

# Ship Arrests in Practice

Ukrainian jurisdiction

ANNUAL REVIEW 2020



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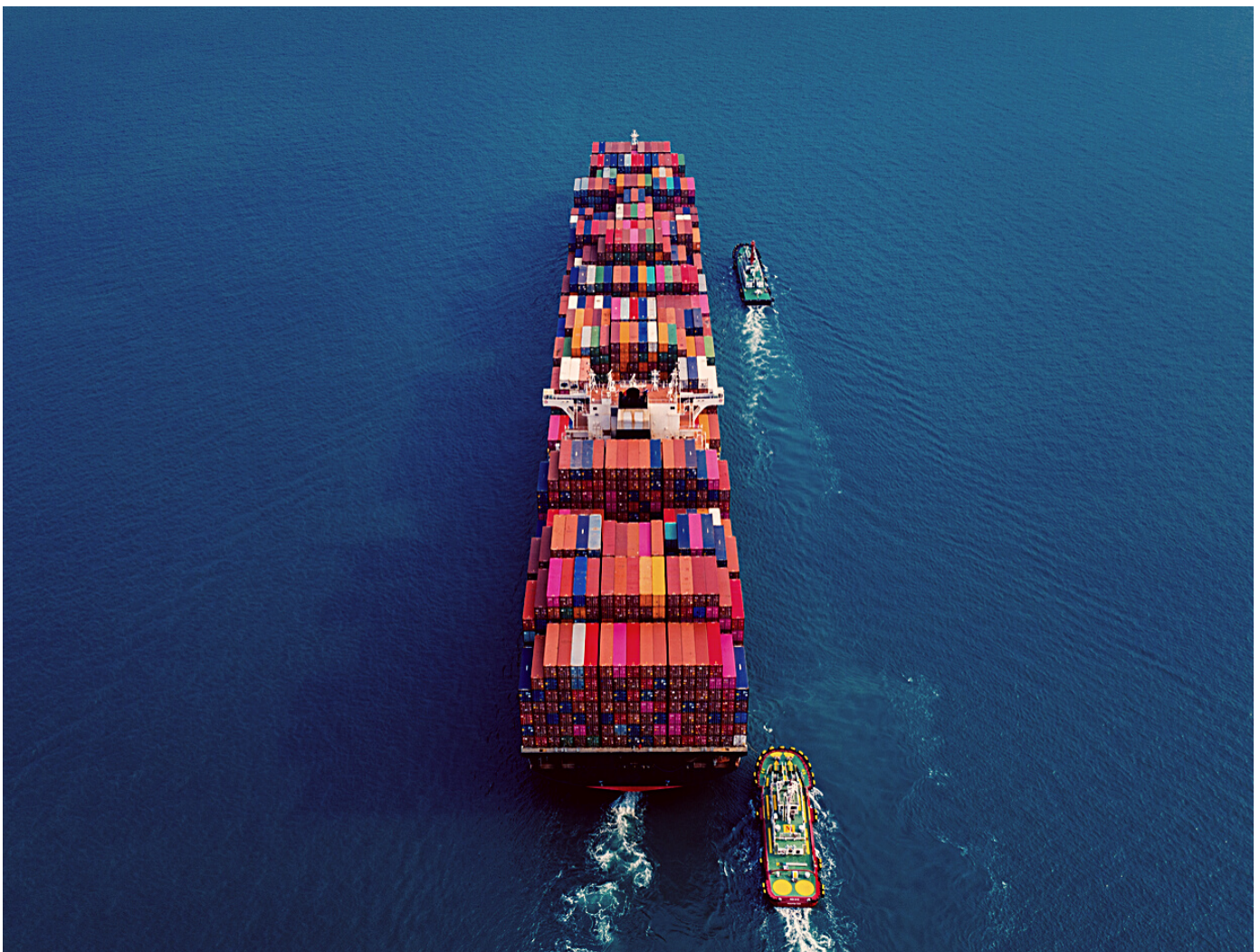
## INTRODUCTION

Ship arrest – one of the most effective tools to secure maritime claims in all jurisdictions. The arrest of a vessel always encourages the Shipowner to take measures to satisfy maritime claims to avoid additional financial losses. The Ukrainian jurisdiction is not an exception, and the arrest of the ship is one of the most powerful method for reimbursement of bunker supply, ship repair and charterparty disputes, as well on contracts of carriage, disputes on ownership of the ship, insurance compensation and claims of the government authorities.

However, to effectively take benefits of the arrest of the court in a particular jurisdiction, it is necessary not only to understand the rules of substantive and procedural law but also to know the features of the application of such rules in practice. The arrest of a vessel in any jurisdiction is a complex process that entails certain legal consequences. Therefore, only a deep knowledge of maritime law, understanding of business principles, and many years of experience can ensure the desired result.

This analytical review was prepared by the Black Sea Law Company Team in order to provide complete statistical information on the ship arrest in Ukrainian jurisdiction for 2018-2020.

This review contains key principles of ship arrest and release in Ukrainian jurisdiction, information on the number of cases related to the arrest of ships, as well as the dynamics of the practice of ship arrest. We hope you find this information useful.

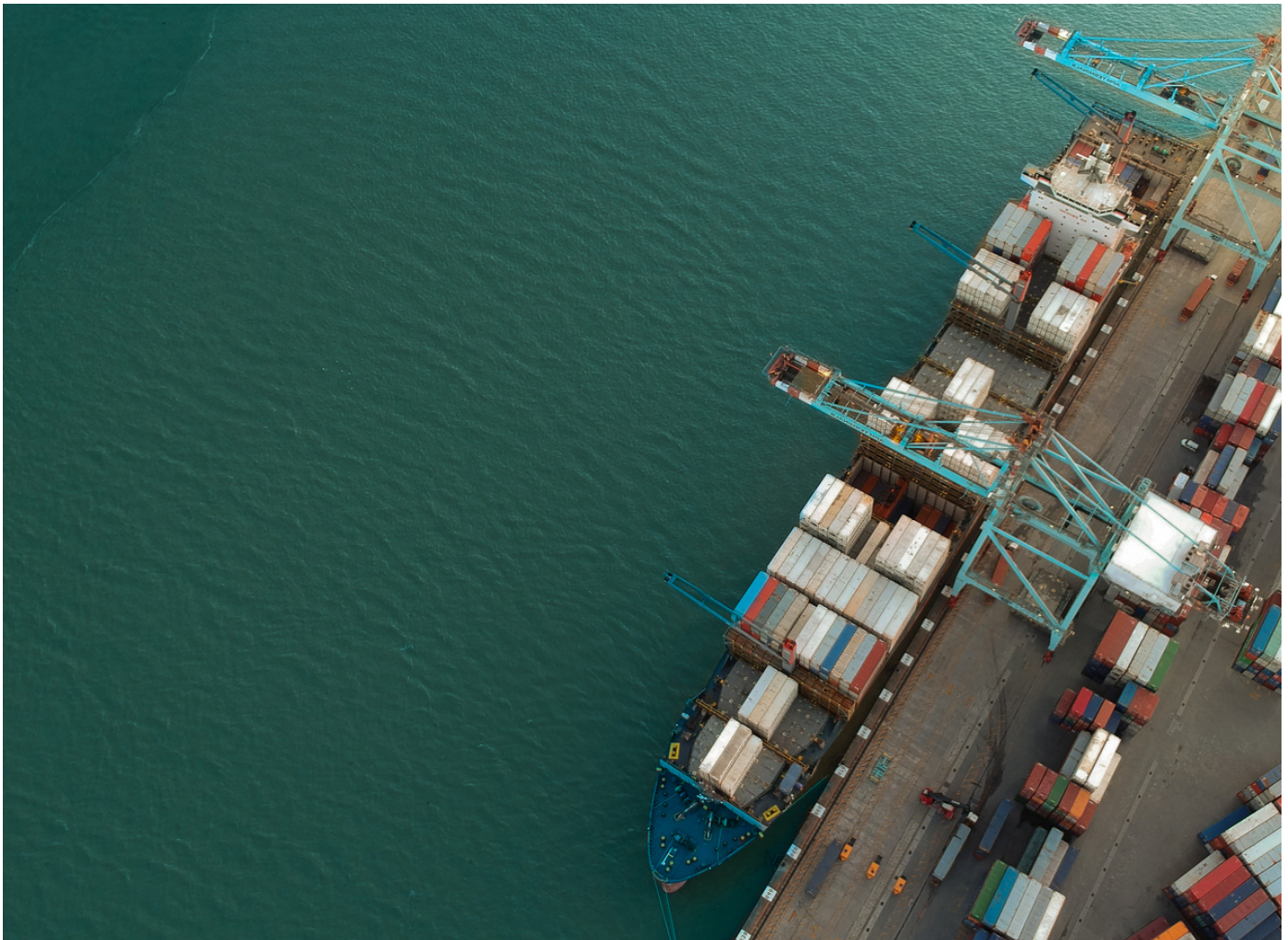


## INTRODUCTION

According to the analysis of the procedures of arrest of vessels in different jurisdictions, including Singapore, China, Turkey, Germany, Italy etc., the Ukrainian jurisdiction has a relatively simple legal procedure and there is a convenient jurisdiction to arrest a vessel or release a vessel from arrest.

According to statistics from the Ukrainian Sea Ports Administration (USPA), Ukrainian seaports increased the volume of cargo handled by 18.4% in 2019 and reached record levels. The annual volume of cargo transshipment of the 13 operating ports exceeded 160 million tones for the first time. This is 25 million tones more than for the whole of 2018. During 2020, nearly 159 million tones of cargo were handled at Ukrainian seaports. All this indicates an increase in the number of vessels handled in Ukrainian ports per year. According to the analytics provided by the USPA 35 355 vessels were handled in Ukrainian ports during 2018-2020. Also, the register of planned port calls is open. Not all vessels that must enter Ukrainian ports are listed in the open register, but the vast majority are. This is another way to analyze the debtor's fleet and the possibility of arrest in Ukraine.

On average, 65-70% of ships call at the ports of Ukraine are covered by the International Group of P&I Clubs. In our practice, there is an excellent example of court decision when the court describes and recognizes an international financial instrument – the Letter of Undertaking of the P&I Club in the process of securing a maritime claim and declares the possibility of its use taking into account all regulatory requirements. It would seem that Ukraine, as a maritime state, should not be an exception.



## What is regulating the arrest of ships in Ukrainian jurisdiction?

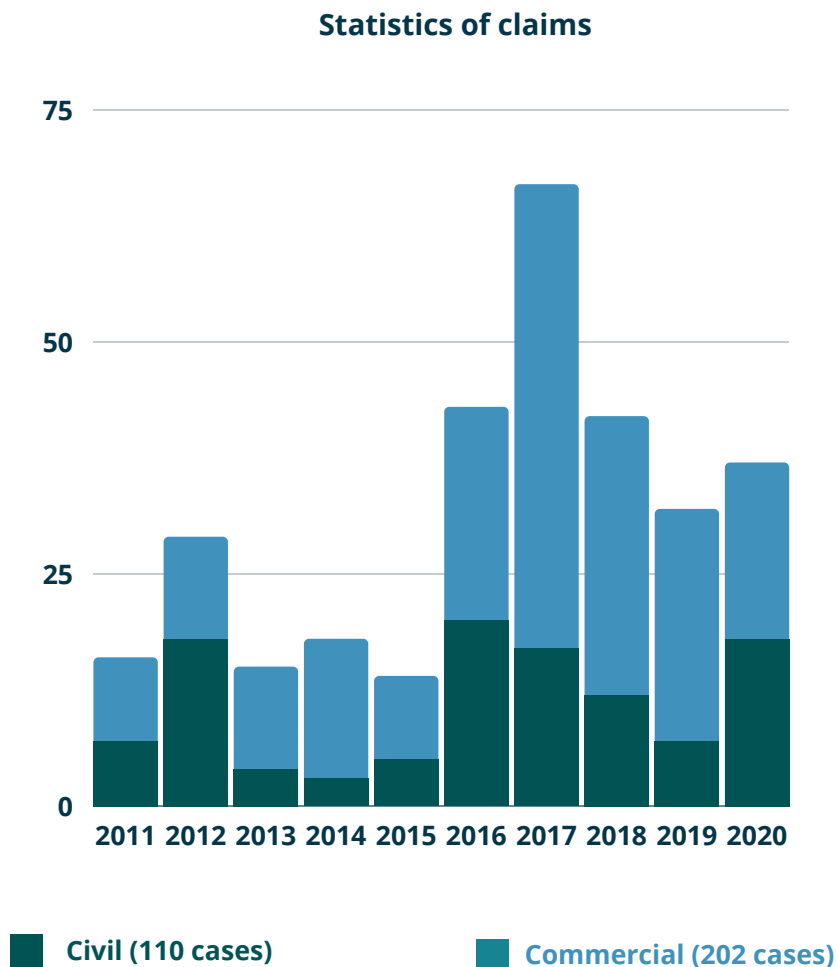
- International Convention Relating to the Arrest of Sea-Going Ships, 1952
- Code of Merchant Shipping of Ukraine, 1995
- Civil Procedural Code of Ukraine, 2004
- Commercial Procedural Code of Ukraine, 1992

Ukraine ratified the 1952 Brussels Convention on 16 May 2012. The Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine regulate ship arrests in support of a “maritime claim”.

## An application for arrest in respect of a maritime claim must contain:

- information about the Debtor and his status relative to the vessel;
- amount of the maritime claim and the essence;
- information about the vessel, including up-to-date information on the port in which the vessel is berthed or to which the vessel is to call;

The graph below shows the dynamics of claims for the arrest of the vessel from 2011 to 2020, that is, for the entire period since the ratification of the 1952 Convention.



## UPDATES AND DEVELOPMENTS

Since 2018, procedural legislation (both Commercial and Civil) has been amended to make the vessel arrest procedure clearer and more understandable. The general practice for ship arrests has become more stable. Changes to the procedural legislation have sped up the ship arrest procedure.

It will be appropriate to point out one of the features of the arrest procedure in Ukrainian jurisdiction: parties have the right to apply for the arrest of a vessel at its scheduled port of destination in Ukraine. At the time of applying for registration, the vessel may be outside Ukrainian territory.

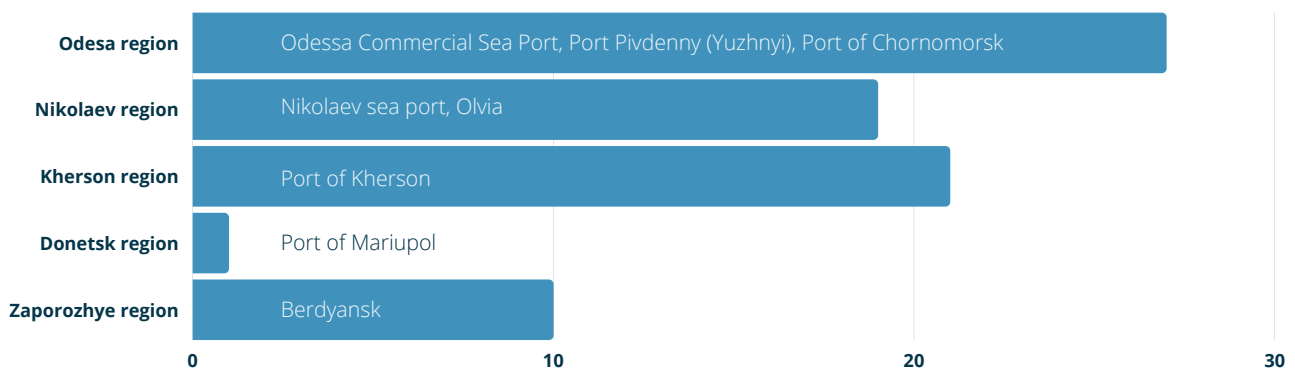
The arrest of a sister ship is possible in Ukraine. In our practice, there are numerous cases of arrest of a sister ship.

An application for such an arrest should be decided within two days of receipt by the court. Usually, from the moment the case of the arrest of the vessel submits in court, the issue is resolved within 1 working day.

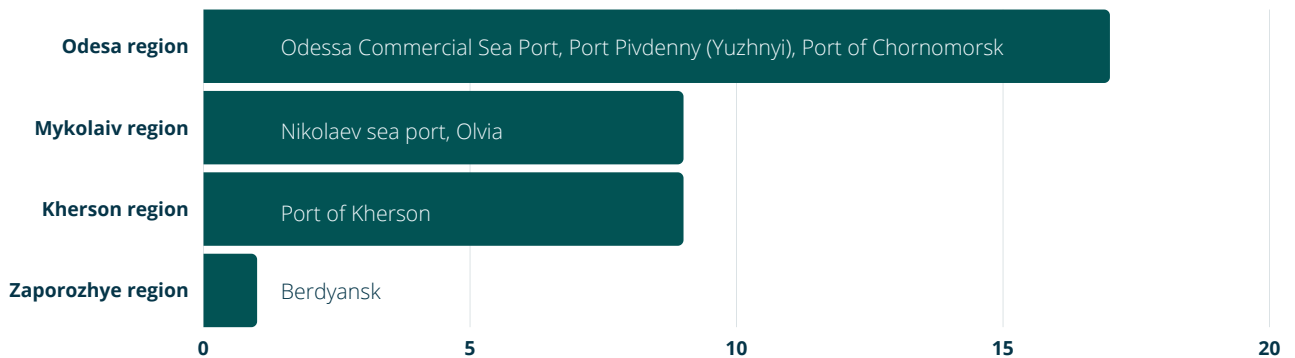
Articles 146 of the Commercial Procedure Code and Article 159 of the Civil Procedure Code establish the right to compensation for damages related to the arrest of a vessel. In practice, it is difficult for Shipowners to obtain damages related to the arrest of a vessel. This is due to the fact that the court requires conclusive evidence of the number of damages.

The chart below shows the information on the number of ship arrest claims for 2018-2020.

### Commercial cases 2018-2020



### Civil cases 2018-2020



■ Civil (36 cases)

■ Commercial (75 cases)

## TYPES MARITIME CLAIMS

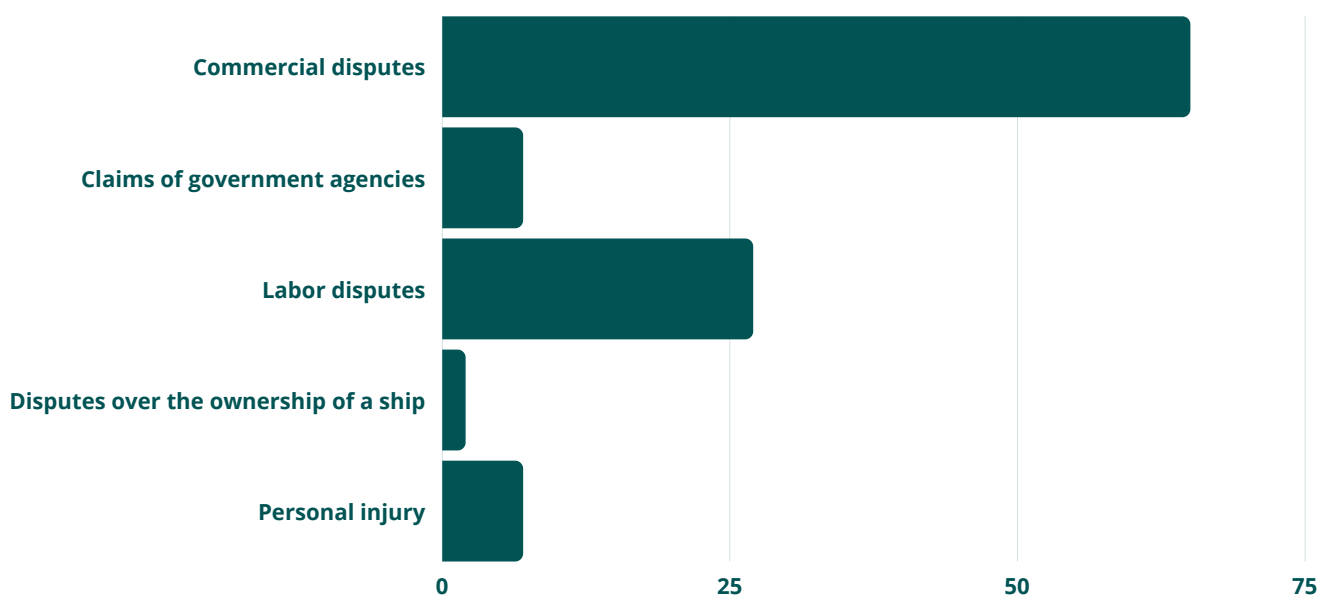
According to Ukrainian law, it is possible to arrest a ship only on "Maritime Claim". Any vessel sailing under the Ukrainian flag or foreign flag is located at a Ukrainian port can be arrested in respect of a maritime claim under the Brussels Convention and the Merchant Shipping Code of Ukraine (Code).

According to the Code, a Maritime Claim is a claim arising from the right of ownership and other property rights to a vessel, shipbuilding, ship management, maritime lien, salvage, etc.

According to official data, the vast majority of ship arrest cases are related to claims for the contract for carriage, Charterparty, bunker debts, debts for ship agency services, ship repair, etc. That is, in commercial cases, the arrest of a vessel is more common than in civil cases. It is advisable to separate claims of government agencies (such as the Ecological Inspection) separately. Although such cases will also be considered in the Commercial Courts. Labor disputes (for example, seafarers' wages) and claims for injuries (personal injury, disability or death) are dealt with by Civil courts. In Ukraine, there is no separate specialized "Maritime" court, and all cases of arrest of the vessel will be considered by the court, at the location of the port.

Article 42 of the Merchant Shipping Code, a Ship may be arrested or released only by a Court, Commercial Court, or President of the Ukrainian Maritime Arbitration Commission (the UMAC). Thus, the ship arrest procedure by the Court provided in procedural codes, and the ship arrest procedure by the President UMAC is established in the Rules of the UMAC (Articles 25-29). It should be noted that in more common practice the vessel is arrested by a decision of the Court.

One of the measures that precede the arrest or can be carried out simultaneously with the arrest is the detention of the vessel by the Harbourmaster. The Harbourmaster may detain the vessels for three days, which are usually sufficient to go to court with a claim to arrest the vessel or resolve the dispute through negotiations. This procedure is regulated by Articles 80 and 81 of the Code. However, the arrest of a vessel and the detention of a vessel by the Harbourmaster are different concepts that have different legal consequences.



### **Is it possible to arrest a ship as property in criminal proceedings?**

The arrest of a vessel in criminal proceedings is a special category of cases. Cases concerning the arrest of vessels or cargoes initiated by the Prosecutor's Office or the Security Service of Ukraine are well known.

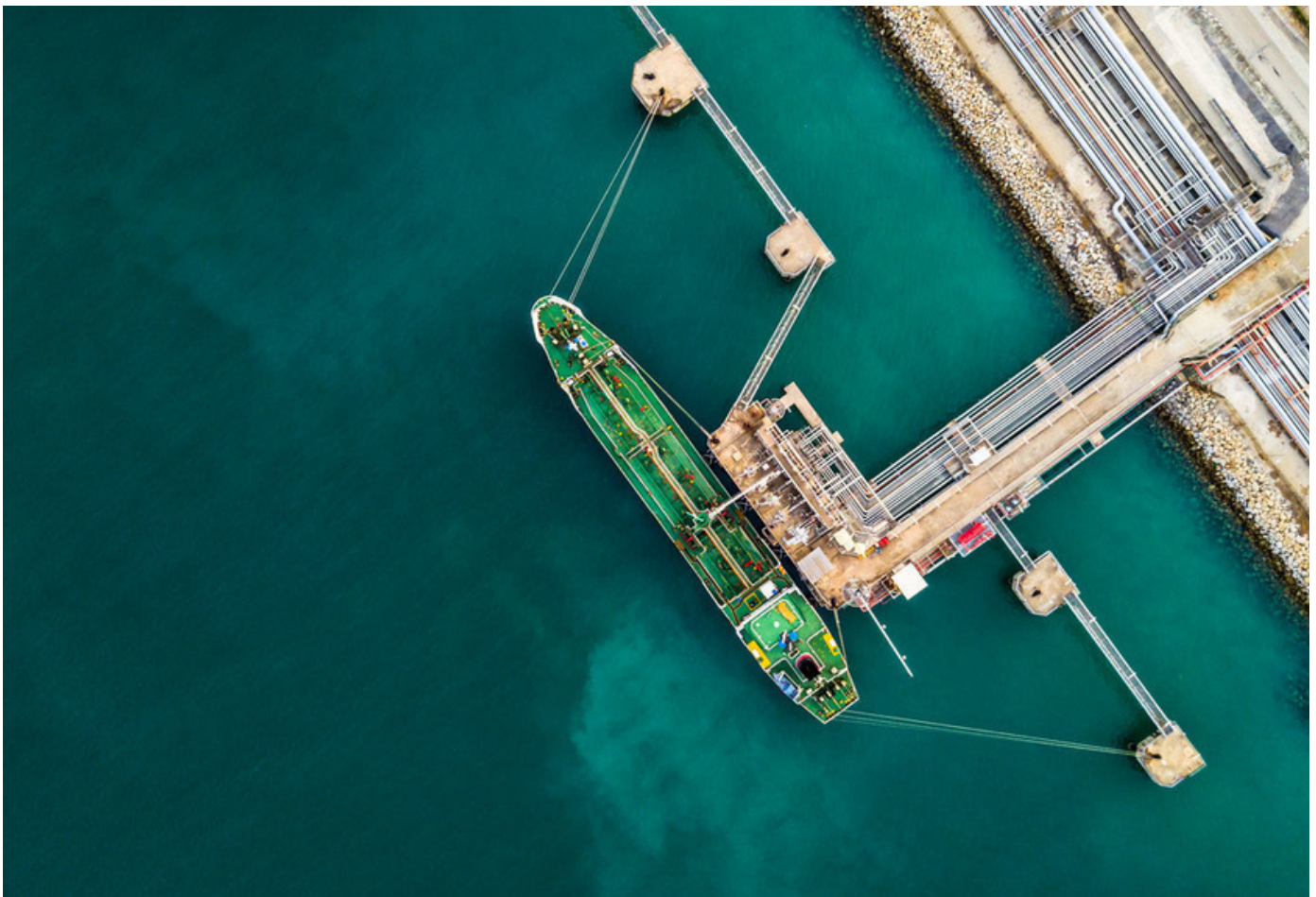
In our practice, there are cases of arrest of a vessel or cargo in criminal proceedings due to sanctions, or, for example, claims by the authorities regarding the illegal discharge of ballast water or other pollution.

The arrest of the vessel in criminal proceedings – is the arrest of the vessel as property, it is evidence of a criminal offense. The arrest of a ship as property in criminal proceedings is regulated by Articles 170-175 of the Criminal Code of Ukraine.

The purpose of arresting property is to prevent the possibility of its concealment, damage, deterioration, destruction, conversion, etc.

The vessel may be released from arrest in whole or in part by a Court Ruling during the pre-trial investigation or the court during the trial. The defense in criminal proceedings has the right to apply for the annulment of the arrest. Such an application must be considered within three days. To do this, it is necessary to assure the Court that the subsequent arrest is not advisable, or the arrest of the vessel is illegal.

In our practice, nonetheless, it is illegal, have been cases when a vessel is arrested at the same time in criminal proceedings, and on a claim from a state authority, or in a commercial dispute.



### **Do your Courts require counter-security to arrest a ship?**

The main purpose of counter-security is to protect the interests of the defendant from losses that can be caused by securing the claim in the event that the material claims of the plaintiff are rejected by the court during the consideration of the case.

Counter-securing the arrest of the vessel is inherent in the arrest of the vessel in the Ukrainian jurisdiction, based on the general rules established by Art. 154-155 of the Civil Procedure Code of Ukraine and Art. 141-142 of the Commercial Procedural Code of Ukraine:

- counter security is a right, and not an obligation of the court, except for the cases specified in Art. 154 of the Civil Procedure Code of Ukraine (the plaintiff does not have a registered place of residence in Ukraine or the court has evidence that the plaintiff's property status or his actions may complicate or make impossible the execution of the court's decision on compensation for damages for illegal arrest);
- counter security measures must be commensurate with the measures for securing the claim applied by the court and the number of losses that the defendant may incur in connection with securing the claim.

Counter-security is usually carried out by making a deposit in the amount determined by the court. If the plaintiff, for valid reasons, is unable to pay the appropriate amount, counter security can also be carried out by providing a bank guarantee or other financial security for an amount determined by the court or taking other actions determined by the court to eliminate potential losses and other risks of the defendant.

Determining the amount of counter-security has its own characteristics. It should be noted that the amount of possible damage to the shipowner as a result of the arrest of the vessel can sometimes be tens of thousands of US dollars per day, which often exceeds the amount of the claim.

The amount of counter-security is determined by the court taking into account the circumstances of the case. Counter-security measures must be commensurate with securing the claim and the number of losses of the Shipowner.

There are cases where the court applied counter-security in the amount of 5% of the claim. This case concerns the arrest of a vessel on the basis of a seafarer's wages, and the amount of counter-security itself is determined taking into account the possible costs of repairing or painting the vessel.

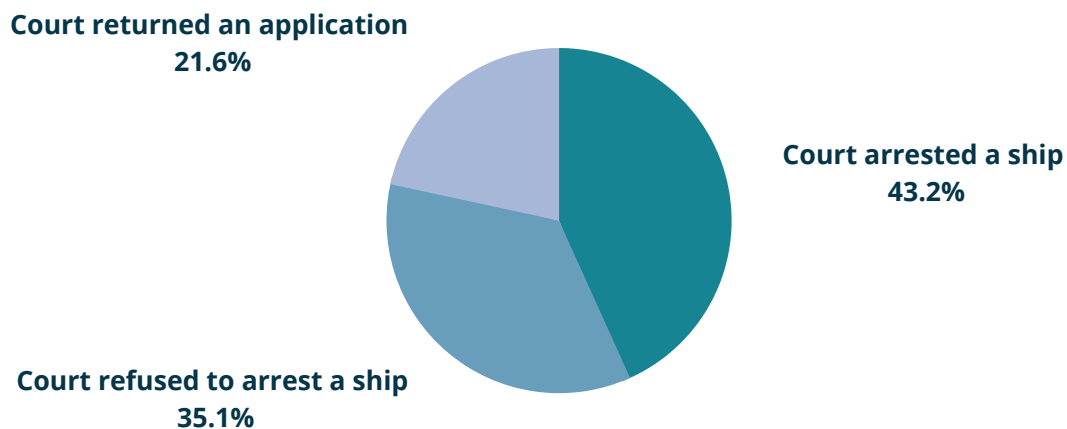
The court may also order to provide counter-security for the maritime claim in full. This is more common for freight or demurrage claims.

If the court decides to apply counter-security, such counter-security must be provided within 10 days. If this period is missed, or the Claimant has not provided documents confirming the execution of the court decision, the vessel may be released from arrest.

Thanks to a comprehensive analysis of court cases concerning the arrest of a vessel, we have the opportunity to draw the following conclusions about the reasons for refusing to arrest a vessel by the Ukrainian court.

As can be seen from the previous graphs, in 2018-2020 there were 36 civil cases and 75 in commercial cases, a total of 111 cases.

The graph below shows the overall outcome of the ship arrest cases. Thus, out of 111 cases, the court arrested the vessel in 48 cases and refused in 39 cases. In addition, in 24 cases the Court returned the application to Claimants.



### The reasons why the Ukrainian court refuses to arrest the vessel

- information on the amount of the maritime claim is not provided
- evidence that the ship is berthed at the port are not provided
- there is no evidence that the ship plans to leave the port
- there is no evidence that the Shipowner avoids liability for a maritime claim
- fact that the ship arrest is the only effective way to enforce a court decision is not confirmed
- the attached documents are not translated
- court fees have not been paid
- no information and evidence of the value of the vessel
- claim is not "maritime claim" under the Convention
- no powers of attorney
- information about the shipowner's company is not provided

As a rule, the Court may mention several of the above reasons.

According to Ukrainian law, the security for the claim must be proportional (commensurate) to the amount of the claim. However, the "principle of proportionality" does not apply to the procedure of arrest of a vessel. This provision in procedural law means that even the fact that a vessel costs much more than the amount of a maritime claim (for example, a wage claim) is not an obstacle to the arrest of a vessel on a "maritime claim". It should be noted that such exception is only for the arrest of a vessel.

There are cases where the Court refuses to arrest of vessel or returns the application for reasons contrary to applicable law. However, this trend is changing every year in a positive direction.

## RELEASE PROCEDURE

There are two options for the release of the vessel from arrest. The first option is to apply for the release of the vessel from arrest to the same court that arrested the vessel, i.e. to the court of the first instance. The second option is to appeal the court's decision to the court of appeal. Undoubtedly, each of these options has its own characteristics, but the first option is more effective in most cases.

The possibility of release of the vessel from arrest is regulated in Article 158 of the Code of Civil Procedure and Article 145 of the Code of Commercial Procedure.

In accordance with the above rules, the Court may, on its own initiative or on the initiative of one of the parties to the case, release the vessel from arrest. The application for release from arrest must be considered within 5 days.

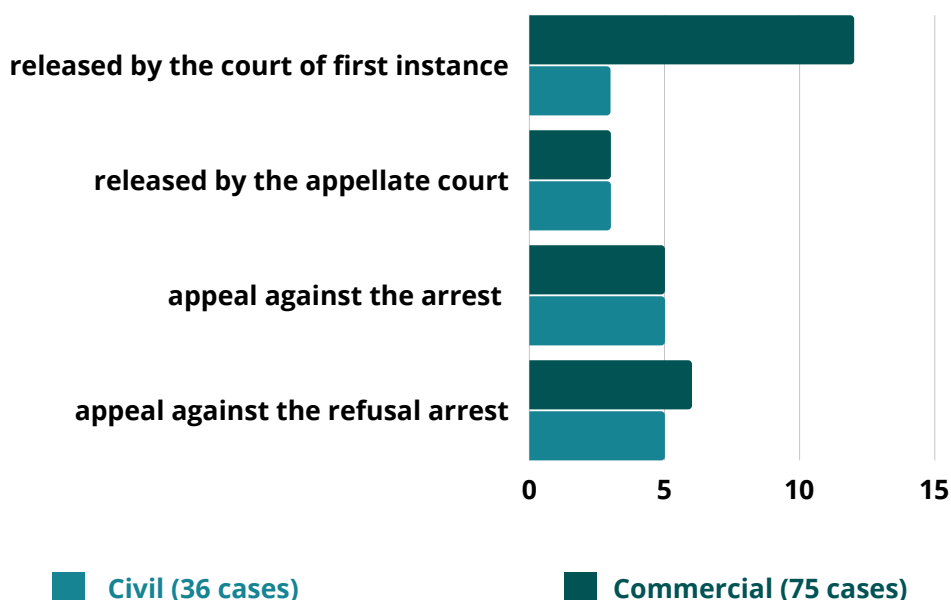
However, if a Shipowner provides a document confirming the security of the maritime claim (court deposit or bank guarantee), the Court is obliged to consider release the vessel from arrest within 1 day.

The arrest of the vessel is possible before the filing of the claim, so if the Plaintiff does not file a claim within the specified period (30 days) then the Court may release the ship from arrest.

The arrest will be valid throughout the trial. If the court rejects the claim or closes the proceedings, the Court must lift the arrest of the vessel as well.

If the Court satisfies the claim, then the arrest will be valid for another 90 days or lifted at the request of the party to the litigation.

**Appeal statistics**

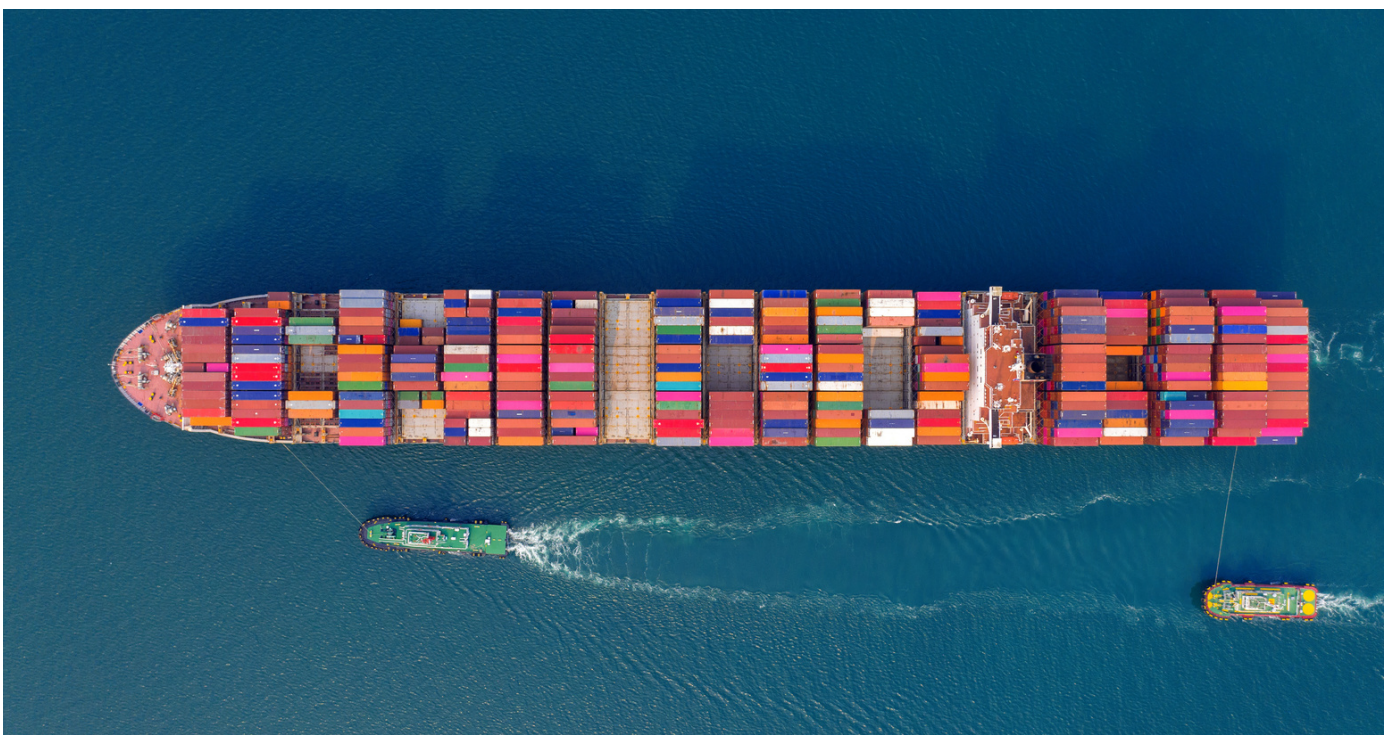


A defendant on the maritime claim can apply to the court for a change of method to obtain security for such claim when the defendant's vessel is under arrest. As a rule, a bank guarantee can be used as a substitute for an arrest and, generally, Ukrainian courts recognize a bank guarantee as an appropriate form of security for a maritime claim. However, courts will give priority to bank guarantees issued by Ukrainian banks. The bank guarantee must cover all demands of a claimant according to the maritime claim. Recent court practice admits the possibility of using a P&I letter of undertaking as a form of security in commercial proceedings. A P&I letter of undertaking must be issued according to the demands of Ukrainian civil law applicable to guarantees.

Chapter 49 of the Civil Code of Ukraine describes the basic terms, conditions, and requirements of the forms of security. According to Article 560 of the Civil Code of Ukraine, under a guarantee, a bank, other financial institution, insurance organization guarantees that the debtor will fulfill his debt to the creditor. The guarantee is valid for the period for which it is issued. The guarantee is valid from the date of its issue, unless otherwise specified in it. The guarantee cannot be revoked by the guarantor, unless otherwise provided in it, in accordance with Article 561 of the Civil Code of Ukraine.

As for P&I Club's LOU – it is an incredibly powerful tool that clubs can provide to the shipowner when they are threatened with the arrest of their vessels by the plaintiff trying to secure a claim. The LOU is not only a form of security recognized in the vast majority of maritime jurisdictions around the world but also a form that can usually be issued much more easily than other forms of security, allowing the threatened vessel to resume sailing much faster.

The possibility of recognizing the letter of guarantee of the Mutual Insurance Club, issued in accordance with the requirements of the legislation of Ukraine, was reflected in the decision of the Commercial Court of Odessa region dated May 15, 2020, where the letter of undertaking (LOU) of the P&I Club was recognized as a financial guarantee against the State Ecology Inspection's claim for the first time in Ukrainian practice. The Commercial Court of Appeal rejected the State Ecology Inspection's appeal claim and confirmed all legal circumstances, mentioned in the appealed court order. This decision is more than important, as previously Ukrainian courts accepted only a court deposit and a bank guarantee.



## ARREST OF CARGO IN UKRAINIAN JURISDICTION

The arrest of cargo can be contentious in practice. First, the arrest of cargo is governed by the general rules for the arrest of property. Secondly, if the "principle of proportionality" is not applied to the arrest of the vessel, but such a principle is applied to the arrest of cargo.

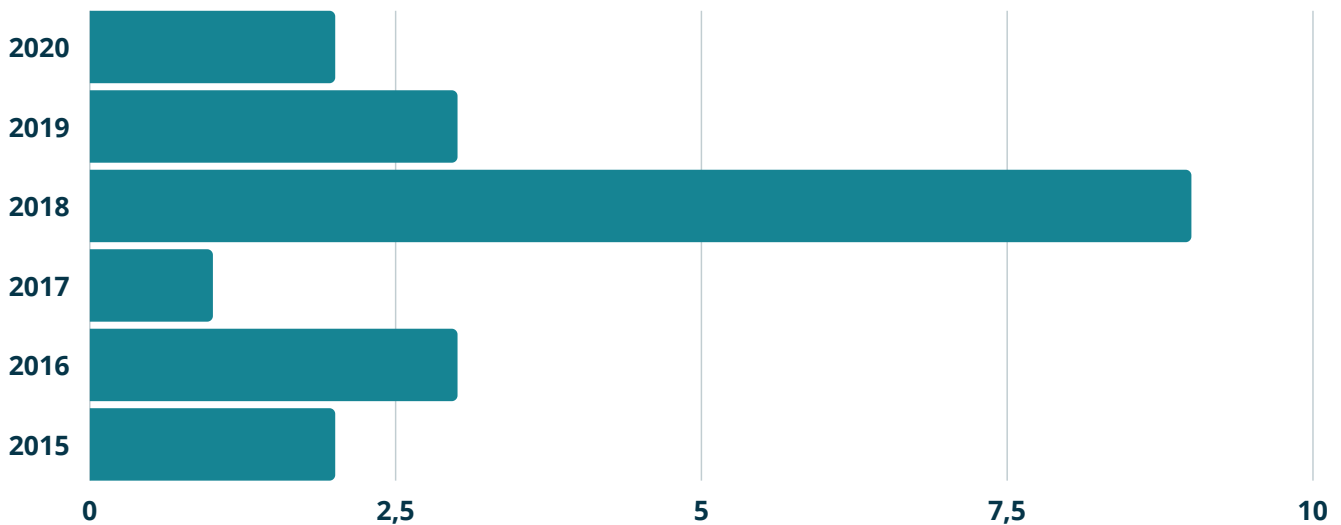
The practice of arrest cargo by unloading cargo from a vessel is common. Thus, the Shipowner will not incur additional costs. There must be strong evidence that the cargo arrested is the property of the Debtor. These are usually commercial documents that are not publicly available.

The inability to get information of the real owner of the cargo under the contract and the location of the cargo in-state public registries complicates the procedure of arresting the cargo.

In fact, there are not many cases of cargo arrest in Ukrainian jurisdiction. The chart below shows the statistics of the arrest of cargo for 2015-2020.

As you can see, there are only a few cases per year.

Statistics of claims



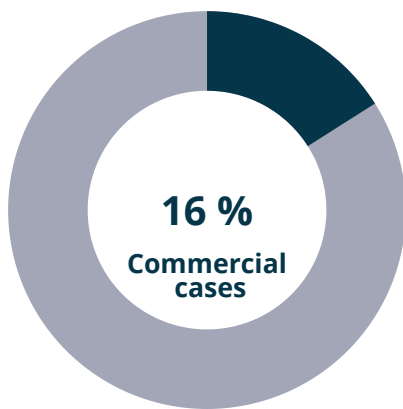
Court decisions



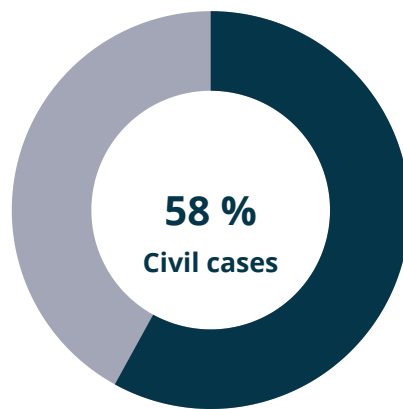
Black Sea Law Company was established in 2008 and has rapidly gained a major share of the legal market, becoming one of the leading maritime law firms in Ukraine. Our clients: P&I Clubs, Shipowners, Ports & Terminals, Traders and other parties of maritime business. Our Company provides the highest quality legal support in matters of ship arrest and release from arrest under maritime claims in Ukrainian jurisdiction.

According to our statistics, the Black Sea Company Shipping Team has been involved in cases of arrest of vessels in both commercial and civil cases. In our practice, there are also criminal cases of arrest of ships or cargo.

### Black Sea Law Company Arrest Practice 2018-2020



12 out of 75 commercial cases



21 out of 36 civil cases

Our Shipping Practice Team is available 24/7

For additional information, inquiries or consultations, please contact:  
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