ship is considered ready for departure once the Master has on board the certificates, all documents of the ship and the permit for departure, submitted to the Master by the Harbour Master. Art. 912 of the Romanian Commercial Code states that "the ship ready for departure can not be seized nor prosecuted", and Article 3 (1) of the 1952 Brussels Convention states that: "a claimant may arrest either 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, even though the ship arrested be ready to sail".

Also in 1985, the Lisbon Conference was accepted seizing the ship ready for departure and the ship already left. Subsequently, the Geneva Convention, these provisions have been invalidated on the ground that seizure established under these conditions would affect the maritime trade and the security of that ship or other ships. Finally it was decided to let to the discretion of national law the establishment or not of precautionary seizure in these situation. Given the constant judicial practice we consider that the Romanian legislator has properly covered the interdiction mentioned.

Conditions of Establising the Precautionary Seizure

In art. 940, to which is made reference by art. 947, there are three situations covered for the competent court to order the establishment of the precautionary seizure of ship.

In paragraph 1 are provided the following conditions:

1. The creditor must not have an enforceable title;
2. The creditor must have a claim certified in writing and which is payable;
3. The creditor must prove that has filed a lawsuit request;
4. Payment of a security in the amount fixed by the court;

Paragraph 2 states that:

1. To establish a precautionary seizure, the creditor who has a claim not certified in writing must prove that has filled an action;
2. A security deposit in the same time with the request of seizure representing half of the amount claimed.

[1] Civil Procedure Code of 09.09.1865, in Official Gazette no. 200 of 11.09.1865, republished and amended by Government Emergency Decision no.138/2000;
[2] Article 950 - Civil Procedure Code of 01.07.2010 - published in the Official Gazette no. 485 of 15.07.2010;

Paragraph 3 states that:

1. The court may approve the precautionary seizure when a claim is not payable if:
    a. The debtor has diminished by his acts the assurances given to the creditors;
    b. The debtor has not given the assurances promised;
    c. There is a danger that the debtor to avoid the prosecution;
    d. There is a danger that the debtor to conceal or dissipate its wealth;

3. In all cases above, the creditor must prove that the conditions set in paragraph 1 are fulfilled.

4. The creditor must deposit a security in the amount fixed by the court.

According to paragraph 1 of art. 948 it is stated that, in urgent cases, the request to establish the precautionary seizure of a ship can be done even before the filing of the action on substance. In this case, the creditor who has obtained the precautionary seizure is obliged to file the action to the competent court or to initiate steps for setting up an Arbitrary Court no later than 20 days from the date of approval of precautionary measure. Paragraph 2 provides that the request for seizure is to be judged urgently, in the Counsel Chamber, summoning the parties, and the conclusion is enforceable.

Failure to file the action within 20 days has as a result the revocation by law of the precautionary seizure. Revocation of precautionary seizure is by final conclusion of the court given by summoning the parties.

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