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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**The Ship Arrest Conventions of 1952 and 1999:
International and Ukrainian perspectives**

By

NADIYA ISIKOVA

Ukraine

A dissertation submitted to the World Maritime University in partial
Fulfillment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2012

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title of Dissertation: **The Ship Arrest Conventions of 1952 and 1999:
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The dissertation is an analytical study on international and Ukrainian perspective of the ship arrest, examining the rights and interests of claimants such as mortgagees and holders of maritime liens, but also those of shipowners and ship operators.

The purpose of this research is to compare two Arrest Conventions of 1952 and 1999, taking into consideration their historical and theoretical development, problems of implementation and interpretation, differences in the list of individual maritime claims, procedures and rules regarding arrest, rearrest, release and counter security. The associated object is to carry out an assessment of the law of Ukraine on ship arrest.

The new Arrest Convention of 1999 has clarified many provisions of the older Convention and expanded the list of maritime claims. However, it has still left room for discussion and freedom for national legislation to fill the gaps.

Both Conventions allow ship arrest for security and in some jurisdictions the concept is used for the founding of jurisdiction. However, no convention has ever addressed the questions of arrest of cargo/bunkers and caveat against arrest and/or release.

The author is of the opinion that the 1999 Arrest Convention is more favourable to developing countries whereas the 1952 Convention meets the needs of the traditional maritime states in a manner more acceptable to them. In a somewhat similar vein, the writer is of the opinion that the 1952 Arrest Convention is more “pro-shipping”, while the 1999 Convention brings more benefits to port countries.

Ukraine has already shown an intention to comply with provisions of the 1999 Convention in articulating the list of maritime claims in the Merchant Shipping Code. However, it ratified the 1952 Arrest Convention, with a view to restrict the

numbers of arrests of Ukrainian vessels in other jurisdictions, allowing arrest only for maritime claims.

KEYWORDS: Arrest of Ship, Arrest Convention, Maritime Claims, Implementation, Enforcement.

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LIST OF ABBREVIATIONS

1976 LLMC Convention - Convention on Limitation of Liability for Maritime Claims, 1976

BLASKO - Black Sea Shipping Company

CLC 1992 - International Convention on Civil Liability for Oil Pollution Damage, 1992

CMI - Comité Maritime International

EEC – European Economic Community

FUND 1992 – International Oil Pollution Compensation Fund 1992

HNS - International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

IMO - International Maritime Organization

LOF 2000 - Lloyd's Standard Form of Salvage Agreement

MLM Conventions - Maritime Liens and Mortgages Conventions

MOA - Memorandum of Agreement

MSC - Merchant Shipping Code of Ukraine, 1995

P&I Club – Protection and Indemnity Club

UNCLOS - United Nations Convention on Law of the Sea

UNCTAD - United Nations Conference on Trade and Development

USSR - The Union of Soviet Socialist Republics

ZPO - German Code of Civil Procedure

CHAPTER I

INTRODUCTION

1.1. Background

*This fell sergeant, death,
Is swift in his arrest.
Hamlet (1601), act 5, sc.2, l. [350]*

Shipping in the current milieu is becoming increasingly dynamic and efficiency is growing mainly due to relatively shorter turnaround times for ships in port. The reduction in time spent for port operations corresponds to the overall increase in efficiency both in terms of technical as well as economic gains. Ships and shipowners are always vulnerable to the imposition of maritime claims targeted at them by varieties of claimants, whose interests are at stake. In a sense, all such stakeholders together with owners and operators of ships are co-adventurers in a maritime adventure; a phenomenon that is steeped in history and antiquity and is virtually unparalleled by comparison with other industries that make up modern global society.

The law of maritime claims is as old as maritime law itself because of such practices as mortgages and marine insurance, the progenitors of which go back to eras preceding Roman times. Some maritime claims enjoy a privileged status and are known as maritime liens.¹ Whether or not a maritime claim enjoys such elevated status, whenever it is a claim emanating from a claimant it may be against the ship itself or its owner or operator, depending upon the particular circumstances.

Enforcement of a maritime claim has always been an important and challenging issue for claimants as well as shipowners and operators. Thus, over many centuries, or even millennia, numerous remedial or enforcement devices have been developed

¹ Under French law the “*privilège*” gives a right to be paid before other creditors; lien as well as “*privilege*” is a right on an object, however not ranking before mortgages and other “*privileges*”. See Hill, C. *Arrest of Ship*, England and Wales, London, 1985, p.2. “The maritime lien is based on the concept that the ship (personified) has itself caused harm, loss or damage to others or to their property and must itself make good that loss.”

by the maritime community at large. Among the devices that are available for enforcing a maritime claim, or recovering a debt, arresting a ship is the most popular and viable means. Of course, it is not only the ship that could be subjected to arrest, any other object, that qualifies as maritime property, can also be targeted by a claimant. Chief among these is cargo. Thus, it is also important to understand and identify what qualifies as maritime property. The significance of this lies in the fact that none of the enforcement devices available in maritime law can be used in respect of non-maritime property. In some legal systems this is a major jurisdictional issue.

While cargo and other maritime property can be arrested along with the ship or independently, the regime of ship arrest is unique and independent with its own legal framework comprising both substantive as well as procedural law. Thus, while there are numerous enforcement devices for all kinds of maritime property, the one that is most prevalent is the regime of ship arrest.

The conceptual framework of ship arrest is based on relatively modern convention law. The first is the International Convention on the Arrest of Sea-Going Ships, which is a product of the Comité Maritime International (CMI),² but adopted under the auspices of the Government of Belgium. This convention is therefore one of the so-called Brussels conventions. The second is the International Convention on the Arrest of Ships 1999,³ which was originally spearheaded by the United Nations Conference on Trade and Development (UNCTAD) with the support of the CMI and the collaboration of the International Maritime Organization (IMO).

In the study of the subject of ship arrest, it is not only important to examine the rights and interests of claimants such as mortgagees and holders of maritime liens, but also those of shipowners and ship operators. The integrity of the law rests on its ability to ensure there is recourse against wrongful arrest through appropriate devices. It is also important to note in this context, that the objective for which a ship

² Article 1 of the CMI Constitution states: "The Comité Maritime International is a non governmental international law organization, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects"; see also Report of the United Nations/International Maritime Organization Diplomatic Conference held at the Palais des Nations, Geneva, from 1 to 12 March 1999. A/CONF.188/5.

³ International Convention on the Arrest of Ships, 1999.

is arrested can also be achieved through devices such as the attachment and the Mareva injunction,⁴ otherwise known as freezing injunction or order.

1.2. Purpose

The principal purpose of this dissertation is to examine the law of ship arrest through a comparative analysis of the two Conventions of 1952 and 1999. The associated object is to carry out an assessment of the law of Ukraine on ship arrest in light of the fact that Ukraine is a party to the 1952 Arrest Convention.⁵ In the course of examining the Ukrainian law the dissertation will focus on the relevant national legislation and also judicial practice.

The methodological approach taken in this dissertation is primarily the so-called dogmatic approach, which looks at relevant legal instruments, including legislation, and applicable case law. However, in this thesis two other approaches are employed: one is the historical approach, which looks at the evolutionary process involved in the law of ship arrest, culminating into the conventions mentioned above, and the national legislation of Ukraine. A third methodology is also employed, which is the comparative analysis approach. In the context of this dissertation, the two Conventions of 1952 and 1999 are comparatively analyzed to look at the respective *pros* and *cons*, and eventually to propose improvements. It must be appreciated that in any research in the field of law the dogmatic approach is used as a methodology, which involves probing into theoretical and philosophical underpinnings of the law; and to a certain extent that approach is adopted in this dissertation.

1.3. Structure

Following this introductory chapter, the historical and theoretical background to the law of ship arrest is examined both in terms of civil law as well as common law

⁴ See Tetley W., “Arrest, Attachment, and Related Maritime Law Procedures” (1999) 73 Tulane Law Review 1895-1985, at p. 1948.

⁵ The Law of Ukraine “On accession of the International Convention on the Arrest of Sea-Going Ships” (The Official Bulletin of the Verkhovna Rada of Ukraine, 2012, No.15, p.97).

in the second chapter. In that chapter the issue of unification or uniformity is also addressed. It must be observed that the established objective of the CMI has been to foster unification in maritime law globally. It is well recognized that the primary way in which uniformity can be achieved is through the instrumentality of convention law.

In the third chapter the subject of maritime claims is discussed in contextual detail by looking at the historical development of this phenomenon and examining relevant definitions appearing in the two Arrest Conventions.

The fourth chapter deals with arrest procedures by looking at the interests of the various stakeholders or potential claimants, *vis-à-vis* the interests of owners and operators, who stand at the receiving end of ship arrest actions. In this chapter the subjects of re-arrest and release of the ship and the requirements for providing security and counter security are also addressed. It must be appreciated in the outset of this chapter that the law of ship arrest consists of both substantive as well as procedural elements closely enmeshed in the conventions. This is quite a unique feature of the law of ship arrest. Aside from that, there are also individual procedural issues, peculiar to a particular jurisdiction, which may or may not be similar to procedures in other jurisdictions. The consideration of this observation leads the dissertation into the very core of this investigation, namely, the Ukrainian perspective on ship arrest. This is discussed in detail in the penultimate chapter which addresses the *status quo* in terms of both legislation and judicial decisions.

In the final and concluding chapter a summary is provided together with the writer's own views and recommendations regarding certain anomalies which continue to exist in the international law of ship arrest as well as proposals for the improvement of ship arrest law in Ukraine for the benefit of all concerned.

CHAPTER II

HISTORICAL BACKGROUND AND THEORETICAL BASIS OF THE CONCEPT OF SHIP ARREST

The Anglo-Norman term “arrest” is similar to the French word *arrêt*, which means “stop”. Historically arrest of the defendant (person) was a primary remedy and arrest of the property (ship) was a subsidiary remedy in the process of enforcement of the claim, however, the combination of them was also possible.⁶ The Universal Declaration of Human Rights 1948 in Article 9 states that “no one shall be subject to arbitrary arrest, detention or exile.”

Given that rules and procedures for arrest differ from one jurisdiction to another, an arrest will generally have the effect of the ship being impeded from freely leaving the port or berth until the merits of the case have been heard, a judicial sale has taken place or the debtor has put up sufficient security for the claim.⁷ A succinct definition of “arrest” is provided by one author as: “Judicial detention of a vessel pending provision of security for a maritime claim.”⁸

The need for a clear definition was recognized by the drafters of the first Arrest Convention.⁹ It expressed in Article 1 (2) as:

“Arrest” means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

⁶ Tetley W., “Arrest, Attachment, and Related Maritime Law Procedures” (1999) 73 *Tulane Law Review* 1895-1985 at p. 1901. See also *Hale and Fleetwood on Admiralty Jurisdiction* (M.J.Prichard & D.E.C. Yale eds., 1992) at pp. xlii, xliii, cxxx, cxxxiii and cxxxiv. The Admiralty Court in Tudor and Stuart days was aware of the Roman (i.e. civil) law distinction between actions *in rem* and *in personam*, as well as of the Roman *action hypothecaria*, but these distinctions did not control the originating form of procedure, which could take the form of an action against the person, an action against his property or both.

⁷ See Visnes, Siril Steinsholt “Arrest of ships in Norway and South Africa – a comparison”, Research dissertation for the Master of Shipping Law at the University of Cape Town, 2005.

⁸ Baughen, Simon, *Shipping Law* – 2nd ed. London: Cavendish Publishing Limited. 2001, at p. lxvii (hereinafter – Baughen).

⁹ *Procès-verbaux*, p. 64; *Travaux Préparatoires*, p. 298.

It is important to distinguish ship arrest, which is a civil action for the enforcement of a maritime claim, from detention, which is a sanction imposed administratively or judicially for a violation of public or regulatory law. It is notable that the word “detention” is used in the definition of arrest in the Conventions, but only in the literal or ordinary sense of the term. It is further to be noted that the term “seizure” may be synonymous with the word “detention” in the ordinary sense of usage, but it also has a legal connotation, which is different from “arrest”. Unless a ship is released from arrest or is found not to be at fault on the merits of the case, arrest of a ship usually leads to its judicial sale. In the Conventions and in most civil law jurisdictions the term used to depict the same meaning is “forced sale.”¹⁰

The arrest of maritime property has three functions. First, it is a form of interim or pre-trial remedy. In France this characteristic is depicted by the concept of the “*saisie conservatoire*”, which literally means seizure of the *res* to conserve it. Procedurally, a creditor may obtain further protection through the filing of a “caution” against release. Secondly, and this is peculiar to English law, arrest is the mechanism through which the claimant can found jurisdiction over the merits of the case. Thirdly, it is the primary method for ensuring the availability of a judicial sale, which itself is the means for implementing the interest conferred or enforced through the action *in rem*.¹¹

There are different approaches to the arrest of ship in civil law countries such as e.g. French *saisie conservatoire*, Spanish *embargo preventivo*, Italian *sequestro conservativo* and Ukrainian *ship arrest*, as compared with common law countries such as English *maritime attachment* and North American *preliminary attachment*.

2.1. Common law jurisdictions

The notion of ship arrest is a component of the action *in rem*, which can be traced back to the Roman law and means an action “against the thing”. However,

¹⁰ Articles 6, 11, 12 of the International Convention on Maritime Liens and Mortgages, 1993. It should be noted that in common law jurisdiction there can be a forced sale without a judicial intervention, such as for example there a mortgagee in possession sells the ship in such a case the seller can not give clear title, in contrast, in all judicial sales the buyer acquires a clear title.

¹¹ Jackson D.C., *Enforcement of Maritime Claims*. 4th ed. London: Informa Publishing. 2005. p.230.

more recently, legal historians have questioned the Roman origin of the action *in rem*, pointing out that by the 16th century, the English Admiralty Court was hearing *in rem* claims of a purely personal nature, having none of the proprietary character required by the Roman action *in rem*.¹² Furthermore, they would not find any indication in the case law of the late medieval or early modern period that anything resembling a maritime lien or a ship hypothec was necessary to found the Admiralty *in rem* jurisdiction against ships.¹³

The English law prefers to explain *in rem* admiralty jurisdiction in terms of the procedural theory.¹⁴ According to it, the statutory right of action *in rem* is regarded as a procedural device to flush out the liable shipowner, rather than as an action primarily aimed at the wrongdoing personified ship.¹⁵ Where the shipowner enters an appearance, he is considered to have submitted to the jurisdiction of the court,¹⁶ and the proceedings continue as an action *in personam* as well as an action *in rem*.¹⁷

The above explanation is based on existing theories. The *in rem* admiralty jurisdiction consists of different features of the personification or procedural paradigm, but they are not totally reflected in common law countries, including the

¹² Hale and Fleetwood on Admiralty Jurisdiction (M.J. Prichard and D.E.C. Yale, eds.), Selden Society, vol. 108, London, 1992 Introduction at pp. xxxix-xl (hereinafter - Hale and Fleetwood).

¹³ *Ibid.* at pp. xxxix-xl.

¹⁴ The historical pedigrees and relative merits of the personification and procedural theories continue to be hotly contested: see, for example, F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (CUP, London, 1970), Chapter 6; Davies M., 'In Defense of Popular Virtues: Personification and Ratification' (2000) 75 TUL. L. REV. 337, pp. 341-350; Jonsson M., 'The Nature of the Action *in rem*' (2001) 75 Australian L.J. 105.

¹⁵ Tetley W., *Maritime Liens and Claims* (2nd edn, Les Éditions Yvon Blais Inc, Montréal, 1998), pp. 977-978.

¹⁶ *The Dictator* [1892] P. 304 at p.332; *The Gemma* [1899] P. 285 (E.W. C.A.).

¹⁷ This is a statement of the traditional understanding of the nature of the action *in rem* in terms of procedural theory: see, for example, *The Beldis* [1936] P. 51, 75-76 (E.W. C.A); *Monte Ulia* (Owners) v. *Banco* (Owners), (*The "Banco"*) [1971] P. 137, 151 (E.W. C.A); *Bank of Nakhodka v. The Ship 'Abruka'* (1996) 10 P.R.N.Z. 219; *International Factors Marine (Singapore) Pte. Ltd. v. The Ship 'Komtek II'* [1998] 2 N.Z.L.R. 108. In *Republic of India v. India Steamship Co. Ltd., The Indian Grace* (No. 2) [1998] A.C. 878, 913 (H.L.), however, the House of Lords per Lord Steyn controversially adopted a more extreme procedural position, stating that 'an action *in rem* is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service... From that moment the owners are parties to the proceedings *in rem*.' (Emphasis added.) For a compelling critique of this (re)formulation of the action *in rem* in *The Indian Grace*, see N. Teare, 'The Admiralty action *in rem* and the House of Lords' (1998) L.M.C.L.Q. 33, 34-37.

United States.¹⁸ Rather, the theories are a product of centuries of political and institutional skirmishes and compromises, and pragmatic decisions handed down by commercial judges. It is, therefore, hardly surprising that admiralty law on both sides of the Atlantic has culminated into an amalgamation of different characteristics and theoretical elements.¹⁹ Some countries have developed their own theoretical and practical expertise. For instance, the United States follows the personification doctrine, which is based on the conceptual elements of *in rem* admiralty jurisdiction and reflects the legal fiction that the ship has ‘rights and obligations separate from those of its owner’.²⁰

In these countries an action can be brought against the owner, who is an individual or a corporate entity or other legal person, such action being referred as an action *in personam*; or it can be brought against the *res* (property), which is known as an action *in rem*.

2.2. Civil law jurisdictions

In these countries the laws relating to jurisdiction, arrest and release procedures are usually set out in a Code of Procedure, while the classification, priority and enforceability of the claims are dealt with in the Maritime or Commercial (Merchant) Code.²¹ Civil or continental legal systems generally consider a ship arrest as a “security measure”,²² which means attachment of the asset (ship) until the decision

¹⁸ Tetley, *supra* note 4, pp. 53-54, describes how maritime liens have ‘been pushed and pulled by the procedural theory and the personification theory’.

¹⁹ For example, although English Common Law jurisdictions follow the procedural theory, the action *in rem* continues against, and is enforced against, the defendant ship itself if the shipowner does not enter an appearance. Maritime lien claims in English Common Law jurisdictions are also commenced and enforced against the defendant ship itself, regardless of subsequent changes of ownership or personal liability. Maritime liens simply cannot be satisfactorily explained in terms of procedural theory: even Lord Steyn had to concede in *Republic of India v. India Steamship Co Ltd.*, (*The “Indian Grace”*) (No. 2) (1998) A.C. 878, 908 (H.L.) that maritime liens ‘may be regarded as distant echoes of the personification theory’. Conversely, there are aspects of admiralty practice in the United States that do not fully accord with the personification doctrine: M. Davies, ‘In Defense of Popular Virtues: Personification and Ratification’ (2000) 75 Tulane Law Review 337, pp. 369-371.

²⁰ Davies M., ‘In Defense of Popular Virtues: Personification and Ratification’ (2000) 75 Tulane Law Review 337, 338.

²¹ Jackson D.C., *Enforcement of Maritime Claims*. 4th ed. London: Informa Publishing, 2005, p. 230

²² See § 917 of the German Code of Civil Procedure (ZPO); Article 709 of the Greek Civil Procedure Code.

on the merits is rendered and in the enforcement following the judgment by forced sale through public auction. The procedure when the plaintiff has a right to bring an action against an individual or legal person has been known in Roman law as action *in personam* (“the relevant person”). However, there is a practical problem in shipping restricting the claimant from exercising jurisdiction over cases where the defendant resides in another country. For instance, according to Article 1 of the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952,²³ an action in respect of collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced -

(a) either before the Court where the defendant has his habitual residence or a place of business;

(b) or before the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security have been furnished;

(c) or before the Court of the place of collision when the collision has occurred within the limits of a port or in inland waters.

The same principle exists in European Economic Community (EEC) legislation. According to Article 8 of the Civil Jurisdiction and Judgment Act 1982,²⁴ insurance policy holders are allowed to sue only in the place of their domicile.

The *saisie conservatoire* (conservatory attachment) in France is very similar to the admiralty attachment and has combined several of the features of the common law arrest *in rem* and the admiralty attachment.²⁵ The French courts can exercise jurisdiction in the territorial seas without pre-seizure hearing or notice and the

²³ International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, Brussels, 1952.

²⁴ See EEC Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters 1968 (amended by Protocol 1971).

²⁵ Tetley W., *Maritime Liens and Claims*, 2nd ed., 1998, p. 971.

defendant's presence.²⁶ In fact this is the only procedure through which the claimant can secure the assets of the debtor from escaping, as there are no writs *in rem* or *in personam*.

One should not lose sight of the fact that Roman law had influenced the procedure of arrest both in England and in civil law countries; however, the action *in rem*, as indicated above, developed as a result of the conflict between the Court of Admiralty and the common law courts and became an effective device to get the real defendant into court.

Several legal historians recognize the civilian influence on the maritime law in the common law jurisdictions.²⁷ The statement of Juta J.A. in *Crooks & Co v. Agriculture Co-operative Union Ltd*²⁸ serves as an example. He emphasized that –

[T]he law administered by it [the Court of Admiralty] was a body of laws, customs, and usages of the sea taken from various continental sources and writers; and as thus received and administered in the High Court of Admiralty it constituted the General Maritime law of England, a law differing in several very important respects from the Municipal law of England.”²⁹

Arthur Browne, in his monumental work, *A Compendious View of the Civil Law and of the Law of the Admiralty* wrote:

²⁶ *Ibid.*, p. 968-970. Article 24 of UNCLOS provides that the coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In addition, Article 28 of UNCLOS restricts the rights of coastal states to exercise their civil jurisdiction and arrest a ship during its innocent passage or transit passage through straits.

²⁷ Benedict, E.C. Admiralty 7 ed. (New York: M. Bender 1958) vol 1 3-1 to 3-25, Hare, J. Shipping Law and Admiralty Jurisdiction in South Africa (Juta 1999) (hereafter - Hare) 10-13 and Dillon, C. & Van Niekerk, J.P. South African Maritime Law and Marine Insurance: Selected Topics (Butterworth 1983) at 4-6.

²⁸ *Crooks & Co v. Agricultural Co-operative Union Ltd* 1922 AD 423 cited from Hofmeyr, G. “Admiralty Jurisdiction in South Africa” (1982) *Acta Juridica* 30 (hereafter - Hofmeyr) at 37, see also Hare *op cit* at 20.

²⁹ *Crooks & Co v. Agricultural Co-operative Union* *ibid* at 432 cited from Hofmeyr at 37.

This remedy *in rem* against the ship or goods is founded on the practice of the civil law, which gives an action *in rem*, to recover or obtain the thing itself, the actual specific possession of it...³⁰

It is thus apparent that the substantive maritime law in the common law system bears a civilian imprint.

³⁰ Browne A., *A Compendious View of the Civil Law and of the Law of the Admiralty*, vol. II, Dublin, 1802; New York 1840 at p. 99.

CHAPTER III

UNIFICATION OF THE INTERNATIONAL LAW OF SHIP ARREST

Prior to the 1952 Convention, there was considerable discussion among maritime countries within the CMI, the international forum for development of "uniformity" in maritime law; in the CMI jargon referred to as "unification". This has always been a difficult task, often involving many years of deliberations. Be that as it may, there is no other alternative to international conventions for achieving any uniformity or unification.³¹

The critics of international private law conventions point to the rules and model laws and are of the view that problems remain to the extent that their provisions are only binding when they are incorporated into national legislation or where they are identified as the proper law of a contract.³² Conventions that adopt uniform private international law rules address the problem of conflict of laws by identifying the proper law of the contract, but leave unresolved the problem of differences between the possible applicable laws.³³

In the context of the law of ship arrest, this writer agrees with the opinion of the CMI that the problems with unification of the rules arise because of the two fundamental differences between the common law and civil law systems. First, while in the civil law countries a vessel is primarily arrested so that it stands as security for any claim, whether of maritime or non-maritime nature, in the common law countries, arrest is also a device for the founding of jurisdiction and consequently for

³¹ Uniformity means identical in form whereas unification has a connotation of equality in all respects. Arguably, it is impossible or impractical to reach unification in the context of law given the fact there are "as many legal system as there are societies of peoples". The more practical approach of achieving "closeness" as much as possible is depicted by the notion of "harmonization" which is the term used by the IMO. Harmonization acknowledges the fact the there are different legal systems in the world, which can operate in harmony to reach the same goals and objectives. See Mukherjee, Proshanto K. *Maritime Legislation*, Malmo: WMU Publications, 2002, pp.144-145.

³² Such criticism, however, is imprecise. The need for express national legislation depends on whether the constitutional law of a particular state calls for the monistic or dualistic method of treaty implementation. In the monistic system a treaty can automatically become the law of the land if it is a self-executing treaty. See Mukherjee, Proshanto K. *Maritime Legislation*, Malmo: WMU Publications, 2002, pp. 126-133.

³³ Berlingieri F., *Berlingieri on Arrest of Ships*, 5th Edition, 2011. p. 15 (hereinafter – Berlingieri).

commencing proceedings *in rem*. Secondly, while in civil law countries the arrestor, in the case of wrongful arrest, could be held liable for damage suffered by the owner of the vessel, in common law countries the owner could only claim the cost of the security on the ground that he could always release the vessel from arrest by providing adequate security.³⁴

3.1. Historical overview

Traditionally ship arrest has been closely linked with claims arising out of collision incidents. It is notable that, in almost all jurisdictions such a claim qualifies as a maritime lien. Arrest is undoubtedly the most popular device not only for the enforcement of maritime liens, but also mortgages and hypothèques. In both such cases, namely, maritime liens and mortgages/hypothèques, the priority positions of holders of such claims are protected against arrest effectuated by other claimants. While the international conventions on ship arrest cover jurisdictional and remedial matters, proprietary and security aspects of maritime claims are the subjects of the Maritime Liens and Mortgages Conventions (hereinafter - MLM Conventions). Three such conventions were adopted in 1926, 1967 and 1993. Notably, the 1967 Convention failed and is now defunct.³⁵ Other maritime conventions establishing jurisdiction for arrest are the Collision (Civil Jurisdiction) Convention 1952³⁶ and the Hamburg Rules.³⁷ The concept of the limitation fund is to be found in several liability and limitation of liability conventions.³⁸

³⁴ See Berlingieri, *supra* note 33, at para. 1.11; CMI Bulletin No.96, p.461.

³⁵ The International Convention for Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted in Brussels, May 27, 1967, but not in force.

³⁶ International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952. See Article 1. See status of the 1952 Arrest Convention <http://diplomatie.belgium.be/fr>.

³⁷ United Nations Convention on the Carriage of Goods by Sea, 1978, United Nations, Treaty Series, vol.1695, p. 3. See Article 21(2)(b) "All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest."

³⁸ International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957; Convention on Limitation of Liability for Maritime Claims, London, 1976, amended by the Protocol of 1996; Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) 1996; International Convention on

3.1.1 Development of the 1952 Convention

The question of the international rules of arrest arose with the adoption of the 1910 Collision Convention and the 1926 Maritime Liens Convention. At the first CMI conference in 1930 four questions, among others, were raised for discussion, *viz* the following:

- (1) Which ship may be arrested?
- (2) Who is entitled to arrest a ship?
- (3) Where can the arrest be made?
- (4) How can a ship be released from arrest?³⁹

The discussions led to a compromise between the civil and common law countries, namely the French pre-trial personal remedy such as *saisie conservatoire* and the English Admiralty concept of arresting a ship through an action *in rem* on a fixed list of maritime claims. Thus, Article 1 of the Arrest Convention 1952 provided that a ship can be arrested for a limited list of maritime claims and allowed the arrest of “sister” ships in the same ownership as the ship in respect of which the original claim arose.

The Arrest Convention 1952 recognizes the common law principle of founding of jurisdiction on the merits by the court where the domestic law so provides. The Convention also addresses the question of the arrestor of the ship and the rights of the parties to agree on another tribunal.⁴⁰ However, there must be one of the links between the claim and the country, specified in Article 7 as follows:

- (a) if the claimant has his habitual residence or principal (*sic*) place of business in the country in which the arrest is made; or
- (b) if the claim arose in the country in which the arrest was made; or
- (c) if the claim concerns the voyage of the ship during which the arrest was made; or

Civil Liability for Oil Pollution Damage (CLC) and International Oil Pollution Compensation Fund 1992 (Fund 1992).

³⁹ Conference d’Anvers, 1930, CMI Bulletin No. 91, pp.76 and 105.

⁴⁰ Jackson D.C. Enforcement of Maritime Claims. 4th ed. London: Informa Publishing. 2005. para. 6.12.

(d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, 1910; or

(e) if the claim is for salvage; or

(f) if the claim is for a mortgage or hypothecation of the ship arrested.

The Arrest Convention 1952 became widely accepted⁴¹ for a number of reasons. First, it unifies the rules and procedures of arrest, namely Article 2 allows arrest of “ship flying the flag of one of the Contracting States in the jurisdiction of any of the Contracting States in respect of the closed list of maritime claims, but in respect of no other claim.” Second, Article 3 (3) prohibits repeated and additional arrests on the same ship in respect of the same claim by the same claimant in a contracting state after a previous arrest was effected in the same or another member state. In addition, it was necessary to ratify the Arrest Convention in order to become a party to the Lugano Convention, 1993.⁴²

However, it is far from perfect and has some detractors. First, a closed list of claims which does not reflect the realities of shipping. Second, the wording of some provisions is not clear which creates differences in interpretations by national courts. For instance, a court in a civil law jurisdiction would interpret Article 3(4) as allowing a ship to be arrested for the debts of a time charterer. By contrast, in a common law jurisdiction, in particular, in an English court only a shipowner’s or demise charterer’s debts would make a ship arrestable, whether or not the claim is in respect of a maritime lien or where a judicial sale takes place. Third, there are also certain linguistic nuances, which create differences between the ways in which civil and common law jurisdictions deal with the subject matter of arrest. Certain civilian procedures, which are called ‘arrest’, are defined in English as ‘attachments’. In

⁴¹ See number of the ratifications at http://diplomatie.belgium.be/fr/binaries/Zeerecht_9_tcm313-79767.pdf.

See also report of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (JIGE) (UNCTAD Doc. TD/B/C.4/AC.8/13 and IMO Doc. LEG/MLM/13). at para. 4.

⁴² Article 54a of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 1988; Convention on Civil Liability for damage resulting from activities dangerous to the environment. Lugano, 1993.

addition, the 1952 Convention does not make a distinction between “arrest” and founding jurisdiction on the merits of the case.⁴³

3.1.2 Development of the 1999 Convention

By the 1980s it was recognized that international shipping had undergone numerous dramatic changes ranging from significant advancements in navigational and marine engineering technology to catastrophic environmental incidents. Technological advancements made some issues associated with enforcement of maritime claims obsolete and environmental damage led to horrendous claims both in terms of their nature as well as their quantum, which were not addressed by the 1952 Arrest Convention, and in those respects were clearly outdated. Furthermore, there were ambiguities and uncertainties, as illustrated above, which posed impediments to the achievement of unification, and were exacerbated by divergent interpretations of courts, particularly in different legal systems.

In addition, a seriously disputed issue, the stipulation that the ship liable for the maritime claim (action *in rem*) could be arrested without personal liability of the owner, lien (or “privilege”) or mortgage became a *casus belli*.⁴⁴ It was therefore not unexpected that the international maritime community would be looking for law reform in the international regime of ship arrest. As discussed earlier, the law of ship arrest is basically an outcrop of the law relating to maritime claims and their enforcement.

In this dissertation mention has been made of attempts made by the world maritime community to create uniformity with respect to major types of maritime claims, namely, maritime liens and mortgages. Whereas the 1967 MLM Convention failed, this branch of private maritime law suffers from an anomaly in that there are two co-existing convention instruments in force. These are the 1926 and 1993 MLM

⁴³ Jackson, D.C., *Enforcement of Maritime Claims* Fourth Edition London: LLP 2005, p. 3, para. 0.25.

⁴⁴ See Prof. Berlingieri Sr. Conference Internationale de droit maritime... Brussels 1952, p. 96 and p.166.

Conventions.⁴⁵ The 1926 Convention might have been overtaken by the more recent Convention of 1993, but it still has a sufficient number of state parties to allow it to remain in force. The 1993 Convention took more than a decade to enter into force, but its viability as international law is still in question mainly because the United Kingdom is not a party to it. For this reason, the United Kingdom (UK) is also staying away from the 1999 Arrest Convention.

Regardless of the position taken by the UK, it became inevitable that a new Arrest Convention would have to enter into the international arena simply because the 1952 Convention was too outdated. Supporters of the 1999 Convention have a strong argument in the fact that this Convention dovetails the 1993 MLM in terms of compatibility. In the evolutionary process, the 1999 Arrest Convention came on the heels of the 1993 MLM. As might have been expected, the CMI played a lead role in the whole law reform exercise. The CMI attempted to articulate the differences between the terms ‘arrest’ and ‘attachment’ in the Lisbon draft to the Arrest Convention 1999 by a deeming provision that read: “‘Arrest’ includes ‘attachment’ or other conservatory measures, but does not include measures taken in execution or satisfaction of an enforceable judgment or arbitral award.” However, it was not approved by the conference and a definition close to the one in the Arrest Convention 1952 was finally adopted. In Article 1 (2) of the 1999 Convention, ‘arrest’ is so defined as to cover Mareva injunctions while Article 2 (3) confirms that the device of arrest may be used where a state other than the arresting state has jurisdiction over the claim.⁴⁶

3.2. Implementation of the Conventions

Establishing the perfect international instrument of arrest does not guarantee the uniformity of its application in different national jurisdictions. The importance of the process of implementation and enforcement is thus self-evident.

⁴⁵ Brussels International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926, Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. I, p.245; International Convention on Maritime Liens and Mortgages, 1993, UN Doc. A/CONF. 162/7/33 ILM 353.

⁴⁶ Baughen, *supra* note 8, p. 369.

There are three different scenarios on how international conventions should be handled. In the first scenario, where a country has its own legislation on arrest of ships and has not become a party to any convention, the norms of any convention law on arrest of ships would not apply. As an example, Turkey has enacted national legislation on ship arrest through its Commercial Code, which reflects the main attributes of international practice. However, the approach taken is rather conservative in that a ship can be arrested only for the debts of the shipowner, except maritime liens. In most cases security is required in the form of a bank guarantee or cash deposit for an amount not exceeding 20-40% of the maritime claim. In so far as maritime liens are concerned, Turkey has implemented the 1926 MLM Convention.⁴⁷

In the second scenario there are those countries which are not parties to any convention, but they extract the substantive provisions of a convention and apply their own procedural laws on ship arrest. For example, Ukraine has included provisions of the 1999 Arrest Convention into the Merchant Shipping Code of Ukraine, 1995 without ratifying the Convention.

In the third scenario, there are those countries which have chosen to be a party to a convention and have given effect to it through national law as dictated by the domestic constitutional law relating to domestic implementation of treaties. As mentioned earlier, there are two major systems through which the implementation process can be carried out, namely the monistic and dualistic approaches.⁴⁸ In terms of different methods of implementation there could be other varieties as well. The dialectic method was used in Soviet Union and continues to be used in Russian Federation and communist systems.⁴⁹

⁴⁷ M. Baris, Gunay, The Turkish Commercial Code, January 2007, 38 *Journal of Maritime Law & Commerce* 83; Brussels International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, 1926.

⁴⁸ Dixon, M., "Textbook on International Law", (3rd Edition, London, 1996), Chapter 4; Brownlie, I., "Principles of International Law", (5th Edition, Oxford, 1998), Chapter 2.

⁴⁹ Engels, F. (7th ed., 1973). *Dialectics of nature* (Translator, Clements Dutt). New York: International Publishers. (Original work published 1940). Jordan, *The Evolution of Dialectical Materialism*, pp. 188–90; also Herbert Marcuse, *Soviet Marxism: A Critical Analysis* (New York: Vintage Books, 1961); J.V. Stalin, 'Dialectical and Historical Materialism', in J.V. Stalin, *Problems of Leninism* (Peking: Foreign Languages Press, 1976), pp. 835–73.

3.2.1. The 1952 Arrest Convention

For example, several countries have given effect to the 1952 Convention through national legislation. Such as Algeria, Belgium, Benin, Cameroon, Congo, Croatia, Egypt, France, Gabon, Germany, Greece, Haiti, Ireland, Italy, Latvia, Morocco, The Netherlands, Poland, Portugal, Russian Federation, Slovenia, Spain, Tchad ⁵⁰ and Ukraine.

Some other countries have implemented the 1952 Convention by incorporating in whole or in part its provisions into their national law. They include China - Hong Kong Special Administrative Region (hereinafter China – Hong Kong), Denmark, Finland, Nigeria, Norway, Sweden and the United Kingdom. They also include the former and present British colonies of the Caribbean: Anguilla, Antigua and Barbuda, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines and the Turks and Caicos Islands. Anguilla, British Virgin Islands, Cayman Islands, Montserrat and the Turks and Caicos Islands are at present known as British overseas territories.⁵¹

Problematic situations do arise involving the 1926 MLM and the 1952 Arrest Convention. If, for example, the court of a state party to both Conventions had to deal with an application for the arrest of a ship flying the flag of a state party only to the 1926 MLM Convention in respect of a claim secured by a maritime lien which is not a maritime claim under the Arrest Convention, the MLM Convention would prevail and the arrest would be allowed. If the flag state is also a party to both Conventions, the Arrest Convention would prevail and the arrest would be denied.⁵²

3.2.2. The 1999 Arrest Convention

According to Article 8 of the 1999 Arrest Convention, it applies only to states, which are parties to it and ships within their jurisdictions. Obviously, if there is a conflict regarding the obligations of a state under two different Conventions it can be

⁵⁰ Berlingieri, *supra* note 33, at p. 21.

⁵¹ Berlingieri, *supra* note 33, at p. 30.

⁵² See Article 30 (4) (b) of the Vienna Convention on the Law of Treaties, 1969.

highly problematic. To avoid this situation, states parties to the 1952 Convention must denounce⁵³ it before implementing the 1999 Convention. In this regard, a distinguished author makes the following comment:

Where for example a claimant seeks to arrest in any State party to both the 1952 and the 1999 Conventions a ship flying the flag of State party only to the 1952 Convention in respect of a claim that is enumerated in article 1(1) of the 1999 Convention but not in article 1(1) of the 1952 Convention (e.g. a claim in respect of insurance premiums), the arrest would entail a breach by the State in question of its obligations under the 1952 Convention, while the refusal to grant the arrest would entail a breach of the 1999 Convention. The question that might arise in such case is whether the claimant would be entitled to claim damages against that State.⁵⁴

In the above context an important observation is that in the ordinary course, states cannot be forced to denounce a convention to which they are parties, unless an express provision to that effect is inserted in the later convention, where a potential conflict with the earlier convention is anticipated. Where such express provision is not inserted, the legal position is dictated by the Vienna Convention on the Law of Treaties 1969.⁵⁵

3.3. Scope of application

According to Article 2 of the 1952 Arrest Convention, a sea-going ship flying the flag of a state party to the Convention can be arrested only within the jurisdiction of a contracting state for a listed maritime claim. Pursuant to the 1952 Convention, a claimant has the right to arrest a ship in respect of a maritime claim in the

⁵³ Review of Maritime Transport Report 2011, UNCTAD, Chapter 5 Legal Issues and Regulatory Developments, p. 110.

⁵⁴ Berlingieri, *supra* note 33, at p. 35.

⁵⁵ See Articles 55, 59 of the Vienna Convention on the Law of Treaties, 1969.

jurisdiction of a contracting state irrespective of whether or not the court has jurisdiction to adjudicate on the merits of the case. In any event, jurisdiction must be accepted in the cases listed in article 7(1) of the Convention unless the parties have agreed to submit the dispute to the jurisdiction of a different court. Refusal to exercise jurisdiction on the merits (but not in respect of the arrest) will instead be permitted under article 7(2) of the 1999 Convention, provided a court of another state accepts jurisdiction.⁵⁶

The 1999 Convention entered into force in September 2011 when the required number of ratifications was reached. So far, 10 states have agreed to be bound by it. They are Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and Syrian Arab Republic.⁵⁷ Contrary to the 1952 Arrest Convention, Article 8 the 1999 Convention provides that it shall apply to any ship within the jurisdiction of a state party to the Convention. Therefore, a ship flying the flag of a non-state party to the 1999 Convention, would be subject to the Convention when it is in the waters of a state party to the Convention unless it has made specific reservations to the contrary. This will be the case irrespective of the nationalities of the parties in dispute and any law and jurisdiction provision they may have agreed between them, subject, however, to the provisions of Article 28 of UNCLOS.⁵⁸

Article 10 allows states to make certain reservations when ratifying the Convention. For instance, the Kingdom of Spain has reserved the right not to apply the rules of the Convention to ships, which do not fly the flag of another 1999

⁵⁶ Berlingieri, *supra* note 33, at p. 24.

⁵⁷ Status as at: 30-08-2012 http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&lang=en.

⁵⁸ Article 28 of UNCLOS.

1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Convention state.⁵⁹ Given that Spain is also a party to the 1952 Convention, such reservation would be helpful in maintaining the obligations in respect of ships flying the flags of other 1952 Convention states. However, local Spanish practitioners suggest that the Spanish Court will not exercise the right not to apply the 1999 Convention to ships flagged in non-state parties in consideration of an amendment to the Spanish Procedural Law Act.⁶⁰ The paradox is that ships flying the flags of state parties to the 1999 Arrest Convention can be arrested in Spain.

The Conventions were designed as a compromise between the states traditionally representing shipowning interests and those, such as the United Kingdom, whose aim was to simplify the enforcement of legitimate maritime claims without creating undue impediment to trade.⁶¹

The following case presented in synoptic form exemplifies how courts have dealt with the application of the 1952 Arrest Convention in such situations. In *The Yuriy Dvuzhilny*,⁶² the plaintiffs Morsviazsputnik Satellite Communications and Navigational Electronic Aids applied to the Court of Appeal of Genoa for the arrest of the Ukrainian m.v. *Yuriy Dvuzhilny* as security for a claim against the defendant Azov Shipping Co. One of the issues submitted to the Court was whether the Convention applied to a ship flying the flag of a non-contracting state and in respect of what claims the arrest was permissible. The Court held that-

The 1952 Arrest Convention applies in respect of the arrest requested by a foreign company that does not have its principal place of business in Italy since Italy has not exercised the option granted by Article 8(3).⁶³

⁵⁹ http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&lang=en

⁶⁰ Deering B., Reese J., An overview of the 1952 and 1999 Arrest Conventions//INCE & Co. Shipping E-Brief, 2011 at <http://incelaw.com/documents/pdf/strands/shipping/shipping-e-brief/shipping-e-brief-october-2011.pdf>.

⁶¹ Gaskell, N., Shaw, R., 'The Arrest Convention 1999', [1999] LMCLQ 470-490, at p. 471.

⁶² *Morsviazsputnik Satellite Communications and Navigational Electronics Aids v. Azov Shipping Co. - The Yuriy Dvuzhilny* (2001 Dir. Mar. 1113).

⁶³ Official web-page of CMI <http://www.comitemaritime.org/The-1952-Arrest-Convention/0,2794,19432,00.html#Anchor-Maritime-64517>.

It is thus apparent from the above decision that the main purpose of the Arrest Convention 1952 is to limit the possibilities of arrest of seagoing vessels flying the flag of a contracting state only to the maritime claims exclusively specified in Article 1.⁶⁴

⁶⁴ Hill, C. *Arrest of Ships*. London: Lloyds of London Press, 1985, p.52.

CHAPTER IV

MARITIME CLAIMS – HISTORY AND LEGAL DEFINITION

It is evident from the history of the 1952 Convention that there have been conflicting views among the CMI national associations regarding the claims in respect of which a ship may be arrested.⁶⁵ The view of the associations of the civil law countries was that arrest should be permissible in respect of any claim; the view of the associations of the common law countries and particularly of the British Association was that arrest, as in England, should be permitted only in respect of specific claims of a maritime nature.⁶⁶ As already indicated, the former view first prevailed but then the second was accepted to such an extent that in the draft approved in Paris in 1937, reference was made only to arrest in respect of claims arising out of a collision. At the Amsterdam Conference of 1949 the suggestion was made to reach a compromise by adopting the English approach whereby arrest was only permitted in respect of claims of a maritime nature and by permitting the arrest not only of the ship in respect of which the claim arose, but also of any other ship in the same ownership.⁶⁷

4.1. The List of Claims in the 1952 and 1999 Arrest Conventions

The wording of the “chapeau” in Article 1 (1) has prompted different state parties to adopt divergent views on whether the list is “open” or “closed”. For example, in the legislation of the Scandinavian countries a “maritime claim is a claim which is based on/have one or more of the following circumstances/causes. The national statutes of the United Kingdom and Nigeria have the wording: “The Admiralty jurisdiction of the High (Federal) Code shall be as follows, - (a) jurisdiction to hear and determine any of the questions and claims mentioned in

⁶⁵ Ripert “Les Conventions de Bruxelles du 10 Mai 1952 sur l’Unification du Droit Maritime”, (1952) DMF 343, at p.354.

⁶⁶ Pasani, “Il Progetto di Convenzione Internazionale per la Unificazione delle Regole in Materia di Sequestro di Navi”, 1952 Dir Mar 316, at p. 318.

⁶⁷ Neil, L.J. in *The Deichland* [1989] 2 Lloyd’s Rep 113, at p.117.

subsection (2) relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2.⁶⁸

The Russian Federation has given the force of law to the 1952 Arrest Convention and adopted, with certain variations, some of its provisions in its Merchant Shipping Code. In view of the fact that the list of maritime claims in Article 389 of that Code is based on Article 1(1) of the 1999 Arrest Convention, they will be considered in connection with the review of the national laws that have adopted it. The maritime claims listed in Article 389 of the Merchant Shipping Code (the claims are neither lettered nor numbered) are preceded by the chapeau: “A maritime claim shall be deemed to be any claim arising out of”.⁶⁹

4.2. Individual maritime claims

Damage caused by a ship either in collision or otherwise *versus* loss or damage caused by the operation of the ship

The term “damage” used in the 1952 Convention includes total loss as in the 1910 Collision Convention⁷⁰ and the Civil Jurisdiction Convention, 1952.⁷¹ The words “or otherwise” cover the situation where damage is caused by one ship to another without physical contact such as by backwash of the propeller or by creating a situation of danger through a negligent or hazardous manoeuvre causing damage.⁷² It can also cover pollution damage as defined in the International Convention on Civil Liability for Oil Pollution Damage, 1992 and damage caused by hazardous or noxious substances as defined in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and

⁶⁸ See Berlingieri, *supra* note 33, at p. 46-47; Merchant Shipping Act of Denmark; Maritime Code of Norway; Maritime Code of Sweden; Maritime Code of Finland; Admiralty jurisdiction Act of Nigeria; Senior Courts Act 1981.

⁶⁹ Berlingieri, *supra* note 33, at p. 51; Merchant Shipping Code of the Russian Federation, 1999.

⁷⁰ International Convention for Unification of Certain Rules of Law related to Collision between Vessels and Protocol of Signature, adopted on September 23, 1910 and in force as March 1, 1913.

⁷¹ The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, adopted at Brussels on May 10, 1952 and in force as of September 14, 1955.

⁷² The proposal of the British Association in relation to the decision of the House of Lords in the case *The Eschersheim* [1976] 2 Lloyd's Rep.1.

Noxious Substances by Sea, 1996.⁷³

In the 1999 Convention the wording was changed in order to bring it in line with the 1993 MLM Convention, Article 4(1)(e). However, the scope of a maritime claim is exactly the same as that of the corresponding maritime lien, but the purpose is to establish the minimum scope. The word “operation” includes, *inter alia*, maintenance, navigation and commercial employment of the ship, whether in a liner service, or by a time or voyage charter party or otherwise. This maritime claim, therefore, overlaps several other maritime claims such as those under Article 1 (1)(c), (d) and (h).⁷⁴ It should be noted, that this provision includes claims for economic loss.

Loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship *versus* loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship

The analysis of this claim would be that it covers events occurring on board both when the ship is the actual instrument by which the damage was done and also when it is not.

The wording of this maritime claim was changed in the 1999 Convention to make it consistent with the MLM Convention 1993, especially the word “direct”.⁷⁵

Salvage *versus* salvage operations or any salvage agreement including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment

According to this provision, the claimants could be both salvors for salvage reward and owners of the salvaged vessel on account of damage or delay due to the negligence of salvors. In the discussions leading up to the adoption of the 1952 Convention, the issue of the definition of “vessel” was raised.⁷⁶ The notion of

⁷³ International Convention on Civil Liability for Oil Pollution Damage, 1992 (hereinafter – CLC 1992); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter – HNS).

⁷⁴ Berlingieri, *supra* note 33, pp. 51-52, 55-56.

⁷⁵ Berlingieri, *supra* note 33, pp. 58, 61.

⁷⁶ CMI –Monreal II, Article 1-1(2), p.40.

salvage in common law jurisdictions include both services rendered to a ship afloat or aground and refloating of the sunken ship and cargo. In civil law jurisdictions refloating, wreck removal and finding of derelicts are excluded. According to the International Convention on Salvage, 1989⁷⁷ a vessel is “any ship, craft or structure capable of navigation”, including any vessel which is stranded, left by its crew or sunk. A compromise was reached among the countries not to include these words, which, however, failed to ensure clarity. The terminology was changed in the 1999 Convention to make it consistent with the 1989 Salvage Convention, which included “expenses” described under Article 14 of this Convention, referred to as “special compensation”; or a salvage agreement, such as the LOF.⁷⁸

Damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d).

There are no such provisions in the 1952 Arrest Convention. However, in recent years the environmental concerns of the international community have grown, which is reflected in UNCLOS and CLC 1992. This was also taken into account when drafting the new Convention. There were discussions at the CMI meetings in connection with the terms “environmental damage”,⁷⁹ “measures taken to prevent, minimize or remove such damage”⁸⁰ and “damage, costs, or loss of a similar nature to those identified in the subparagraph (d)”. The last expression has the concept of an “open” list of claims for environmental damage, which may raise doubts in the interpretation of these provisions by national legislatures and courts.

Costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or

⁷⁷ See Article 1 (b) of the International Convention on Salvage, 1989 (hereinafter - SALVAGE).

⁷⁸ Lloyd’s Standard Form of Salvage Agreement (LOF 2000).

⁷⁹ UNCLOS Article 211 (1) “marine environment”.

⁸⁰ Article 7 (1) CLC 1992 “preventive measures”.

abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew

These new provisions were included in the 1999 Arrest Convention. Even though it is unlikely that a ship will be arrested in respect of such claims, the concept will work in close connection with Article 1 (d) “damage to the environment”, particularly when the “threat” of environmental damage and sistership arrest might be relevant.

Agreement relating to the use or hire of any ship whether by charterparty or otherwise *versus* any agreement relating to the use or hire of the ship, whether contained in a charterparty or otherwise

The scope of this provision is closely connected with carriage of goods and loss or damage to goods, including baggage. The terms "use" or "hire" are contextually synonymous and entail placing a thing at the disposal of the person. In shipping "hire" is more frequent; however, “use” is applied in some cases, such as salvage agreements or carriage of goods without reward or management agreements for use of the ship. The other term "carriage" means providing a service. The new Convention did not change the scope of this sub-paragraph.

Agreement relating to the carriage of goods in any ship whether by charterparty or otherwise *versus* any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charterparty or otherwise

The new Convention has improved the wording of the sub-paragraph by referring to "any agreement" and on board of "the" ship. This will help to avoid disputes which arose in the past in connection with the type of agreement and its relation with the particular ship or one or more ships.⁸¹ In view of rapid growth in cruise shipping, Article 1(f) of the 1999 Arrest Convention now covers agreements for carriage of passengers.

⁸¹ Berlingieri, *supra* note 33, at p. 80, see also *MSC Mediterranean Shipping Company SA v. The Owners of the Ship "Tychi"* [1999] 2 Lloyd's Rep 11; *The Sonia S* [1983] 2 Lloyd's Rep 63; *The Lloyd Pacifico* [1995] 1 Lloyd's Rep 54.

Loss or damage to goods including baggage carried in any ship *versus* loss of or damage to or in connection with goods (including luggage) carried on board the ship

The question arises as to whether the loss or damage should be limited to physical loss or damage. National courts have been known to include mis-delivery in this provision, such as in the case of *Sottocasa v. Tirrenia di Navigazione SpA*.⁸² The new Convention adds economic loss and damage for delay to the subparagraph by the words “or in connection with goods”. It is also important to note that the definite article “the” is used instead of “any”.

General average

This sub-paragraph is not of any great practical significance as such claims fall under the previous sub-paragraph.

Bottomry

This claim was considered an anomaly and was therefore excluded from the new Convention. However, it is notable that bottomry still exists in several jurisdictions and the phenomenon is to be found in the national legislation of several countries including Hong Kong, Finland, Nigeria, and the United Kingdom.⁸³

Towage and pilotage

These claims cover damage caused by a tug to its tow or *vice versa*, and can include non-performance of the contract. Reference is made to the type of services rendered.

Goods or materials wherever supplied to a ship for her operation or maintenance *versus* goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance

⁸² *Sottocasa v. Tirrenia di Navigazione SpA*, Tribunal of Naples (1951) Dir Mar.

⁸³ See section 4(8) in chapter 4 of the Maritime Code of Finland; Section 2(2)(o) of the Admiralty Jurisdiction Act of Nigeria; Section 20(1) of the Senior Courts Act 1981 of United Kingdom.

Under the Admiralty jurisdictions of common law countries, this claim is considered to be a claim for “necessaries”.⁸⁴ The distinction *vis-a-vis* the 1926 MLM Convention is that the materials could be supplied in the homeport and away from it and ordered not only by the master, but by any person, including the shipowner himself.⁸⁵

The 1999 Convention clarified the scope of this sub-paragraph by including ‘hire (lease) of containers as well as services such as mooring, fireguard, surveys by classification societies.’⁸⁶ The extension of this provision by the use of the words “provisions, bunkers, equipment...” will certainly benefit the supply companies and ship managers.

Construction, repair or equipment of any ship or dock charges and dues *versus* construction, reconstruction, repair, converting or equipping the ship

The nature of these claims is the opposite of supplies and operational services. The new Convention added the wording “reconstruction and converting” to bring it in line with the 1993 MLM Convention and moved “dock charges and dues” to a new sub-paragraph (n) “*Port, canal, dock, harbour and other waterway dues and charges*”.

Wages of masters, officers or crew *versus* wages and other sums due to the master, officers and other members of the ship’s complement in respect of their employment on the ship, including costs of reparation and social insurance contributions payable on their behalf

The new Convention attempted to clarify the previous wording of this sub-paragraph, which was examined by the English courts in various decisions such as *The Gee Whizz*⁸⁷, *The Arosa Star*⁸⁸, *The Fairport*⁸⁹, *The Tacoma City*.⁹⁰ The wording

⁸⁴ See Administration of Justice Act 1956 and section 20 (2)(m) of the Senior Courts Act 1981 of the United Kingdom.

⁸⁵ Berlingieri, *supra* note 33, at p. 100.

⁸⁶ Berlingieri, *supra* note 33, at p. 101, 105; See also the case *The River Rima* [1988] 2 Lloyd’s Rep 193.

⁸⁷ *The Gee Whizz* [1951] 1 Lloyd’s Rep 145.

⁸⁸ *The Arosa Star* [1959] 2 Lloyd’s Rep 396.

⁸⁹ *The Fairport* [1965] 2 Lloyds Rep 183.

⁹⁰ *The Tacoma City* [1990] 1 Lloyd’s Rep 408 and [1991] 1 Lloyd’s Rep 330.

was taken from the 1993 MLM Convention.

Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner *versus* disbursements incurred on behalf of the ship or its owners

According to the wording of the sub-paragraph disbursements made on behalf of the bareboat charterer or voyage charterer do not qualify as maritime claims unless they are made in respect of the ship and not on behalf of the owner.⁹¹ Agency fees and fees of the manager of a ship are not disbursements and are not considered as maritime claims.⁹² Regarding this sub-paragraph, Professor F. Berlingieri in his commentaries on the 1952 Arrest Convention has stated as follows:

The wording is at the same time too wide and too narrow. It is too wide because disbursements made by shippers may not relate to the operation of the ship and if they do not, they are not maritime claims. It is too narrow because there are disbursements incurred on behalf of the ship that are not incurred by charterers or agents and because the disbursements incurred by charterers and agents are not "included" in those incurred by the master.⁹³

Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer

The 1952 Convention does not include insurance premiums as being the subject of a maritime claim. The 1999 Arrest Convention has rectified that situation, providing in Article 1(1)(q) enforcement of unpaid insurance premiums (Hull and Machinery), including Protection and Indemnity Club's (P & I Club) calls for mutual insurance. However, according to some, the nature of a claim is not easy to understand. This prompted the Australian delegate at the negotiations to request a

⁹¹ Delaware Shipping Corporation v. CNAN (*The "Tabessa"*), (1989), DMF 704.

⁹² *The Westport* [1966] 1 Lloyd's Rep 342; Greece, Single Member First Instance in Piraeus, Decision No.8647/1979 (1985) 9 Maritime Law Review 6.

⁹³ Berlingieri, *supra* note 33, at p.120.

clarification from the CMI on the question of which kinds of insurance premiums are coverable and who is to be responsible. The CMI clarified, that “the manner in which the premium is calculated is irrelevant, however, it must be related to the ship the arrest of which is requested.”⁹⁴ Due to the wording “insurance premiums...in respect of the ship” all types of mutual insurance, which basically cover third party liability, would be included (liabilities in respect of passengers, seamen and third parties, damage of property, liability for pollution, liabilities in respect of wreck removal, etc.).⁹⁵ The person responsible for these claims is the one who operates the ship, whether he is the owner or the demise charterer.

Any commissions, brokerage fees payable in respect of the ship by or on behalf of the shipowner or the demise charterer

This provision exists only in the 1999 Arrest Convention. It is important to note the wording “in respect of the ship”, which may include commissions and brokerage fees in relation to insurance, contracts for the hire or use of the ship, carriage of passengers, towage, salvage, and agency fees. However, the practice of some national courts is to recognize the rights of claimants to arrest a ship under the Arrest Convention 1952.

The Tribunal de Commerce of Aiaccio in 19 October 1999 accepted the claim of the plaintiff in *Cruise Holding Ltd. and Others against Southern Cross Cruises S.A.* and ordered the arrest of the m.v. *Islandbreeze*⁹⁶ in the port of Aiaccio as security for a claim in respect of brokerage fees. The owners applied for the revocation of the arrest. The Tribunal de Commerce of Aiaccio held that “the claim for brokerage commissions in respect of charter party is a maritime claim covered by Art. 1(1)(d) of the 1952 Arrest Convention.”

Another example is the order of the Tribunal of Bari in Italy, on 19 July 2002 for the arrest of the *Sea Serenade*, owned by Bellatrix Shipping Co. as security for claims against Poseidon Shipping Lines, the operators of the ship, arising out of an

⁹⁴ *Ibid.* at p. 121.

⁹⁵ *Ibid.* at p. 122.

⁹⁶ *Cruise Holding Ltd. and Others v. Southern Cross Cruises S.A. (The “Islandbreeze”)*, 2000 DMF 32.

agency agreement consisting mainly of severance indemnity. Bellatrix Shipping Co. requested that the ship be released from arrest on the ground, *inter alia*, that the claim was not a maritime claim under the 1952 Arrest Convention. The Tribunal of Bari held that:

The claim of a maritime agent is a maritime claim covered by article 1(1)(n) of the Arrest Convention even if it is mainly related to matters not directly related to the call of ships at the port where the agent operates.⁹⁷

Disputes as to the title or to ownership of any ship *versus* any dispute as to ownership or possession of the ship

In the new Convention the wording of the sub-paragraph was changed by adding “possession” of the ship and deleting the repetitive concepts of ownership and title.

Disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship *versus* any disputes between co-owners of the ship as to the employment or earnings of the ship

The difference with the previous claim is that it covers disputes between the co-owners and not disputes between the owner and the third party who alleges to be the actual owner of the ship. According to section 1 (1)(b) of the Administration of Justice Act 1956 “co-owners” include both joint ownership of a ship and shares in a ship. The language of the sub-paragraph was corrected in the new Convention, but there are still some disputes which are not covered, such as those relating to sale or mortgage.

The mortgage or hypothecation of any ship *versus* a mortgage or a “hypothèque” or a charge of the same nature on the ship

It would be more precise to use the wording “claims secured by a mortgage”, as the claim does not arise from a mortgage, but out of the contract such as a loan

⁹⁷ *Morfimare S.r.l. v. Poseidon Shipping Lines and Bellatrix Shipping Company (The “Sea Serenade”)*, (2004 Dir. Mar. 1424).

agreement in respect of which the mortgage is executed.⁹⁸ In England, the contention of a mortgagee that the sale price of bunkers should be included in the sale price of the ship and paid to them was rejected in *Den Norske Bank A/S v. The Owners of the Ships "Eurosun" and "Eurostar"*.⁹⁹ The clarification was also made to the qualification of claims arising from mortgages and charges, as they do not need to be registered or they may not even be registrable.

Any dispute arising out of the contract for the sale of the ship

This provision was added to the 1999 Arrest Convention in order to protect the interests of the buyer or seller, whose rights were abused by the other party in a contract of sale of the ship (such as failure to transfer the possession of or title to the ship or non-payment of the purchase price). Pre-contractual damages do not fall within the scope of the definition of maritime claim.

According to the 1926 and 1993 MLM Conventions the following claims (expressed in synoptic form) are maritime liens:

Legal costs, expenses to preserve the vessel, dues (port, canal, waterway and pilotage) and taxes;

Claims arising from the contract of engagement of master, crew and other persons hired on board;

Remuneration for salvage, contribution in general average, indemnities for collisions, damage to harbours;

Loss of life and indemnities for personal injury;

Loss or damage to cargo, containers and/or baggage;

Contracts entered into by the master acting within the scope of his authority, away from the vessel's home port, when necessary for the preservation of the vessel or continuation of its voyage.

This means that they are ranked at the top when it comes to their enforcement.

It goes without saying that the intentions of the drafters of international

⁹⁸ Berlingieri, *supra* note 33, at para. 3.482.

⁹⁹ *Den Norske Bank A/S v. The Owners of the Ships "Eurosun" and "Eurostar"* [1993] 1 Lloyd's Rep 106.

conventions do not always coincide with those of the drafters of national legislation when it comes to implementation of a particular international instrument. Also, there could be differences in the interpretations given by national courts in respect of maritime claims. It has been alleged that in transforming the 1952 Convention into UK legislation through the Administration of Justice Act 1956, the convention has been misconstrued.¹⁰⁰ In practical terms, it appears that Egyptian courts are not very forthcoming when it comes to orders for ship arrest and they do not even rely on substantial evidence provided in support of a claim, especially if the claim is quantitatively small. The courts of Alexandria have been known to give a restrictive interpretation to Article 1 (4) of the 1952 Convention.¹⁰¹

The 1999 Arrest Convention has widened the list of maritime claims considerably, but it still remains closed. However, a small compromise was made in respect of “damage to the environment” by the use of the words “damage, costs, or loss of a similar nature” in Article 1 (1)(d). The rationale was that it is a new category of claims, which will evolve in the near future.

¹⁰⁰ Gaskell N., Christodoulou D., Implementation of the 1952 Arrest Convention. Source web-site of the British Maritime Law Association at <http://www.bmla.org.uk/>.

¹⁰¹ Berlingieri, *supra* note 33, para. 4.67.

CHAPTER V

PROCEDURES AND RULES REGARDING ARREST, REARREST, RELEASE AND COUNTER SECURITY

5.1. Arrest procedure

One of the important questions in the arrest procedures, both theoretical and practical, is whether the ship can be arrested when it is about to set sail or is already under way. Under French law, a ship “prêt a faire voile” cannot be arrested.¹⁰² The dispute was resolved during the conference; through Article 3(1) of the 1952 Convention, arrest was allowed even when a ship was ready to sail. During the discussions leading up to the adoption of the new Convention, the CMI went even further by giving the right to arrest the ship not only when it is “ready to sail” but also when it “is sailing”. The critics of this provision point to Article 28 of UNCLOS, which, as mentioned earlier, restricts the rights of a coastal state to arrest a ship for civil matters. However, it allows “arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters”. Eventually, the CMI proposal was removed from the 1999 Arrest Convention, leaving the matter of arrest-related procedures to national legislation. In this writer’s opinion, this may be considered a step backward from moving towards a claimant friendly direction.

According to Article 3 of the 1952 Arrest Convention the plaintiff can exercise the right of arrest on the basis of the assertion that a maritime claim exists. Security can be granted without investigation into whether or not liability has been established. Be that as it may, there are some principles that need to be emphasized.

5.1.1. Arrest against the debts of the shipowner

Article 3(1) of the 1952 Arrest Convention provides that arrest of a particular ship is allowed in respect of which the maritime claim arose and there is no need for

¹⁰² Article 215 of Code de Commerce; See Mongalvy M., Germain M. *Analyse raisonnée du Code de commerce*, Volume 1. Paris. 1824. p. 325.

establishing personal liability. This concept was changed in the new Convention which requires the shipowner to be personally liable for the maritime claim and to be also the owner at the time of the arrest. It means that according to Article 3(4), the right of arrest can be exercised only on the ship owned by the personal debtor, unless the claim is secured by a maritime lien.¹⁰³ However, interpretation of the provisions in some jurisdictions is different. For example, Belgian courts permit arrest even if the ship is no longer under the ownership of the person who is liable for the maritime claim. This decision contradicts Article 9 of the 1952 Convention and was quashed by the Cour de Cassation.¹⁰⁴ In Greece if the ship is not owned by the debtor at the time the arrest is made, it is null and void¹⁰⁵ except where the claim is secured by a maritime lien and where the ship is sold as part of a going concern, since in such a case the purchaser is responsible for the debts arising out of the management of such concern.¹⁰⁶

The 1999 Arrest Convention allows an arrest only when the (registered) owner or demise charterer is personally liable,¹⁰⁷ or the claim is based on a mortgage or “hypothèque”¹⁰⁸ or disputes about ownership and possession, or the claim is against the owner, demise charterer, manager or operator of the ship is secured by a maritime lien under the law of the *forum arresti*.¹⁰⁹ Comparing this text with the 1952 Convention shows that the right of action *in rem* is greatly restricted. The lien does not allow the arrest of a ship for the debts of the time-charterer, voyage charterer or other similar entities.

¹⁰³ This is the view of Professor Berlingieri (See Berlingieri, *supra* note 33, at p. 213); however, it is well established that a ship can be arrested in the hands of a new owner, where the claim travels with the ship, such as an unpaid mortgagee.

¹⁰⁴ Walter P. Verstrepen, ‘Arrest and judicial sale of ships in Belgium’, [1995] *LMCLQ* p. 131-153, at p. 143. “Omalia” and “Heinrich J.” cases (Wim Fransen, “Principes généraux de droit maritime”, Université Libre de Bruxelles).

¹⁰⁵ Piraeus Single Member Court of First Instance, judgment 25/1974, END 1984, 71.

¹⁰⁶ But See a comment in footnote *supra* 31, 32.

¹⁰⁷ See Article 3 (1) (a) and (b) of the 1999 Arrest Convention.

¹⁰⁸ Both “registered” and “registrable”. See Gaskell N. and Shaw R., *supra* note 61, at pp. 477-478.

¹⁰⁹ See Article 3 (1) (c) – (e) of 1999 Arrest Convention.

5.1.2. Arrest against the debts of the demise charterer

According to the 1952 Convention Article 3(4), the ship can be arrested for a claim against the demise¹¹⁰ charterer when “the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship”. The 1952 Convention permitting arrest for claims against the demise charterer was a principal reason why the Scandinavian countries initially did not enter the Convention.¹¹¹ In fact, it is not very practical, to allow arrest for a claim which cannot later be enforced against the ship. On the other hand, it would not make any sense as the owner of the vessel can still collect hire when the ship is arrested for a claim for which the demise charterer is responsible. This will leave no choice for the former to provide security and release the ship.

The above-mentioned provision has been characterized as “controversial and difficult to interpret”¹¹² in the case if the time and voyage charterers are involved. The criticism was made by the courts in *The Span Terza*,¹¹³ where it was held that the arrest applies on the time charterers, although dissenting opinion confined the interpretation of demise charterers; and in *The Tichy*,¹¹⁴ where slot charterers were specified as voyage charterers.

5.1.3. Sister ship arrest

The concept of the sister ship arrest is found in both arrest Conventions.¹¹⁵ It allows for the arrest of a ship or ships other than the “particular” ship, if the person

¹¹⁰ The terms “demise charterer” and “bareboat charterer” are equivalent and are used alternatively in maritime Conventions. While “demise charterer” (or “charterer by demise”) is used in the two Arrest Conventions and in the International Convention on Maritime Liens and Mortgages 1993 (Article 4.1), “bareboat charterer” is used in the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Article 1.3) and in the UN Convention on Conditions for Registration of Ships 1986 (Articles 11 and 12).

¹¹¹ Rui, S.A. “Arrest av skip. Etter Norges tiltredelse av arrestkonvensjonen av 1952 [“Arrest of vessels. After Norway’s accession to the Arrest Convention of 1952” (translation by Falkanger)] (1995) Marlus 211 at page 5, 6 with references to the report of the Norwegian delegation.

¹¹² See 1998 Report of the Scottish Law Commission, referred to in the answer to question 1, at p. 164.

¹¹³ *The Span Terza* [1982] 1 Lloyd’s Rep. 225.

¹¹⁴ *The Tichy* [1999] 2 Lloyd’s Rep. 11.

¹¹⁵ Article 3 (1) of the 1952 and Article 3 (2) of the 1999 Arrest Conventions.

who owns them is liable for the maritime claim. The relevant provision in the new Convention, however, is more clearly drafted; as it covers also the situation when the ship or ships are owned by demise charterer, time charterer or voyage charterer of that ship.

The practical problem, which is not covered by the Conventions, arises when the shipowner operates the fleet by incorporating single ship companies. An attempt was made during the drafting of the new Convention to allow “piercing”¹¹⁶ or “lifting”¹¹⁷ of the corporate veil through the mechanism of utilizing the notion of “control” instead of “ownership”, or by giving the right of interpretation through national legislation. Despite the fact that the delegates recognized the importance of piercing of the corporate veil in cases of environmental damage, the proposal failed; and in the new Arrest Convention the question of ownership is to be decided under national law.

Further discussions on legal and beneficial ownership¹¹⁸ are in progress in the Legal Committee of IMO in light of the requirement of compulsory insurance or evidence of financial security.¹¹⁹

5.1.4. Arrest and forced sale

Last but not least, a new rule was introduced in Article 3 (3) of the 1999 Convention, which prohibits the arrest of a ship which is not owned by the person liable for the claim unless a sale is possible later. It is an important provision which protects the rights of shipowners, especially when a ship is arrested in a civil law

¹¹⁶ “Piercing the corporate veil” originates in the United States of America. See Blumberg, *The Law of Corporate Groups*, Boston Toronto, 1987 and 1997 Supplement; Thompson, “Piercing the corporate veil: an empirical study”, 76 *Cornell Law Review* 1036. In England this expression has been used in the case *The Aventicum* [1978] 1 Lloyd’s Rep 184, at p. 187.

¹¹⁷ See *The Maritime Trader* [1981] 2 Lloyd’s Rep 153, at p. 157.

¹¹⁸ “Beneficial ownership” of ships in maritime law refers to the ownership of a party who is not the legal or registered owner of the vessel, but who stands behind that legal and has rights over the vessel (such as corporations or holding companies).

¹¹⁹ Report of the third session of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers, LEG 83/4/1, 11 June 2001.

jurisdiction for the debts of a time charterer.¹²⁰

5.2. Rearrest

Article 3 (3) of the 1952 Arrest Convention allows the arrest of a ship in respect of the same maritime claim only once. It is a general principle in many national jurisdictions that the right of the second arrest or re-arrest cannot be granted for the same maritime claim, such as in section 93(5) of the Merchant Shipping Act of Denmark.¹²¹ This rule has been supported by jurisprudence in the judgment of the Supreme Court (Hoge Raad) in *The Kapitan Kanevskiy* case.¹²²

By contrast, the Arrest Convention 1999 in Article 5 provides the possibility of a claimant to re-arrest the ship after it has been released if the amount of security is found to be “inadequate”. It also allows for “multiple arrest” of different vessels for the provision of additional security.¹²³ Some countries have inserted these provisions of the Convention in their national legislation without ratifying the Convention, such as for instance, Article 392 of the Merchant Shipping Code of the Russian Federation, 1999.

The question of arrestor liability for losses of the arrestee as a result of the arrest is of considerable importance. There is a double purpose behind liability for unjustified or wrongful arrest; namely, prevention of abuse of the right to arrest by maritime claimants and the equitable effect of the risk involved in the pursuit of wrongfulness.

The 1952 Convention does not provide for sanctions for wrongful arrest, although it was a highly controversial issue in the negotiations leading up to the adoption of the Convention.¹²⁴ The main disagreement between the civil and common law countries was based on existing rules relating to the *lex fori*. The English system merely imposes liability if the arrest is acquired in bad faith or with

¹²⁰ Gaskell, N and Shaw, R, *supra* note 61, p. 479-480.

¹²¹ Merchant Shipping Act of Denmark No. 538 of 15 June 2004.

¹²² *The Kapitan Kanevskiy* (1994) *Nederlandse Jurisprudentie* Kort 329.

¹²³ Gaskell, N. and Shaw, R., *supra* note 61, at p. 480-481.

¹²⁴ *Travaux Préparatoires* of the 1952 Convention at pp. 370-396.

gross negligence,¹²⁵ whereas most continental civil law jurisdictions impose strict liability on the claimant for all losses.¹²⁶ The French delegate to the CMI 1951 Naples Conference, M.J. de Grandmaison, summed up the quandry by an interesting quote from Rudyard Kipling who once said: “If you hold an ox by the horn and kick it by the bottom it goes round in circles, and you get no further.”¹²⁷

New in the 1999 Convention is Article 6 (1) which provides a rule giving the Court power to decide whether the claimant has to lodge security as a condition for the arrest. However, the Convention does not provide substantive rules for wrongful arrest for the same reasons as pointed out above in relation to the 1952 Convention.¹²⁸

5.3. Release

According to Articles 3(3) and 7 (4) of the 1952 Arrest Convention the situations when the arrested ship must be released are the following:

- a) the ship had already been arrested in respect of the same maritime claim;
- b) where the owner has provided security;
- c) the claimant has failed to bring proceedings on the merits within the time bar.

There can be other conditions under which the ship may or must be released:

- d) the shipowner established the limitation fund according to the 1957

Limitation Convention, 1976 LLMC Convention and CLC 1992;

- e) judicial sale of the ship;
- f) bankruptcy of the owner.

The new Arrest Convention clarifies the existing provision, making the release mandatory when “sufficient security has been provided in a satisfactory form”.¹²⁹ As in the 1952 Convention, the court must determine the nature and amount of the security in the absence of agreement between the parties. The question is what a

¹²⁵ Jackson, D.C., *Enforcement of Maritime Claims* Third Edition London: LLP 2000 at p. 398, para. 15.118

¹²⁶ Rygh, *Travaux Préparatoires* of the 1952 Convention at p. 370.

¹²⁷ *Ibid* at 387.

¹²⁸ Berlingieri, *supra* note 33, at p. 340.

¹²⁹ Article 4 (1) of the Arrest Convention 1999.

national court will assume to be sufficient: cash, bank guarantee or a letter of undertaking from the shipowner's P&I Club.

The importance of the release procedure after provision of security (except certain cases of dispute as to ownership, possession or control of her between co-owners), which permits the ship to continue trading even when it is under arrest, is self-evident.

5.4. Provision of Counter-Security

The concept of providing for counter-security before bringing the claim to court, which is widely used in civil law jurisdictions, was not reflected in the 1952 Convention. However, there is a provision that protects the rights of shipowners which refers to the law of the contracting state with regard to the questions of claimant's liability in damages for the arrest of a ship or for the costs of bail or other security furnished to release or prevent the arrest of a ship.

Article 6 (1) of the new Convention empowers a court to impose on the claimant the obligation to give countersecurity for losses that may be incurred by the defendant as a result of the arrest and for which the claimant may be found liable. This provision should serve to reduce the number of cases of arrest motivated by bad faith, malice or gross negligence on the part of the claimant (known in the common law jurisdictions as "wrongful" arrest). The 1999 Arrest Convention also took a position prevalent in civil law jurisdictions relating to damages and imposition of counter-security in cases of "unjustified" arrest, or arrest effected erroneously, that is without proper legal foundation, but not motivated by bad faith or gross negligence.

5.5. Jurisdiction on the merits

According to the 1952 Convention the court of the *forum arresti* is allowed to determine the case on the merits. The 1999 Convention restricts the application of this provision to cases of valid jurisdictional agreements among the parties reserving the right of national courts to refuse to do so if the law of the *forum arresti* so allows.

CHAPTER VI

UKRAINIAN PERSPECTIVE

6.1. Historical and theoretical background of ship arrest in Ukraine

Ukraine is the second-largest country in Europe, with a coastline of 2,782 km, 18 maritime ports and two navigable rivers available for transportation (the Danube and Dnipro). Such a good location for logistics and port infrastructure development explains its long shipping history. In the times of the former Union of Soviet Socialist Republics (USSR), the Black Sea Shipping Company (BLASKO), established in 1833 and based in Odessa, was one of the largest shipping companies in the world and the largest in Europe. By 2006 the fleet size of the company had been drastically reduced to a fraction of its original size. Since then, it has virtually ceased to exist as a viable shipowning entity.¹³⁰ The deadweight of the fleet under the Ukrainian flag over 20 years since independence has shrunk to the extent that its ranking from 25th position has dropped to 72nd in the world.¹³¹ State shipowning entities have been replaced by a number of private companies such as Ukrriichflot, Ukrferry, Commercial Fleet of Donbass, Transship and Chernomortakhflot.

There are several ways in which ships can be restrained from sailing out of ports in Ukraine. These are as follows:

a) administrative or public arrest by the harbour master, which is conducted by the port state authorities in order to ensure safety and the sovereign rights of the coastal state. The right of such arrest is established by international convention instruments, such as UNCLOS, as well as national public law legislation;

b) preliminary arrest for securing a maritime claim pursuant to the order of a District court or Commercial court established by the provisions of private maritime law;

¹³⁰ Nitsevyich, A. and Melnikov A. Marine Transport Developments in Ukraine in its 20 Years of Independence. *Ukrainian Journal of Business Law*, 2012, No. 1. www.ujbl.info.

¹³¹ http://unctad.org/en/docs/rmt2011_anx3c_en.pdf.

c) seizure of a ship following a Court decision or arbitration award for execution of such decision or award;

d) arrest of a ship for a criminal offence.¹³²

6.2. Legal background to ship arrest

6.2.1. International Conventions

Ukraine acceded to the International Convention Relating to the Arrest of Sea-Going Ships, 1952 to which it in September 2011, with a reservation of “its right not to apply the provisions of this convention to warships and other state vessels operated with a non-profit purpose”. Is also ratified the International Convention on Maritime Liens and Mortgages 1993 on 22 November 2002.

6.2.2. National legislation

Ukraine is a civil law country, where the maritime law is governed by Acts of the Parliament (Verkhovna Rada), such as the Transport Act 1994, the Act of Exclusive (Marine) Economic Zone of Ukraine 1995, as well as by Decrees of the Cabinet of Ministers, such as the Decree on Measures to Increase Safety of Navigation 1992, the Regulation on State Registration of Foreign Vessels under Bareboat Charter 1994, and by the Merchant Shipping Code of Ukraine, 1995 (hereinafter - MSC).¹³³

Prior to obtaining independence in December 1991, Ukraine was a part of the USSR and has been greatly influenced by Soviet law. Some of the Acts enacted in those days are still partially in force, where they are not contradictory to the Constitution of Ukraine and other national legislation.¹³⁴

The norms of material law are contained in the Merchant Shipping Code of Ukraine. The MSC of Ukraine does not regulate procedure and the courts apply the

¹³² Buryachenko A.V., Korotkiy T.R., Shpilevoy K.O. Arrest of ships International legal regulation /Arest sudov mezhdunarodno-pravovoe regulirovanie. Odessa: Fenix, 2004. pp.7-9.

¹³³ Merchant Shipping Code of Ukraine, 1995, Journal of the Verkhovna Rada of Ukraine, 1995, No. 47, 48, 49, 50, 51, 52, p. 349.

¹³⁴ W.Tetley, *Maritime Liens and Claims*, 2 ed., Montreal: Les Editions Yvon Blais Inc., 1998, p.1395.

relevant norms of procedural legislation, such the Commercial Procedural Code of Ukraine and the Civil Procedural Code of Ukraine. This situation in effect deprives potential claimants of the right to enforce a maritime claim by arresting a foreign ship in a Ukrainian port.

Ukraine is a monistic state,¹³⁵ where there is no need for express legislation to implement international treaties. Such treaties and their norms have priority. Thus, in the case of the 1952 Arrest Convention, it is essential for Ukraine to enact national legislation to clarify what changes will follow the implementation of the treaty. Eventually, by reference to Article 6 of the 1952 Arrest Convention, according to which state parties must establish procedural rules of arrest, the Ukrainian Parliament amended Article 16 of the Commercial Procedural Code and Article 114 of the Civil Procedural Code of Ukraine. According to the former, the courts of the port where the ship calls or the port of the ship's registration have jurisdiction over maritime claims.¹³⁶ However, the questions of whether the court should decide the case within action proceedings or special proceedings, or are subject to the norms of provisional remedy (or security for a claim) remain unsettled. The amount of the court fees depends on whether or not it is a property claim or is simply a "dispute about arrest of the vessel". This, in turn, raises the question of whether ship arrest is to be considered a substantive matter of law or whether it falls under the procedural legislation of Ukraine. Whether the procedure for the release of a ship is to be carried out by appeal to a higher court or to the same court is uncertain.

There are contradictions between the norms of the Convention and the Merchant Shipping Code of Ukraine. The main concern of lawyers is the list of maritime claims. Article 1 of the Convention establishes the closed list of maritime claims, consisting of 17 items, while the Merchant Shipping Code of Ukraine has a list of 23 items. The Convention does not mention such claims as damage to the environment

¹³⁵ Sweet, Alec Stone and Keller, Helen, "Assessing the Impact of the ECHR on National Legal Systems" (2008). Faculty Scholarship Series. Paper 88. p. 685 http://digitalcommons.law.yale.edu/fss_papers/88.

¹³⁶ The Law of Ukraine No. 4190-VI "On amending some laws of Ukraine on the determining the jurisdiction of the court in the cases of arrest of sea going vessels", Official Bulletin of the Verkhovna Rada of Ukraine, 2012, No.29, p.342. The lack of clarity of this provision created ambiguity and convulsion with respect to the arrest of foreign ships.

(Article 42 (3)); claims for compensation and other costs for measures taken to remove or attempts to prevent the threat of damage, prevention or similar operations (Article 42 (5)); claims relating to the raising, removal or destruction of a ship which is sunk or wrecked, or its cargo and costs or expenses relating to such operations (Article 42 (6)); claims for port and dock dues and charges (Article 42 (15)); claims for insurance premiums (including mutual insurance calls) in respect of a ship payable by or on behalf of the shipowner or demise charterer Article 42 (18)); claims for commissions, brokerage or agency fees (Article 42 (19)); claims for any dispute arising out of a contract for the sale of a ship (Article 42 (23)).¹³⁷

The interesting fact is that the 1952 Arrest Convention includes a claim, which is not mentioned in the MSC; this is the bottomry claim (Article 1 (h)). This concept is not known to Ukrainian law, but is found in the British legislation and is described as follows:

Bottomry¹³⁸ - contract in the nature of a mortgage, by which the owner of a ship, or the master, as his agent, borrows money for the use of the ship, and for a specified voyage, or for a definite period, pledges the ship (or the keel or bottom of the ship, *para prototo*) as a security for its repayment, with maritime or extraordinary interest on account of the marine risks to be borne by the lender; it being stipulated that if the ship be lost in the course of the specified voyage, or during the limited time by any of the perils enumerated in the contract, the lender shall also lose his money.¹³⁹

It is recognized that bottomry is quite different from an ordinary loan. In a simple loan the money is wholly at the risk of the borrower and must be repaid at all events. But in bottomry, the money, to the extent of the enumerated perils, is at the

¹³⁷ Mashenko A. What cannot be cured, must be endured (Na suda I suda net)//*Yuridicheskaya praktika* No. 28 (759), 10 July 2012. <http://yurpraktika.com/article.php?id=100104678>.

¹³⁸ Bouvier, J. Bouvier's Law Dictionary A Concise Encyclopedia of the Law, Rawle's Revision, 8 ed. Kansas City, MO.: West Publishing Company. 1914. Vol 1., p.381-382.

¹³⁹ See *Davies & Co. v. Soelberg*, 24 Wash. 308, 64 Pac. 540.

risk of the lender during the voyage on which it is loaned, or for the period specified. On an ordinary loan only the usual legal rate of interest can be reserved; but on bottomry and respondentia loans any rate of interest, not grossly disproportionate, which may be agreed upon, may be contracted for legally.¹⁴⁰

Liens and Mortgages

Articles 358 – 365 of the MSC provide for the law of liens¹⁴¹ and mortgages. The order of ranking (liens have priority over mortgages) is as follows:

1) claims arising out of labour relationships, claims for reimbursing damage inflicted by injury, other impairment of health or death and, after said claims are paid out in full - the claims relative to social insurance as far as all said claims refer to a given vessel;

2) claims arising out of nuclear damage and marine environment pollution as well as elimination of said pollution consequences;

3) claims regarding port and canal dues;

4) claims regarding salvage rewards and payment of general average contribution;

5) claims for reimbursement of losses resulting from collision of vessels or from other sea casualty, or from damage to port facilities and other property located in the port as well as to navigational equipment;

6) claims arising out of the actions taken by the master by virtue of his lawful rights in order to preserve the vessel or continue the voyage;

7) claims for reimbursement of losses relating to cargo or baggage;

8) claims for payment of freight, and other payments due in connection with the carriage of a given cargo.

Claims regarding payment for services rendered in port are considered equal to the claims listed in paragraphs 7 or 8, depending on the property out of which they are satisfied.

¹⁴⁰ Bouvier, J. Bouvier's Law Dictionary A Concise Encyclopedia of the Law, Rawle's Revision, 8 ed. Kansas City, MO.: West Publishing Company. 1914. Vol 1., p.381-382

¹⁴¹ "Liens" correspond to the term "Preferential Claims" in MSC.

According to Article 361 of the MSC, liens rank *pari passu* as between themselves. However, claims in paragraphs 4 and 6 of Article 358 of the Code, rank in inverse order from the time they arose. Claims arising from the same event are considered simultaneous and rank *pari passu*. The time bar for liens is one year from the time when the relevant claim arose and six months for the claims mentioned in paragraph 6 of Article 358 of the Code.

Jurisdiction

The commercial courts and District courts (courts of general jurisdiction) are state courts which exercise jurisdiction over maritime disputes. The Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine is a domestic arbitral institution with a panel of arbitrators specializing in maritime arbitration.

These rules apply to vessels flying the Ukrainian Flag. Such vessels are treated as *res* in the general legal sense. There are no proceedings *in rem* in Ukraine, so it is possible to arrest a ship owned only by the debtor. Associated vessels can be arrested if at the moment of initiating the arrest procedure they were property of the person liable for the maritime claim and who was the owner of the vessel in respect of which the said claim has arisen. There is no procedural difference with respect to arresting a ship for a maritime claim and a maritime lien. Once a vessel has been arrested, a Ukrainian court will have jurisdiction over the merits of the claim, unless a particular forum had been chosen by the parties to consider the substantive claim. According to Article 43-3 (3) of the Commercial Procedural Code of Ukraine, a plaintiff should bring the claim on the merits within 5 days from obtaining the arrest warrant.

Ratification by Ukraine of the Arrest Convention 1952 brought positive changes. The main political factor¹⁴² was the fact that until now any commercial or corporate

¹⁴² Taras Chernovil, Vice Chairman of the Committee of Foreign Affairs of Verkhovna Rada on 07.09.2011. <http://news.liga.net/news/politics/536869-ukraina-odobrila-konventsiiyu-ogranichivayushchuyu-arrest-morskikh-sudov.htm>. See also subsequent cases *The Maritime Trader* [1981] 2 Lloyd's Rep. 153 and *The Nazym Khikmet* [1996] 2 Lloyd's Rep. 362, where the issue of the beneficial

debt, even if it was not connected with the state, was often accorded grounds for arrest of Ukrainian ships by decisions of third countries. The Convention restricts arrest only in respect of maritime claims. However, provisions of the Convention have no priority status compared with respective provisions of national legislation, which is stated in Article 2.

6.3. Case Law

Some Ukrainian courts grant arrest warrants by referring to the provisions of Articles 33, 66, 67 of the Procedural Commercial Code of Ukraine, Articles 41, 42 of the Merchant Shipping Code of Ukraine and Law of Ukraine on accession to the International Convention on Unification of the Certain Rules on Sea-Going Ships” No. 3702-VI 07.09.2011.¹⁴³ For example, the Commercial Court of the Donetsk Region 07.03.2012 issued a warrant for the arrest of the passenger ship *Fellow* registered in Panama and owned by Fellow Shipping Ltd. (Malta) was arrested in the port of Mariupol. The debtor failed to pay the disbursement invoice for the agent’s fees for pilotage, search and rescue operations, supply and supervision, as well as and also had the unpaid wages for the crew. There was a clear possibility that the ship would sail. The decision was based on the provisions of Article 42 of MSC and the 1952 Convention.¹⁴⁴

On appeal, the Court of Appeal of Odessa Region (14.07.2011) held that the arrest granted by the district court was wrongful. The vessel was registered in Panama and therefore according to the Merchant Shipping Code of Ukraine, could not be arrested in Ukraine. Moreover, a dispute arose in respect of contractual relations between two foreign companies, which are considered to be legal entities in Ukraine. Therefore, according to paragraph 1 of Article 12 (1) of the Commercial

owning of the was examined by the English courts; *The Giuseppe Di Vittorio* (No.2) [1998] 1 Lloyd’s Rep. 661 where the Republic of Ukraine sought a declaration there the vessel could not be sold pendent lite.

¹⁴³ Official register of the decision of Ukrainian courts <http://reyestr.court.gov.ua/Review/22229141>.

¹⁴⁴ Entered into force for Ukraine on 16.05.2012.

Procedural Code of Ukraine the claim should have been brought to the Commercial Court.¹⁴⁵

The Commercial Court of the Autonomous Republic of Crimea denied the application for the arrest of m.v. *Omega-G* flying the flag of the Union of Comoros. The application was made by plaintiffs Yalta Sea Trade Port as security for their claim against Ma Shatl-Trans, Ukraine the first defendants, and against Granada Logistics S.A. the second defendants for payment of port and dock dues. The Court considered the fact that both Ukraine and the Union of Comoros were parties to the 1952 Arrest Convention but concluded that the claim did not qualify as a maritime claim under the Convention. The Court emphasized that the MSC applied only to Ukrainian ships which had been confirmed by the practice of the High Commercial Court of Ukraine in the decision on case No. 39/71 of 15.04.2004.

Another exemplary case was *BALTDRAHA v. Alkor Dredging and Marine Construction Ltd. Co.* The dispute involved an alleged debt for non-payment of charter hire and was under arbitration in London in respect of the merits of the case for which the applicable legislative provision was Article 358, paragraph 8 of the MSC which provided that claims in respect of charterparties were maritime liens. At the behest of the plaintiffs *BALTDRAHA*, the Primorsky District Court of Mariupol of the Donetsk Region ordered the arrest of the vessels *Alkor -1*, *Alkor-2* and *Alkor-3* and restricted them from leaving port. The order was made under articles 41- 43 of the MSC. The plaintiffs were a Ukrainian company; the defendants were Turkish and the arrested ships were all registered under the Turkish flag.

In another case the plaintiff Swiss cargo owning company Creative Trading S.A. brought an action against defendants Norstar Ship Management Pte Ltd. for damage to cargo alleging unseaworthiness of the ship m.t. *Global Vika* registered in Valletta, Malta and owned by Constellation Navigation Ltd. An application was made to the Commercial Court of Odessa Region for the arrest of the ship to stand as security for the claim. The plaintiffs were unable to discharge their burden of proof as all documentation was in English and not translated into Ukrainian in accordance with

¹⁴⁵ Official register of the decision of Ukrainian courts <http://reyestr.court.gov.ua/Review/21826844>.

the Guidelines No. 04-5/608 of 31.05. 2002 issued by the High Commercial Court of Ukraine. The case was therefore dismissed by the Court.

A similar case was an action instituted by Kherson Shipyards, a public company alleging a maritime claim against Leinster Inter S.A. of Anguilla, British West Indies, who were bareboat charterers of the m.t. *Rexton* registered in Sierra Leone. The plaintiffs made an application for the arrest of the ship and for provision of security in respect of the claim. The applicant invoked Article 3 of the 1999 Arrest Convention. The case was dismissed by the Commercial Court of Kherson Region because the charterparty submitted to the Court was in English and had not been translated into the Ukrainian language. But no reference was made by the Court to the fact that Ukraine is not a party to that Convention and therefore that Convention was not applicable; rather the 1952 Arrest Convention would have applied as Ukraine is a party to it.

It is apparent from the above two decisions that there is a growing trend in the Ukrainian courts to dismiss cases on the basis of language which is a problem that needs to be resolved as shipping is an international activity and most commercial maritime contracts are in standard form and written in English, which is considered to be the international language of shipping. The Guidelines referred to above seem to be slavishly followed by the courts without any consideration of the rationale of a claim being presented. Apart from the fact that the Guidelines are not legally binding as they are not legislation *strictu sensu*, they are potentially in conflict with the Convention which has higher priority under the constitutional law of Ukraine.

In *Gess & Co. v. Multitrade Ltd.*, the plaintiffs were a Ukrainian company who were agents for the defendant shipowning company owners of the *Princess Helen* managed by Seariver Shipping Co. Nevis and Titan Marine Corporation. According to the agency contract, certain invoices were payable to the plaintiffs by the management companies acting on behalf of the shipowners. The plaintiffs brought an action for recovery of payments in respect of the invoices and applied for the arrest of the vessel as security for the claims. However, subsequently the application for arrest was withdrawn; and instead, the plaintiffs applied for an injunction to prevent

the ship owner from transferring any of its proprietary interests in the ship and to limit the trading area of the ship to the territorial seas of Ukraine. The Commercial Court of Sevastopol granted the injunction as requested by the plaintiffs. Its decision was based on the norms of the Commercial Procedural Code of Ukraine relating to the security of the claim and of the MSC relating to maritime claims.

Another interesting case is *Delta-Lotsman v. Merchant Marine Port of Odessa* (first defendants) and *RHL FIDELITAS Schiffahrtsgesellschaft GmbH & Co. KG* (second defendants) and *RHL Reederei Hamburger Lloyd GmbH & Co. KG* (third defendants) and *Ekonom International Shipping Agency Ltd.* (fourth defendants). The claim against the second defendants is the one that is relevant to the present discussion as it involved the arrest of the m.s. *RHL FIDELITAS* owned by them and registered in Liberia. The plaintiffs alleged damage suffered by their pilot vessel *Skory* as a result of collision with the *RHL FIDELITAS* which constituted a collision lien pursuant to Article 358 paragraph 5 of the MSC. The plaintiffs applied to the Commercial Court of Odessa Region for an arrest warrant. The relevant procedural provisions were Articles 41-43 of the same statute as well as Articles 66 and 67 of the Commercial Procedural Code. The Court granted an order for the vessel's arrest pending its decision on the merits.

It is apparent from the discussion in this Chapter that the law of ship arrest in Ukraine and the practice of the courts are inconsistent leading to decisions that are not always clear and rationalized. In some instances the litigants advised by their lawyers plead law that is not applicable in the jurisdiction, such as the case in which the 1999 Arrest Convention was pleaded. In several instances the MSC was applied to foreign ships in Ukrainian ports, when this is not permissible according to the MSC and the Guidelines issued by the High Commercial Court. As mentioned earlier, the 1952 Convention to which Ukraine has recently become a party should be properly implemented through amendments to the procedural rules, as may be necessary to ensure compliance with the Convention.

CHAPTER VII

CONCLUSION

The new Arrest Convention of 1999 has clarified many provisions of the older convention which were ambiguous or confusing. However, it has still left room for discussion and freedom for national legislation to fill the gaps. This is not conducive to maintaining uniformity in the law, which is the aim of international conventions. Many are of the opinion that the 1999 Convention is a positive step towards a clearer and more all-encompassing approach to ship arrest for maritime claims. Jurisdictional disputes involving foreign-owned, foreign-controlled or foreign-registered vessels have always given rise to complicated issues. Critics of the new Convention maintain that claimants should be reminded that its current application is limited to those states which are parties to it. In this context, it must be noted that the Convention applies also to all ships entering those jurisdictions. In addition, it is important to note that each state accepting the 1999 Convention must do so individually; thus there may be differences among them as to how it is applied.

The 1999 Arrest Convention in Article 1(1) (v), in contrast to the 1952 Arrest Convention permits arrest for breach of a ship sale Memorandum of Agreement (MOA) or other ship sale claim. Another novel provision in the new Convention is that arrest for arbitration claims is allowed. Under Article 2 (3), the court must consider the question of whether to stay proceedings in favour of arbitration. In Article 5, a new provision has been added regarding the subsequent arrest of a ship for which there was a previous arrest in respect of the same claim. There is also a positive change which gives to the owner the right to apply for the amount of security to be “reduced, modified or cancelled” by the local court (Article 6(5)).

As compared with the 1952 Arrest Convention, the expansion of the list of claims for which arrest is possible, and the prospect of multiple arrests in relation to a single claim, are likely to mean that shipowners will view the 1999 Convention with some concern. This sentiment is only likely to increase, should the 1999 Arrest Convention be accepted more widely in the future.

There are several supporters of the “open-list” concept. One of them, Professor William Tetley has stated as follows:

It is regrettable that an 'open-ended' list was rejected, because it would have provided greater flexibility to courts applying the Arrest Convention 1999 in future years.¹⁴⁶

However, it was realised by those who were instrumental in the drafting of the instrument that uniformity, which is the core of any international convention, could not be achieved with an "open list" approach.

Both Conventions allow ship arrest for security and in some jurisdictions the concept is used for the founding of jurisdiction. However, no convention has ever addressed the question of arrest of cargo and bunkers; perhaps this is a matter for discussion in an appropriate international forum although it is recognised that in some jurisdictions there is domestic law that provides for these matters. Also, in the context of arrest law, consideration may be given to the fact that freight can constitute security for a maritime claim where the claimant is the shipowner. The Conventions also do not address the issue of caveat against arrest and/or release, but in the opinion of many, these are matters for domestic procedural law and should not fall within the scope of the Conventions. Some authors consider the new Convention as signifying the end of uniformity and thus encouraging forum shopping; a paradise for lawyers no doubt, but a potential nightmare for others.¹⁴⁷

Although in jurisdictions such as in the United States of America, arrest necessarily implies the existence of a lien, in most maritime countries, arrest is simply the most effective device by which a maritime claim including a maritime lien can be enforced. The desirable legal framework calls for connection with but a clear distinction between the concept and functions of arrest, jurisdiction and maritime liens. To an extent this is recognized by the Arrest Convention 1999. This

¹⁴⁶ Tetley, William Q.C.: Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review, May/June, 1999, 73 Tulane Law Review 1895 at page 1965.

¹⁴⁷ Kegels T. “Arrest of Ships. The End of the Uniformity?”, 2001, pp. 111-130.
www.kegelsco.be/Default.aspx?catID=2&pageID=&lngID=2

writer is of the view that ship arrest should not in itself be considered as security for maritime claims, but rather the means for obtaining security such as through a cash deposit, bank guarantee or letter of indemnity from the P&I Club.¹⁴⁸

The UNCTAD Transport Report of 2011 in referring to the imminent entry into force of the 1999 Arrest Convention contains the following commentary regarding the co-relation between that Convention and the MLM 1993:

In view of the fact that the international regulatory landscape for ship arrest is to change soon, other States may too wish to consider the merits of accession more closely. In particular, Contracting States to the 1993 MLM Convention that are not parties to the 1999 Arrest Convention may wish to give the matter of accession particular consideration, with a view to strengthening the relevant legal regime for the enforcement of maritime liens and mortgages. The 1993 MLM Convention entered into force in 2004 and, as at 31 July 2011, had 16 Contracting States.¹⁴⁹

The Report then goes on to comment on the position of developing countries in relation to both these Conventions although some of the assertions made are somewhat speculative in nature. It states:¹⁵⁰

In some respects, the 1999 Arrest Convention may offer particular advantages from the perspective of developing countries. For instance,

¹⁴⁸ See *Oceanconnect UK Ltd v. Angara Maritime Ltd* [2010] EWCA Civ. 1050.

¹⁴⁹ For the official text and current status of the 1993 MLM Convention, see www.unctad.org/ttl/legal.

¹⁵⁰ http://unctad.org/en/docs/rmt2011ch5_en.pdf at p.110 -111.

The footnote numbers in the passage cited below are those used in the original text.

⁸ See Articles 1(1)(s), 1(1)(u) and 1(1)(v) of the 1999 Arrest Convention.

⁹ In particular, “claims for wages and other sums due to the master, officers and other members of the vessel’s complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf”, see Article 4 of the 1993 MLM Convention.

¹⁰ See Article 1(1)(o) of the 1999 Arrest Convention.

¹¹ For further information, see the BIMCO/ISF Manpower 2010 Update, available for a fee from www.bimco.org.

express reference in the list of maritime claims under the 1999 Arrest Convention to disputes, arising in relation to ownership or possession of a ship, or contracts of sale of a ship, as well as to claims regarding mortgages, hypothèques or charges of the same nature,⁸ may indirectly promote ship financing and purchase of second-hand ships - an important issue for developing countries. Moreover, in connection with a wide maritime lien of the highest priority under the 1993 MLM Convention in relation to crew claims,⁹ the possibility of arrest of ships for such claims under the 1999 Arrest Convention¹⁰ will be of particular interest to developing countries, from which the vast majority of the maritime workforce originates.

It can be surmised from the above passages that the 1999 Arrest Convention is more favourable to developing countries whereas the 1952 Convention meets the needs of the traditional maritime states in a manner more acceptable to them. In a somewhat similar vein, the writer is of the opinion that the 1952 Arrest Convention is more “pro-shipping”, while the 1999 Convention brings more benefits to port countries. It should, of course, be recognised that many maritime states are both shipping as well as port states but the focus of their national maritime interests may be different. Some see their shipping interests as being stronger than their port interests and *vice versa*. Also, with the changes in shipping dynamics in present times, perhaps the developed/developing dichotomy is no longer totally valid, or, at least the line is blurred.

The Conventions provide the framework for national jurisdictions. In their turn the courts of one particular country are not consistent in their judgments, as matters are decided on a case-by-case basis.

The legitimate rights and interests of shipowners and shippers, as well as mortgagees and holders of other proprietary interests such as maritime liens and rights of retention should be ensured in respect of wrongful arrests, attachments, or

freezing injunctions.¹⁵¹ Both sides believe the law is not in their favour and that the other party has a greater advantage under the law and the practices of courts.¹⁵² From the practical point of view, the high cost of legal expenses incurred by the claimants in the courts and potential losses of the shipping business caused by arrest, prevents the bargaining parties from its execution, however, in many cases, the possibility of the ship arrest remains the main power in the hands of the claimant.

In this regard it has to be emphasized, that it is essential for Ukraine to establish clear and transparent statutory provisions for the substantive law and procedures for ship arrests in respect of the requirements of the European Union¹⁵³ and the World Trade Organization.¹⁵⁴ In this dissertation the writer has presented the legal position from the Ukrainian perspective as an example of a developing country with unsettled legislation and unclear and inconsistent court practices on ship arrest. The observations are particularly important given that ship arrest is a regular occurrence these days.

In the ideal situation, it would be beneficial for Ukraine to ratify the 1999 Convention, as it has already shown an intention to comply with its provisions in articulating the list of maritime claims in the Merchant Shipping Code. If Ukraine goes ahead with ratification, then under the Convention it could arrest any vessel in its ports, even those flying the flags of non-Parties to the Convention or Parties to the 1952 Convention. However, it took a defensive position and ratified the 1952 Arrest Convention, with a view to restricting the numbers of arrests of Ukrainian vessels in other jurisdictions, allowing arrest only for maritime claims.

¹⁵¹ Maritime & Transport Law Committee of the Section of Business Law of the International Bar Association, *Maritime Handbook* General Section 5 (Hans-Christian Albert et al. eds., Kluwer Law International, 1998).

¹⁵² Preparation and Adoption of the Convention on Arrest of Ships, United Nations International Maritime Organization Diplomatic Conference on Arrest of Ships (hereinafter – Preparation).

¹⁵³ Council and Commission Decision of 26 January 1998 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part (1) (98/149/EC, ECSC, Euratom); see also “Yanukovych: Ukraine chooses Europe, will join EU in 10 years” //Aug. 19, 2011, 7:22 p.m. Ukraine — by Interfax-Ukraine

¹⁵⁴ On April 10, 2008, the Verkhovna Rada of Ukraine approved the following Law of Ukraine No. 250-VI “On Ratification of the Protocol of Accession of Ukraine to the World Trade Organization”.

Taking into consideration today's market-economy conditions, Ukraine requires substantial structural reform to adopt modern methods of management of economic activities of the shipping industry and its associated enterprises. This will include replacement of administrative methodologies of management with economic ones based on a new legal foundation with the use of modern scientific methods for organizational planning and development. However, the country has been more involved in political battles than in day-to-day constructive and meaningful activities. It would appear that lawmakers have no time to decide whether they wish Ukraine to remain a shipping country, or just a country by the sea.

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