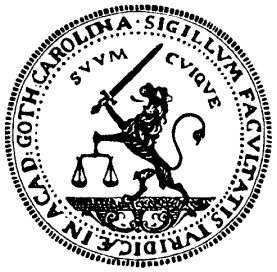

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Arrest of Ships
The Swedish perspective

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Contents

Summary

Since a ship is movable and on the same time a very high-priced asset, a ship owner in debt may be very tempted to move it outside a creditor´s reach. Fortunate for the creditor it exist a legal mechanism that hinders this, it is referred to as “arrest of ship”. The purpose of this paper is to outline the current legal position in Sweden regarding arrest of ships and to discuss the specific problems faced within this topic. Much effort is therefore laid on both the international and the domestic legislation and its meaning.

The domestic law of Sweden is used as a primary source to find out Sweden’s legal position regarding arrest of ships and how this is dealt with in Sweden. Much focus is laid on chapter 4 of the SMC and other domestic legislation that relates to this particular chapter of the SMC. The international efforts to regulate this area are also examined by using the applicable international instruments available on this area, such as the 1952 Arrest Convention, the 1968 Brussels Convention and the Lugano Convention. So to conclude there are two “regimes” that govern the arrest institute of ships in Sweden: the “international” regime found in Chapter 4 of the SMC, based on the 1952 Arrest Convention to which Sweden is party, and the “domestic” regime governed by a number a scattered different provisions in different laws. The most important of these are RB 15:1-2§§.

Before Sweden became a Contracting State to the 1952 Arrest Convention the “*kvarstad*” institute used to govern all attachment relating to ships. However, with the introduction of the new SMC in 1994 the international concept of arrest was introduced, but the term “arrest” is not used but rather the Swedish term “*kvarstad*”.

This choice of wording, among other things, has made the international regime of arrest intertwined with the domestic regime of arrest, usually referred to as the “*kvarstad*” institute. An important thing in this context and that makes these two institutes intertwined with each other is the fact that since procedural matters are not treated in the 1952 Arrest Convention but left to *lex fori*, Sweden can therefore and has been applying the procedural rules on “*kvarstad*” even in international arrest cases. Because of this relationship it is therefore difficult sometimes to understand how matters of arrest of ships are dealt with. Hopefully this paper will make the reader more familiar in how Sweden handles arrest of ships, both in an international and national perspective.

Abbreviations

BrB	Brottsbalk (*The Swedish Penal Code*)
CMI	Comité Maritime International
DC	District Court (*Tingsrätt*)
DS	Departementsserien (*Swedish Departments series*)
ECJ	European Court of Justice
EFTA	European Free Trade Association
EU	European Union
ICJ	International Court of Justice
IMO	International Maritime Organization
PROP	Proposition (*Government Bill*)
RB	Rättegångsbalk (*The Swedish Code of Judicial Procedure*)
SFS	Svensk Författningssamling (*Official Series of Swedish Laws*)
SMC	Swedish Maritime Code
SOU	Statens Offentliga Utredningar (*The Swedish Government Official Report)*
UB	Utsökningsbalk (*The Swedish Enforcement Code*)
UNCTAD	United Nations Conference on Trade and Development

1 Introduction

1.1 Purpose

The purpose of this paper is to outline the current legal position in Sweden regarding arrest of ships and to discuss the specific problems faced within this topic.

The purpose will also be to focus on the relevant Conventions and how they have been implemented within the Swedish legal systems.

Hopefully, this paper will result in a better understanding of the international arrest in general and a deeper understanding of the Swedish approaches in the matter.

1.2 Delimitation

This paper will be limited to discuss only arrest on ship that is connected to private law. Therefore arrest connected to any criminal action, or arrest of cargo will not be dealt with nor ships that are owned by the state or war ships.

In the international perspective this paper will only deal with the general international regime of arrest of ships from a Swedish perspective.

In early 1990 a joint effort on the arrest convention was taken up by IMO, UNCTAD and CMI, and this was continued during the 1990s until the adoption of that convention at Geneva in 1999. Matters discussed during the closing round were numerous, and many difficult issues were left unresolved. Sweden is not a member of this Convention and the Convention has very few members. Because of this the 1999 Arrest Convention will not be discussed more than what already has been said in this chapter.

1.3 Methodology and material

The method that is used throughout this paper is mainly the traditional legal method. Much effort is therefore laid on both the international and the domestic legislation and its meaning. A comparative study is also used by highlighting the differences between the international regime and the Swedish domestic regime related to arrest of ships is examined.

As a consequence the domestic law of Sweden will be used as a primary source to find out Sweden's legal position regarding arrest of ships and how it is dealt with in Sweden. Much focus will be laid on chapter 4 of the SMC and other domestic legislation that relates to this particular chapter of the SMC.

Sweden can be said to have a dual system when it comes to arrest of ships, since it also applies the domestic legislation regarding the "*kvarstad*" institute when chapter 4 of the SMC is applicable. Because of this I shall give an account of the "*kvarstad*" institute's position and function in Swedish law.

The international efforts to regulate this area will also be examined by using the applicable international instrument available on this area, such as the 1952 Arrest Convention. I shall also examine at how the issue of jurisdiction has been solved in relationship between the international arrest regime and the legislation originated from EU such as the Lugano Convention, the 1968 Brussels Convention and the Brussels I Regulation, and more important, how Sweden has implemented these efforts within its legal systems.

Apart from this I shall also make use of the different legal literature that is available on the matter. I shall also make use of case law, in particular cases that originate from Swedish courts, to illustrate how the regulation that governs the concept of arrest in Sweden is being interpreted in practice.

Since "*travaux préparatoires*", i.e. the preparatory work provided by different Swedish government bodies, is consider to be a legal source in the Swedish legal system I will use this source to great extent. The Swedish "*travaux préparatoires*" is also a very good source in finding out Sweden´s position toward any particular legal issue since it is a political instrument that is used to influence the government in its process in creating new legislation.

1.4 Disposition

This paper will start with a brief introduction to the concept of arrest of ships from a terminological and from a historical perspective that will hopefully lay a general foundation for why the institute of arrest exists today. The most basic circumstances that are required for a claimant to obtain an arrest or a defendant to avoid getting his ship arrested will also be discussed in this introduction part of the paper.

At this point, after the general foundation is laid, the legal instruments on the matter will be examined starting with the international arrest regime and thereafter Sweden´s relationship towards it. The 1952 Arrest Convention is therefore examined in great detail, article by article, since these articles are of great importance for the later examination of both the international and the domestic regimes that governs the arrest of ships. After that the EU law will be examined since Sweden is an EU State. The focus is laid on how this area of law has influenced the legislation connected to arrest of ship. Finally the Swedish domestic legislation will be examined in much detail, section by section, in order to fulfill the purpose of this paper. It is also necessary in order to examine various problems within the domestic arrest setting and how Sweden has attempted to solve these.

When international instruments and domestic legislation are examined, the more analytic part takes place by discussing Sweden´s position in some classic issues related to arrest of ships. The paper then concludes with a short but consist conclusion in order to finalize and to fulfill the purpose of this paper.

2 Background

2.1 Arrest of ship

Since a ship is movable and on the same time a very high-priced asset, a ship owner in debt may be very tempted to move it outside a creditor´s reach. So for a creditor to be able to stop the ship owner from moving his ship it can therefore be a very effective legal instrument to secure a maritime claim. In some cases this is the only way for a creditor to secure his claim against a debtor, especially in cases when the debtor is foreign. It is fortunate for the creditor that it exist a legal mechanism that makes this possible, it is referred to as "arrest of ship".

Arrest of ship is a prejudgment remedy in order to secure civil claims or better right to certain property. Consequently, the arrest which interrupts the operation of and limits the debtor´s use of his ship is an effective way to put pressure on a debtor who refuses payment.

The definition of "arrest of ship" is expressed as follow: "Seizure of a ship by authority of court of law either as security for a debt or simply to prevent the ship from leaving until a dispute is settled"[1] but "does not include the seizure of a ship in execution or satisfaction of a judgment".[2] Arrest can also be defined as the "judicial process of securing maritime claims against a ship owner".[3] The 1952 Arrest Convention states that "arrest means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of the ship in execution or satisfaction of a judgement".

An arrest could be, and in most cases are, a very disturbing event for a ship owner, its financier, the cargo-owner or other parties that are involved in the ships movements. Very large amount of money is often at stake for all parties involved in an arrest situation and the amount of money involved is usually growing by the minute. Therefore, speed is of great importance. A ship is only in a port for a few days at the most and once the ship has set sail and left the port, it is too late for the claimant to get the ship arrested.

[1] Brodie, Peter "Dictionary of shipping terms", p. 30
[2] Article 1 (2) in the 1952 Arrest Convention
[3] Curzon, L.B. "Dictionary of law", p. 25

The institute of arrest of ships is therefore shaped to create obstacles and to hinder the debtor, by legal and sometimes even with physical obstacles, from slipping away from his main obligation which is to pay the creditor.

When a ship has been arrested the ship will be in a state of arrest until the creditor or a court releases the ship and allows it to continue on its journey.

The possibility to pursue the matter about a due payment before a court in the claimant´s owns country is an important legal right. It is usually both less expensive and relative easy.

2.2 Maritime lien

Because of the large amount of money involved when discussing maritime issues it has in the maritime field been created a lien that gives the claimant some legal rights over the ship in question without a decision from a legal court or by registration, the so called maritime lien.[4] Consequently, a maritime lien can come into force without anyone asking for it and it does not require any registration. Therefore a maritime lien could arise even if none of the parties knows about it.

It is therefore important to differentiate between maritime liens and maritime claims. As a general rule, the term “maritime claim” could be described as a claim which gives a claimant a right to arrest a ship while the term “maritime lien” arises in respect of a more limited group of claims. This limited group of claim is distinctive by the fact that they follow the ship regardless of private sales of the ship and follow the ship in question into the hands of the purchaser even when the purchaser has no knowledge of the claim giving rise to the maritime lien. The word “lien” is a French word that means “link, tie or connection” and that is exactly what a maritime lien does; it is intimated “linked” with the ship.

A maritime lien is defined as follow: “claim against a ship enforced by means of her seizure, arising from non-payment of, for example, salvage charges or coast in relationship to a collision”.[5]

Lien is therefore a legal claim of one person upon the property of another person to secure the payment of a debt or the satisfaction of an obligation.[6]

A maritime lien can be created in two ways:[7]

[4] Falkanger, Thor “Scandinavian maritime law”, p. 119
[5] Brodie, Peter ”Dictionary of shipping terms”, p. 158
[6] http://dictionary.reference.com/browse/lien, 15/2- 2010, 06:36

1) Through law.
2) Through a contractual creation.

A maritime lien follows the ship and not the ship owner so if the ship is sold, the maritime lien will follow the ship and not stay with the old owner. A maritime lien cannot be moved to someone else or a person because a maritime lien could only be attached to the ship itself. A maritime lien gives the claimant the right to arrest and sell the ship if necessary to satisfy the claimant.

A maritime lien can only be dissolved from a ship when:

- The payment is made.
- A monetary security is made.
- The ship is sold by a court.
- When the time bar for the claim has reach its end.
- If the ship is sinks or gets lost in any other way.

The maritime lien is based primarily on an international Convention that has changed several times through the years. The first international convention on maritime liens came as early as 1926 and the newest one is from 1993 and it's called "International Convention on maritime liens and mortgages, 1993".

The Swedish domestic rules that govern the issue of maritime lien today are based on the international convention from 1993 but have its roots from the Swedish maritime law from the year of 1860.

In the Swedish legal system there is no such thing as a clear codification of the maritime lien institute. Instead you find bits and pieces of regulation connected to this particular area in different laws and in case law. Through these sources you have to make a correlating interpretation between the cases etc. to come to a conclusion that any Swedish court could accept. This makes it of course quite difficult in getting a clear picture and understanding of the Swedish maritime lien institute. Also, when the existence of a maritime lien is established by the court it is not always obvious that the maritime lien is allowed to be used in that particular case.

[7] Falkanger, Thor "Scandinavian maritime law", p. 118

2.3 Maritime claim

The starting point for acquiring a right to arrest a ship is always the existence of a monetary claim. Claims that can be grounds for arrest of ships are known as maritime claims.

In this context it is important not to confuse a maritime claim with a maritime lien. It is easily done because of the list of claims that is found in the 1952 Arrest Convention is also found in the list of maritime liens as defined in the "International Convention on maritime liens and mortgages, 1993". Sweden is a party to both these conventions. Maritime claims are, however, more numerous than maritime liens. As a result, a ship could be arrested even though there is no maritime lien attached to the ship. Furthermore, the domestic rules may give rise to maritime liens under different circumstances than the international Convention-based regulation of maritime liens.

A ship may be arrested only for a maritime claim mentioned in the "International Convention Relating to the Arrest of Sea-Going Ships (Brussels 1952)" article 1 (1) a-q, hereinafter called the 1952 Arrest Convention. Under Swedish law this list has its correspondence in the Swedish Maritime Code (SMC) chapter 4 section 3. The list is meant to be exhaustive or a "closed list", and therefore any claim not found therein will be barred as grounds for arrest of a ship.

3 The historical perspective

The need for credit in sea voyages has always been important and therefore also the need for an offering of security for the credit. During the antiquity a way to fulfill this need was developed, it was called "sea loan" and the Romans called it "*foenus nauticum*".[8]

This sea loan was a loan for building or repairing a ship, to hire a crew, to purchase goods or for other costs that could arise during a voyage. As a security for the sea loan you could put the ship or the goods or even the debtor´s house territory. The creditor could thereafter sell the obtained security if the sea loan was not paid back during a set time after the sea loan period expiring date. The sea loan however did not have to be paid back if the ship went under during the voyage, but in return the sea loan was attached with a relative high interest.[9]

The sea loan in the countries around the Mediterranean was used during the whole medieval period and further more into the new era but during this time it started to lose its importance because of the development of the maritime insurance system and the arrival of the newer forms of association that were more or less connected to the insurance system. A typical thing during the medieval period sea voyage is the development of these associations. These associations replaced more or less the sea loan institute totally by different association forms, in particular the "*commendan"* agreement, where sharing the profit instead of interest made the financier´s payment.[10]

So instead of supplying a sea loan that should be paid back with interest, the financier paid a sum of money as a stake, first usually for one single expedition, but later also for a more long term cooperation, where he instead for interest owned a right to earn a firm amount of the profit.[11]

In the Germanic countries the development related to the institute of arrest of ship for paying the debt took another development. The Germanic systems had one thing in common, that an object could be forfeited as a "*deodand*" [12] for a debt, especially where the object was the cause for

[8] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 19
[9] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 19
[10] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 19
[11] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 20
[12] "*Deodand*" comes from the Latin phrase "*Deo dandum"*, which means "a thing to be given to God". "*Deodand*" had basically the same meaning, that is that the object that has

personal damage such as death. Consequently, in situations when collisions with ships occurred, the ship responsible for the collision could therefore be forfeited as a "*deodand*".[13]

In northern Europe you could, for a more permanent credit, obtain a registration of a lien right in the court´s book. And for the short termed credit there was the "bodmeriloan", i.e. *bottomry*. In both cases it was for now only the ship and the freight and not the ship owner personally responsible for the repayment of the loan.[14]

A bodmeriloan is a loan that was taken with the ship or the cargo onboard as security. The word "*bodmeri*", is derived of the German word "*boden*" or "*bodem*", ground or bottom, especially referred to the ship´s bottom or keel, denoted originally a loan, for which only the ship was the security.[15]

The Swedish provisions that govern bodmeriloan was abandoned 1928 and the subject is today of interest only to legal historians.

At the end of the medieval period a new fusion of principals started to develop in between these two judicial areas. One common European merchant right, *lex mercatoria* started to build and develop. In *lex mercatoria* the thought of a particular sea capital separated from the land capital was developed. The simple pattern with fastening of things has been left and the sea capital is made of the ship but also of the cargo plus the gross freight for the voyage through which the secured demand has arisen.[16]

More carefully outlines were made up to check for which agreements were for sea contracts and which were for land contracts, which actions could charge a ship, cargo and freight and which that could not. During the end of the medieval period and in the beginning of the new era the financing of shipping could be met in different ways.[17]

During the 15th century another system took place, the "*abandon system*", which meant in theory that the ship owner had a personal responsibility, but also that the ship owner had a possibility to make free from this

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caused damage was given to God, i.e. forfeited to the King to be applied to honorable uses and distributed in alms such as money, food, or other donations given to the poor or needy or anything given as charity.

[13] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 21
[14] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 24
[15] Carlquist, Gunnar "Svensk Uppslagsbok", p. 343
[16] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 23
[17] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 23

responsibility through abandoning of the ship, freight and cargo. The abandon system existed in the Swedish Maritime law from 1667.[18]

The German Preussish Maritime law of year 1727 was also built partly on the abandon principal but was abandoned whole in the Handelsgesetzbuch of year 1861. A new system was installed with personal responsibility for the ship owner with limitation in case of the maritime claims through that seizure can only be done with relationship to the assets connected with the maritime world, this was called the "*execution system*".[19]

During the same time Sweden also abandon the principles that upheld the abandon system and in the Maritime law of the year of 1864 the "execution system" was introduced, whereas the responsibility limitation was so that the ship owner in some cases only could pay with the ship, cargo and freight. All these claims were called "lien" in the 1891 Swedish Maritime law. The lien owned beneficial rights before all other claims but trough the Brussels conference in 1926 and the following legislation that came into force in 1938 the lien was greatly limited in numbers and the bottomry loan was totally removed from the Swedish legal system.[20]

In the English legal system the maritime law had from the 15th century been part of a whole different especial field that the admiralty courts had been taking care of. During the 18th century the common law courts succeeded in pushing away the admiralty court´s jurisdiction, where the common English principle of land rights was introduced in the maritime law.

In situations when an object was forfeited the common law recognized the lien, mortgage and possessory liens, which means a security right which assumes possession of the object. The so called *in-rem-jurisdiction* was created by the admiralty court´s which gave only the admiralty court´s the authority to arrest a ship and give the creditors right to sale the ship, if necessary, to get his money back. But this authority to arrest the ship had to have support in the earlier legal order in the English system with connections to earlier rules connected to the institute of arrest of ships. These earlier rules were assumed to be found in collision demands and salvage payment claims, bottomry and certain other contractual demands. The English institute of maritime liens were developed from this the legal systems.[21]

[18] Holmbäck, Åke "Studier i äldre sjörätt", p. 10-13
[19] Holmbäck, Åke "Studier i äldre sjörätt", p. 27-29
[20] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 25-26
[21] Tiberg, Hugo "Kreditsäkerhet i fartyg", p. 27

4 The international regime related to arrest of ships

4.1 The 1952 Arrest Convention

At the 1930 CMI conference in Antwerp the need for an arrest Convention was acknowledged but it still took almost two decades for the CMI to produce a draft that most of the delegates could accept.

In 1952 a draft was finally accepted and was presented on a diplomatic conference held at Brussels the same year.[22] The draft became known as the "International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (Brussels 1952)".

The first purpose of the 1952 Arrest Convention is to secure and protect the maritime industry from seizure of ships for debts that has no connection towards the ship itself. Secondly it also secures ships to continue on their journey if sufficient security is given for the debt connected to the ship in question. Thirdly it also contains regulations about Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. [23] And finally the 1952 Convention is a compromise between Common Law (Anglo-American legal system) on the one hand and Civil Law (Continental European legal system) on the other hand.[24]

4.2 The Swedish relationship to the 1952 Arrest Convention

Sweden participated at the conference in Brussels 1952 when the 1952 Arrest Convention was drafted. Sweden did not however sign the Convention. It was considered that the Convention in several areas was complicated and unclear. In particular the forum rules and the provisions or the lack of uniformed rules regarding the obligation for a person that applies for arrest to also cover a possible damage caused because of wrongful arrest or provide security for such damage were criticized.[25]

[22] Berlingieri, Francesco "Berlingieri on Arrest of Ships – a commentary on the 1952 and 1999 conventions", p 1-7
[23] Prop. 1992/93:5, p. 9
[24] Swedish Departments series, SD 1991:70 p.11
[25] Prop. 1992/93:5, p. 17

Another thing that was criticized was that the Convention contained several elements that were unfamiliar in comparison with the Swedish legal system. Thus was pointed out that according to the Convention, arrest could come in question only for particularly enumerated requirements and that arrest was even possible although the requirement did not concern the ship owner or that the debt was not connected to a lien related to the ship.[26]

It was finally stressed from several directions that a signing of the Convention should not take place before the Convention had shown itself to what extent the Convention would come to be ratified by the bigger shipping nations.[27]

But in the early 1990s, both circumstances and view of the Convention had change by several reasons. Several important shipping nations had signed the Convention and all the EU States was at that time Contracting States to the Convention. The Convention seemed in practice to function well, as confirmed by the UNCTAD and IMO.[28]

Another very important reason that got Sweden to sign the 1952 Arrest Convention was the creation of the Lugano Convention and Sweden´s decision to sign that.[29]

Before signing the Lugano Convention, Swedish Courts in maritime cases associated to international nature were based in big extent on that, the particular ship to which the dispute was related to, had to be inside the territorial boundaries of Sweden or had already been a matter for an arrest in Sweden. But since the Lugano Convention does not permit use of exorbitant authorization rules in relation to a defendant that is domiciled in one of its Contracting States, an access to the Lugano Convention would result in a limitation for the Swedish courts' authorization to examine maritime cases. But by signing the 1952 Arrest Convention Sweden retains the authorization for Swedish courts to examine a maritime case in matter after an arrest has been announced.[30]

The Lugano Convention required more or less that all Contracting States besides signing the Lugano Convention also would sign the 1952 Arrest Convention. Finally, Sweden had at that time also applied for membership

[26] Prop. 1992/93:5, p. 17
[27] SOU 1965:18, p. 94
[28] Prop. 1992/93:5, p. 17
[29] Prop. 1992/93:5, p. 18
[30] Prop. 1992/93:5, p. 18

in EU and if Sweden wanted to become a full member of the community, a signing of the 1952 Arrest Convention was necessary.[31]

But although Sweden did sign the 1952 Arrest Convention it clearly stated that all the objections that earlier were aimed against the 1952 Arrest Convention more or less remained.[32]

When it was decided how to make the 1952 Arrest Convention come into force in Sweden the Convention was considered to have such a structure that it was inappropriate to incorporate the Convention´s original text within the Swedish legislation.

So Sweden decided to make a special regulation in the Swedish legal system related to the institute of "*kvarstad*" with respect toward the shipping industry. The final result of this is found in the SMC chapter 4.[33]

The Swedish legal systems that consequently were affected by the provisions of the 1952 Arrest Convention were mainly the "*kvarstad*" institute according to chapter 15 section 1 and 2 of the Swedish Code of Judicial Procedure (RB15:1-2§§), but also in some degree chapter 26 of the RB. [34]

4.3 The content of the 1952 Arrest Convention

4.3.1 Article 1

In the first section of Article 1 you will find an exhaustive list of pretensions that are defined as a maritime claim under the Convention. In the list you find both contractual and non contractual claims that are connected to the ship´s operation.

The second section of Article 1 contains a definition of the word "arrest". To note in this section is that an arrest of a ship is not defined as to keep a

[31] Prop. 1992/93:5, p. 18
[32] Prop. 1992/93:5, p. 18
[33] Prop. 1992/93:5, p. 19
[34] Chapter 26 of the Swedish Code of Judicial Procedure treats "*kvarstad*" connected to private claims pursued in criminal cases, such as claims on damage or other compensation to a plaintiffs.

ship in detention for the purpose of execution of a judgment but rather as only to secure a maritime claim.[35]

The third and forth section of Article 1 defines what a "person" includes and what a "claimant" means.

4.3.2 Article 2

In Article 2, the 1952 Arrest Convention makes it clear that the Convention shall not restrict or violate on domestic law. It also gives the Contracting State a right, according to their jurisdiction, to arrest ships flying the flag of another Contracting State. But according to Article 2 a ship from a Contracting State is only to be under arrest if the claim presented for the purpose to obtain arrest is found in Article 1 section one. Article 2 also contains an exception from this central rule that gives the Contracting State the right to intervene against a ship to secure public interest or other aspect with respect for the public interest according to existing domestic laws or regulations related to arrest.

4.3.3 Article 3

In the first section of this Article it prescribes that a claimant may arrest a ship either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, so called "sister ship". There are exceptions to this rule. One of them is found in section four of Article 3. Another exception is found in Article 10 but is only applicable for a state at the time of signature, deposit of ratification or accession of the Convention.

The ship´s responsibility for its maritime claim is not affected by changes in ownership of the ship. Even if the ship was obtained in good faith and the ship owner was not aware of the debt that came along with the ship.[36]

The second section states that a ship shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

The central rule in the third section of Article 3 is that a ship may not be arrested twice for the same claim by the same claimant.

[35] Prop. 1992/93:5, p. 9
[36] Prop. 1992/93:5, p. 10

> "A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant;….unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest."[37]

In this context arrest is equated with cases when security has once been given to avoid the ship to be arrested. So if the claimant in spite of this rule nevertheless obtains an arrest of such a ship the arrest decision may be void and the ship shall be released. But this rule of no allowance for re-arresting a ship for the same claim is not absolute. If the claimant can show that the bail or other security has been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest. This exception could be applied in cases when the security has been inadequate or insufficient because of circumstances that have occurred after the security was decided.[38]

Furthermore, if a claimant has obtained arrest on a ship, he or she cannot go around this rule by transferring the debt to someone else. This follows by a general appliance of the principle found in section 5 of Article 8 even though this section´s main focus is on other matter than the subject of re-arrest of a ship.[39]

Section four of Article 3 prescribes also that a ship could be arrested even for claims against someone else than the owner of the ship. It states the following:

"When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such a ship or any other ship in the ownership of the charter by demise, subject to the provisions of the Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provision of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship"

According to the section´s first part could a claimant that has a lien on the person that charters a ship, i.e. in cases of charter by demise, obtain arrest on

[37] Article 3 (3) in the 1952 Arrest Convention
[38] Prop. 1992/93:5, p. 10
[39] Prop. 1992/93:5, p. 10

the ship that is rented if the claim is attached toward it or any other ship that belongs to that person. But a sister ship to such a ship that the debtor is chartering could not be arrested because of such a claim. In the second part of this section it states that the rules found in section four shall apply even in cases when someone else than the registered owner of a ship is liable in respect of a maritime claim relating to that ship. This is applicable to all forms of charter parties.[40]

As a conclusion for Article 3, the claimant can obtain arrest for the same claim for only one ship, either in the ship that the claim is attached to or in a sister ship to this ship. The sister ship must be owned by the person at the time when the claim arose also owned the ship that the claim is attached to. Does the ownership of the sister ship transfer to someone else, the "liability" in respect of the maritime claim ceases. For certain claims a sister ship is not liable, such as claims that arises because of disputes over the title of ownership of a ship, some disputes between the ship owners of a ship and finally claims that arises because of a contract that is reconciled with mortgage in a ship.[41]

4.3.4 Article 4

According to Article 4 an arrest decision is only valid under the Convention if decided by a Court or by any other appropriate judicial authority.

4.3.5 Article 5

Article 5 contains the rules that govern the course of action when and how a ship should be released after being arrested. It states that a ship shall be released by a Court or other appropriate judicial authority after sufficient security has being furnished. If the parties cannot agree upon the amount or nature of the security the Court or other judicial authority shall determine this matter for them. If the decision of arrest is based on a dispute about the title of ownership of a ship or between the ship owners the Court or other judicial authority can determine the use of the ship in question by limiting the right of the person that has the possession of the ship. These limitations could for example be that the ship is not allowed to leave the territorial water or is not allowed to carry certain goods. The last part of Article 5 states that the person that provide a security to release a ship when arrested shall not be consider to have given an acknowledgement of liability or to

[40] Prop. 1992/93:5, p. 10
[41] Prop. 1992/93:5, p. 11

have waived the benefit of the legal imitation of liability of the owner of the ship.[42]

4.3.6 Article 6

Article 6 of the 1952 Arrest Convention states that:

> "All questions whether in any case the claimant is liable in damages for the arrest of a ship…., shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for."

Article 6 states in the first part that all questions related to the claimant´s liability for the damage caused by a wrongful arrest of a ship shall be determined by the law of the Contracting State in which the arrest was made or applied for. The second part of Article 6 states that all question related to matters of procedure which the arrest may entail, shall be totally governed by domestic law in that state that the arrest was made or applied for.

4.3.7 Article 7

Section one provides provisions about the right of the Courts in the Contracting State where the arrest or other similar security measure is imposed to examine the requirement that has given rise to the decision about the particular security measure. Section one starts therefore to state that the Courts of the Contracting State has the authority to examine such a dispute if it comply with the domestic laws in that State. Thereafter the section gives alternative in a number of situations (a-f) that gives the Court the authority to examine such a dispute regardless if the domestic laws in the Contracting State give the authority or not to examine such a dispute. The Convention from 1910 mention in point d) concerning provisions about collisions between vessels has been ratified in Sweden. The article 13 in this Convention has its corresponding provision in chapter 8 section 3 of SMC.

In section two of Article 7 you find provisions about situations when the Court at the town or place where the ship is detained does not have the authority to examine the case. In these cases the Court or other judicial authority that decided that the ship was to be arrested, shall specifically provide that the measurement that has been given as security for the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a

[42] Prop. 1992/93:5, p. 11

Court having jurisdiction so to decide. It shall also fix the time within the claimant shall bring an action before a Court that has jurisdiction.[43]

If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other judicial authority that made the decision, may, according to section three of Article 7, fix the time within which the claimant shall bring proceedings.

If the claimant does not take action within the time fixed according to section 2 or 3, the ship or the security shall be released according to section four of Article 7, if the defendant applies for it.

According to section five of Article7, all previous provision mentioned in this Article are not to be applicable in cases that are governed by the provisions found in the revised Rhine Navigation Convention of 17 October 1868. This Convention governs the principles of Rhine navigation today. The Contracting States of this Convention are Germany, Belgium, France, the Netherland and Switzerland. The United States was temporarily a member immediately after World War II, while Germany was under Allied occupation.[44]

4.3.8 Article 8

This Article governs the Convention´s applicable area. According to section one, the provisions of the Convention shall apply to every ship flying the flag of a Contracting State within the jurisdiction of a Contracting State.

According to section two, the Convention´s applicable area of jurisdiction can expand to also include ships that flies the flag of a non-Contracting State if any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest.

Section three acknowledges that a Contracting State puts a non-Contracting State or a person that is not domiciled nor has his principal place of business in a Contracting State in a poorer position than States or persons that falls under the provisions of the Convention.

In section four, the Convention permits a possibility to apply domestic laws in cases of internal disputes.

[43] Prop. 1992/93:5, p. 12
[44] http://www.ccr-zkr.org/, 13/4-2009 13:36

In the fifth and last section of Article 8 it states that when a maritime claim is asserted by a third party, such party shall be deemed to have the same habitual residence or principal residence principal place of business as the original claimant. This identification between the third party and the original claimant is not considered, as mentioned above (see Article 3), to only take sight on the relationship that is the main focus of section five but also to be considered to having a more general application.[45]

4.3.9 Article 9

According to Article 9, the 1952 Arrest Convention will not create a right of action, which, apart from the provisions of the Convention, would not arise under the domestic law of the Contracting State. Neither shall the Convention create any maritime liens which do not exist under the domestic law or under the Convention on Maritime Mortgages and Liens, if it is applicable.

The meaning of this provision is controversial. According to some, the provision means that the 1952 Arrest Convention does not include any obligation for the Contracting States to permit security measures in a ship any further than what follows of the law of the Contracting State. For example, if the law of the Contracting State is based on the principle that arrest only may be granted for debts or claims for what distraint can take place, the 1952 Arrest Convention does not interfere on this principal. Behind this view lies that the 1952 Arrest Convention primarily aims at the interests of the shipping industry's to limit the possibilities to security measures in ships. It also has been stated that in adverse cases of withholding a ship by arresting it would or could be used in extortion against the ship´s owners.[46]

4.3.10 Article 10

This Article contains some provisions that give a State the right to reserve at the time of signature, deposit of ratification or accession reservation, the right not to apply the Convention to the arrest of ships for any of the claims enumerated in section o) and p) of Article 1. But to apply their domestic laws to such claims and/or to reserve the right not to apply the first section of Article 3 to arrest of a ship, within their jurisdiction, for claims set out in Article 1, section q).

[45] Prop. 1992/93:5 p13
[46] Prop. 1992/93:5 p27

4.3.11 Article 11

According to this Article the 1952 Arrest Convention refer to a question related to the interpretation of the Convention or its applicability to arbitration. But if the parties agree upon to let the ICJ to settle the dispute the Convention gives ICJ the authority to examine the dispute that is related to the interpretation or the application of the Convention.

4.3.12 Article 12-18

These Articles contains common end provision.

4.4 Additional Comments

Before I continue comparing the international regime with the Swedish domestic regime related to arrest of ships, it is appropriate to bring in the relevant European laws since Sweden is a member of the EU. The relevant Conventions are the 1968 Brussels Convention, The Brussels I Regulation and The Lugano Convention.

5 EU law

The central rule in Sweden is that foreign judgments are not recognized and are not enforceable in Sweden. There is however a number of international Conventions, to which Sweden is a party to, which permits that a judgment that has been announced in another State can be accepted in Sweden in the same way as a Swedish judgment. Not just only judicial settlements can be enforceable, but also, in many cases, arbitrations, official documents, mediations before a court and/or other decision made by a "court" that are related to the judicial procedure to be allowed to arrest a ship. The international Conventions that make this possible are, as mentioned earlier:

- The 1968 Brussels Convention [47]
- The Brussels I Regulation [48]
- The Lugano Convention [49]

These three legal instruments are similar in content, but there are some differences. In general, it is the residence of the defendant that determines which of these legal instruments that should be applicable. The 1968 Brussels Convention and the Brussels I Regulation are applicable where the defendant has his residence in any state that is a member of the EU. The Lugano Convention is applicable when the defendant has his residence in Norway, Iceland, or Switzerland.

Another important difference between these three legal instruments is that the 1968 Brussels Convention and the Brussels I Regulation are both subject to the jurisdiction of the ECJ that has the exclusive right to interpret all questions related to these two legal instruments. The Lugano Convention on the other hand contains no references to the ECJ. As a consequence, various divergences have arisen among member states in the interpretation of this particular convention since every court in every member state to this Convention interprets the Convention in the light of their own legal tradition.

[47] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

[48] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; *or* "Council Reg (EC) 44/2001" *for short.*

[49] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters

In relation to other States where it does not exists any international cooperation towards Sweden, the Swedish Courts applies the domestic rules on jurisdiction according to the Swedish Code of Judicial Procedure chapter 10 in an analogous fashion, i.e. the provisions ruling the competence of Courts in Sweden.[50]

5.1 The 1968 Brussels Convention

Within EU, matters such as enforcement of judgments, is looked upon as a part of the private law field and since 1973 these questions have been regulated in the 1968 Brussels Convention. The purpose for this Convention is to allow and simplify the enforcement of judgments between the EU member states. All EU member states are members of the 1968 Brussels Convention.[51]

In article 2, the 1968 Brussels Convention states that legal action against a defendant should be brought before a court in the state in which he is domiciled or has his residence. In article 3 it states that exceptions to this rule are only admissible to the extent that they are allowed according to the 1968 Brussels Convention. Exceptions for maritime cases are however not found in the 1968 Brussels Convention. The effect of this was that an arrest proceeding could be made quite difficult because of the international nature of maritime operations.

In order to overcome these difficulties it was decided that, instead of bringing special rules on arrest into the Brussels Convention through revision, a reference was made in the 1978 Accession Convention (see art.35), to the 1952 Arrest Convention. This reference should have the effect that all parties should comply with the Arrest Convention in order to simplify the matter of arrest and permit countries to be able to bring cases of arrest of ships to its court even if the defendant in question was domiciled in another member state. The Arrest Convention became therefore an accessory to the EU membership.

5.2 The Brussels I Regulation

As of 1st of March 2002 the Brussels Convention of 1968 was replaced by an EU regulation, the so called Brussels I Regulation, as a consequence of the Amsterdam treaty and the deepened cooperation within EU. This

[50] Bogdan, Michael "Svensk internationell privat- och processrätt", p. 114; Ekelöf, Per Olof "Rättegång I", p. 78
[51] Pålsson, Lennart "Bryssel I-Förordningen jämte Bryssel- och Luganokonventionerna", p. 21-22

Regulation is directly applicable in all EU States.[52] The preamble to the Brussels I Regulation declares the Regulation´s purpose and roll:

> "In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction, the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable."[53]

The Brussels I Regulation is applicable in all EU member states. The exceptions are the territories in the EU member states that were covered by the 1968 Brussels Convention´s territorial application area, and that is not governed by the regulation.

In Sweden, the Brussels I Regulation is applicable to all legal procedures that have been initiated after the 1st of March of 2002.[54]

The Brussels I Regulation is built on the 1968 Brussels Convention but has some new changes. Many interpretations by the ECJ of the 1968 Brussels Convention will still have high value when interpreting the Brussels I Regulation. But the search after relevant precedence could be a little difficult since the Brussels I Regulation has not maintained the same order of articles as the 1968 Brussels Convention and the Lugano Convention has, apart for the six first articles in the Brussels I Regulation.[55]

Before the Brussels I Regulation came into force both the 1968 Brussels- and the Lugano Conventions had a number of weaknesses from a Swedish perspective. In Sweden it was first noticeably when a judgment was made in cases of payment that had been issued by the Swedish Enforcement Administration (*kronofogdemyndigheten*).

A decision from the Swedish Enforcement Administration was not accepted as a valid enforceable decision under any of the two Conventions. Therefore if a creditor in Sweden wanted a decision for payment that was enforceable in another state party to any of the two Conventions he had to issue a European Payment Order, or go to a foreign court; even if the decision by the Swedish Enforcement Administration was a valid enforceable judgment in Sweden.

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[52] Bundock, Michael "Shipping Law Handbook", p. 2
[53] see (6) in the Preamble to the Council Regulation as published in the Official Journal of the European Communities, published on the 16th January, 2001
[54] Article 66.2a in the Brussels I Regulation
[55] Bogdan, Michael "Svensk internationell privat- och processrätt", p. 130

As indicated earlier, this position for decision made by the Swedish Enforcement Administration is however changed now thanks to the Brussels I Regulation. In article 62 it states:

> "in Sweden, in summary proceedings concerning orders to pay (*betalningsföreläggande*) and assistance (*handräckning*), the expression "court" includes the "Swedish enforcement service" (*kronofogdemyndigheten*)".

5.3 The Lugano Convention

Sweden has been part of the so-called Lugano Convention and the Convention is regarded as part of Swedish law since 1992.

The Lugano Convention is basically a copy of the 1968 Brussels Convention and if not specifically stated the description of the Lugano Convention is applicable also with the 1968 Brussels Convention.[56]

The Lugano Convention reflects cooperation between the EU - and EFTA-states and Poland. The Lugano Convention was created for the purpose of creating greater uniformity in the field of enforcement of judgment. Upon ratification of the Lugano Convention non-member states would enjoy the same benefits as under the 1968 Brussels Convention. The interpretation of the Lugano Convention is not subject to the ECJ.[57]

Today Sweden is party to both the Lugano Convention and the 1968 Brussels Convention, the latter one upon accession, as a result of Sweden´s membership of the EU in 1995. Being party to both the Lugano Convention and the 1968 Brussels Conventions causes very few problems in practice since both of these Conventions are very similar. If there is a conflict they are to be applied in relation to different countries. The Lugano Convention is also applicable to judgments that have been announced in some off EFTA´s member states.[58]

The Lugano and the 1968 Brussels Convention do not only regulate questions related to the acceptance of jurisdiction and the enforcement of judgments in civil and commercial matters, but also the direct applicable authorization of which State that has authority in different types of

[56] Prop. 1991/92:128, p. 121; Pålsson, Lennart "Bryssel I-Förordningen jämte Bryssel- och Luganokonventionerna", p. 24
[57] http://curia.europa.eu/common/recdoc/convention/en/index.htm?44,3, 14/4-2010, 13:53
[58] Bundock, Michael "Shipping Law Handbook", p. 2-3

international disputes. This means that the decision of a Court in a Contracting State is without boundaries and could therefore under the influence of the Convention move over the State boundaries and still be accepted as an enforceable judgment in another Contracting State. There is an exception to this principle. If a Contracting State is party to another international Convention with a focus on a particular area and has provision related to the enforcement of judgments in civil and commercial matters this Convention should be applicable instead of the Lugano or 1968 Brussels Convention.[59]

The provisions related to the maritime industry found in the 1968 Brussels Convention were added in connection to the entry of Denmark, Ireland and Great Britain to the 1968 Brussels Convention year 1978. Within EU it was agreed that a need for any special authorization rules for sea court objectives did not exist. The reason for this was among other things the provisions, found in the 1968 Brussels Convention, which retains a Contracting State´s authority to examine an objective with the support of a maritime Convention. Such a Convention would therefore be considered to be one that has a focus on a particular area, which gives it precedence over the 1968 Brussels Convention. Moreover, the negotiating States at this time were unanimously in favor of all States joining the 1952 Arrest Convention. The rules could therefore limit itself to the two Articles above. The provisions that are related to the maritime industry found in the Lugano Convention are identical to those in the 1968 Brussels Convention, as evident in Article 5.7 or 54A.[60]

Since authorization rules other than the provisions found in the Lugano Convention may not be applied between Contracting States, a State´s entry to the Lugano Convention could limit that State´s jurisdiction. For example, in the Lugano Convention there are no provisions that gives a Contracting State a jurisdiction in matters related to arrest of ships, consequently the State´s authority to examine the dispute in matter related to the arrest of a ship is therefore limited under the Lugano Convention unless the Contracting State has signed a Convention that has a special focus on a specific matter, such as the 1952 Arrest Convention.[61]

In the 7th Article of the 1952 Arrest Convention the Convention gives the Courts in a Contracting State the jurisdiction and authority to examine the dispute in matters related to arrest of a ship. This authority mention in the 1952 Arrest Convention is accepted under the Lugano Convention, since

[59] Article 57 in the Lugano Convention Article 57; Prop. 1992/93:5, p. 14-16
[60] Prop. 1992/93:5, p. 14-16
[61] Bundock, Michael ”Shipping Law Handbook”, p. 3

special Conventions have precedence before the Lugano Convention, see Article 57. So in order for a new Contracting State to the Lugano Convention to retain its authorization to examine a dispute in matters related to arrest of ship, after the decision of arrest has been granted it is required that the Contracting State also is a Contracting State to the 1952 Arrest Convention.[62]

But to be a Contracting State to both the Lugano Convention and the 1952 Arrest Convention could also be said to complement each other in one particular area. Together with the 1952 Arrest Convention authorization rules and the 5.7 article of the Lugano Convention the authorization rules for arrest expands since the provisions found in this article also permits arrest forum relating to cargo and freight which the 1952 Arrest Convention does not allow.

Since its introduction in 1988, many states that were party to the Lugano Convention have now become EU members and by doing so have ratified the 1968 Brussels Convention. So the Lugano Convention only applies to Iceland, Norway and Switzerland to today, for the purpose of Sweden.[63]

5.4 Additional Comments

We can see that since Sweden being member of EU since 1995 it has agreed to follow these Conventions stated above. The Brussels I Regulation is directly applicable in all EU States and simplifies the enforcement of judgments between the EU member states. All EU member states are also members of the 1968 Brussels Convention and Sweden has been part of the so-called Lugano Convention since 1992.

So far I have described and researched on the international regime and the European law, now I will continue with the Swedish domestic legislation and the comparison between these two regimes.

[62] Pålsson, Lennart ”Bryssel I-Förordningen jämte Bryssel- och Luganokonventionerna”, p. 142-144
[63] Bundock, Michael ”Shipping Law Handbook”, p. 2

6 Swedish domestic legislation

In Sweden arrest of ship is considered a security measure designed to enforce a claim not yet recognized by a Court.[64] It is also intended to give access to certain property open for judicial execution until an executor title has been obtained.[65]

The domestic legislation that is most relevant when discussing arrest of ships in Sweden is:

- The 1994 Swedish Maritime Code [66]
- The Swedish Code of Judicial Procedure [67]

When Sweden signed the 1952 Arrest Convention it did meet certain difficulties because of the principle that the Convention is built on, namely, that the aim of the security measures is against the ship itself and not against the debtor (*in rem*). While in the Swedish legal system it is the opposite principle that is used that relates to arrest of ship, namely, that the aim of the security measures is against the debtor and his assets (*in personam*).

The contradictions between these two principles are particularly visible when examining the relationship between section 4 and 5 of the 1994 Swedish Maritime Code, hereinafter just called SMC.

Also of interest as stated above will be the Swedish Code of Judicial Procedure, hereinafter just called RB, and especially its 15th chapter section 1-2. The reason for that is found in Article 8 (4) of the 1952 Arrest Convention, it is possible for a contracting state to keep their domestic legislation relating to arrest of any ship within the jurisdiction of the State and especially if the person has its habitual residence or principal place of business in that State.

Under this exception the RB is still being used in the proceeding related to arrest of ships because in its legislation you will find provisions related to the Swedish institute of "*kvarstad*", a legal system that plays a very important part in how Sweden handles arrest of ships and its position in respect of international arrest of ships that it has today.

[64] Dillén, Kristian "Några anmärkningar om kvarstad och skingringsbud", p. 321-322
[65] Rune, Christer "Rätt till skepp" p. 175
[66] Sjölag, SFS 1994:1009
[67] Rättegångsbalk, SFS 1942:740

6.1 The "*kvarstad*" institute

In Sweden the "*kvarstad*" institute, in the maritime context, used to govern all attachment relating to ships. However, with the introduction of the new SMC in 1994 and as a consequence of Sweden's membership in the EU, the international concept of arrest was introduced. The 1952 Arrest Convention was incorporated into chapter 4 of the SMC but the term "arrest" is not used but rather the Swedish term "*kvarstad*". This choice of wording has resulted in an intertwined relationship between the international concept of arrest and the Swedish institute of "*kvarstad*". Another thing that makes these two institutes intertwined with each other is the fact that since procedural matters are not treated in the 1952 Arrest Convention but left to the *lex fori*, Sweden can and has been applying the procedural rules on "*kvarstad*" even in international arrest cases. As a result the domestic rules on "*kvarstad*" and other procedural statues connection thereto applies more or less as a supplement to the SMC.[68] This means that grounds, procedural matters, enforcement and legal effects relating to the institute of "*kvarstad*" also applies frequently to international arrest situations in Sweden.

"*Kvarstad*" is in many ways equal to the international concept of arrest of ships but there are also a number of things that vary. For example, in the Swedish concept of arresting a ship the issue of the matter is not only a "*debt*" but rather also a dispute over "*title*" to part of or the whole of a certain property. Furthermore, there is no restriction to maritime claim, i.e. a ship could be imposed by "*kvarstad*" for any claim against the owner of the ship as long the 1952 Arrest Convention is not applicable.

6.1.1 The procedural of "*kvarstad*"

The Government appoints the Courts that handle maritime cases in Sweden; these are referred to as Maritime Courts.[69] There are seven appointed Maritime Courts today in Sweden.[70]

Questions related to the judicial procedure shall, according to Article 6 part 2 of the 1952 Arrest Convention, totally be governed by the law of the Contracting State. The general conditions or criteria related to the judicial procedure for "*kvarstad*" according to Swedish law will therefore be applicable also for "*kvarstad*" associated with maritime claims on a ship.

[68] SMC chapter 4 section 2
[69] SMC chapter 21 section 1
[70] The seven Maritime Courts in Sweden are: Gothenburg, Kalmar, Luleå, Malmoe, Stockholm, Sundsvall and Värmlands district courts according to SFS 1975:931.

The first criterion for allowing "*kvarstad*" on a ship is any claim, it does not matter if it is a maritime nature to it or not. But this is only true if the ship is to be considered being a Swedish ship or a foreign ship flying a flag of a non-Contracting State to the 1952 Arrest Convention. If the ship flying a flag of a Contracting State to the 1952 Arrest Convention the claim must correspond to the list in section 3 of the SMC. (See also Article 1 of the 1952 Arrest Convention)

The second criterion that must be fulfilled before the Court will grant a claimant his desire to impose "*kvarstad*" on a ship in Sweden the claimant must first put up a security. The amount of security has to be designed in order to cover all expenses, i.e. for the damage that can be inflicted on the other party in case of wrongful or unjustified "*kvarstad*" of the ship. The Court may however free a claimant from this obligation. The conditions for this exception are that the claimant is unable to give security and that he or she shows a genuine reason for his or her wishes to apply for "*kvarstad*". Furthermore, the State and certain municipal authorities do not need to set security nor an applicant that has been granted general legal help needs to give such security.[71] After the security has been set, the security will be examined by the Court, if it has not already been approved by the other party.[72] The Swedish Government and certain governmental authorities are not according to UB 2:27§ obliged to provide security.

The third and fourth criteria are more of an evidentiary nature than all the others. These two criteria are found in RB 15:1-2-§§. These two criteria are:

1. That the claimant has "*probable reason*" that the <u>*same*</u> has a rightful claim that could, or can be assumed be brought before a court.

2. That there is a "*presumed risk*" that the defendant might slip away, hide assets or in other ways avoid payment.

According to the preparatory work that was done in order to implement the 1952 Arrest Convention into the Swedish legal system, it was felt that it would be of an importance that Sweden as far as possible did retained the protection mechanisms that was related to the institute of "*kvarstad*". It was therefore considered that Article 6 provided the Contracting State freedom to set conditions to secure the risk for escape or sabotage by the debtor in order to avoid payment.[73]

[71] Rättshjälpslagen 9a§ (SFS 1972:429)
[72] RB 15:6§ (SFS 1942:740) and UB 2:25§ (SFS 1981:774)
[73] Prop. 1992/93:5, p. 25

When it comes to "*kvarstad*" on foreign ships it was stated that the criterion "*presumed risk*" ought to be presumed, since ships are very easy to move outside the creditors reach if wanted and that ships are more or less expected to leave the country. But if the foreign ship owner has other property in Sweden the importance of this requirement becomes unimportant. [74]

But this presumption that the "*presumed risk*" should be fulfilled in cases that involves a foreign ship is not always so, which is shown in the two cases "*The Nestor*" and "*The Mindaugas*". [75] In these two cases the Swedish Court found that the claim was a maritime claim. Therefore, chapter 4 of the SMC was applicable. However, the Court also referred to the provision found in RB 15:1-2§§. When doing so the Court found that the second condition, that need to be shown when applying the evidentiary criteria used for "*kvarstad*" was not adequate fulfilled. On that ground the Court refused to impose "*kvarstad*" in both cases.

Another aspect of this criterion for "*kvarstad*" is related to foreign decision related to security measures. Foreign settlements cannot be effected in Sweden without the authority in special rules about this matter.[76] These special rules in Swedish legislation normally have their base in one or more international agreements. Foreign decisions related to security measures, such as arrest of ships, are normally not enforced in Sweden but, as mentioned earlier, the Lugano Convention constitutes here as an exception.[77] The question about if the Lugano Convention permits that Swedish conditions on escape - and sabotage risk will be met in order to execute a foreign decision about "*kvarstad*" has been treated in the preparatory work that was done at the time when Sweden decided to sign the Lugano Convention.[78] The answer on that question was that the Lugano Convention does not permit this condition on a foreign decision under the Lugano Convention.[79] But this only applies when the Lugano Convention is applicable.

The fifth and the last criterion that has to be fulfilled to obtain "*kvarstad*" is that the ship has to be subject to distraint for a maritime claim.

According to the 1952 Arrest Convention, a ship can be arrested for all types of maritime claims that are connected with the ship. The ship's

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[74] Tiberg, Hugo "Kreditsäkerhet i Fartyg", p. 265-266; Prop. 1992/93:5, p. 25
[75] See case: *The Nestor* (T 1863-02, Malmö Tingsrätt) and *The Mindaugas* (T 11513-02, Stockholm Tingsrätt)
[76] UB 3:2§ (SFS 1981:774)
[77] Prop. 1991/92:128, p. 146
[78] Prop. 1991/92:128, p. 145
[79] Prop. 1992/93:5, p. 26

responsibilities for the maritime claims are not influenced by change of ownership of the ship itself. Also so called sister ship can in the majority of cases become objects for arrest. Furthermore, a ship can be arrested in order to secure a number of maritime claims against other than the owner, for example the charterer. The 1952 Arrest Convention permits therefore "*kvarstad*" in several cases despite that the ship cannot to be subject to distraint for a maritime claim.[80]

The 1952 Arrest Convention´s provisions is therefore not in harmony with several aspects of the bases for and the whole aim with the Swedish institute of "*kvarstad*". The Swedish institute of "*kvarstad*" is mainly built on the idea that the "*kvarstad*" will function as a safe security measure for a future execution of the property which is imposed with "*kvarstad*". If the property has been transferred, the transferor's creditors cannot, as a primary rule, make a claim on that same property since the new owner has, by good faith (through tradition or registration), obtained the legal protection for its acquisition.

So when the new law (the SMC of 1994) was discussed it was decided that it was of great importance that also in the future reserve "*kvarstad*" on ships in situations where the ship could be subject to distraint for a maritime claim in Sweden or on other ways take as a compensation for a maritime claim. If not, the new legislation could be misused in a way that could hurt the credit security within the shipping industry. For example, "*kvarstad*" could force a ship owner to pay a claim that neither he nor the ship in the end had to pay. Furthermore, if this criterion would not be used, a conflict would arise towards the principle which says that Swedish Court could only declare "*kvarstad*" for claims that later on will be examined by a foreign Court but only if that foreign Court's decision could take effect here in the country.[81]

If these five criterions have been satisfied in one way or another the Court may decide to attach as much of the debtors property as needed to cover the debt in question by declaring "*kvarstad*".[82]

At "*kvarstad*" in general and under normal circumstances the Court never gives in its decision which property that will become object for "*kvarstad*". The Court only declares that the debtor's property up to the decided value will be put under "*kvarstad*". Its therefore up to the Swedish Enforcement Authorities ("kronofogdemyndigheten") when it shall execute the Court´s decision, which property that will be consider property that should be

[80] Prop. 1992/93:5, p. 26
[81] NJA 1983 s. 814
[82] Ekelöf, Per Olof "Rättegång III", p. 17

imposed with "*kvarstad*". But when the Court´s decision involves a foreign shipping company that owns a ship which is ready to take sale, the Court normally make an exception from this rule and declare the particular ship to be arrested and to be imposed with "*kvarstad*".[83]

6.1.2 The enforcement of "*kvarstad*"

Once a decision has been taken by the Court and the claimant has obtained "*kvarstad"* on the ship of his desires, enforcement is placed with the Swedish Enforcement Authorities, according to the Swedish Enforcement Code 1:3§. The decision is then communicated to the ship's master, and the ship's certificate and nationality documents are taken into custody and a seal is fixed to the rudder. Once this has been done, the rules in the Swedish Penal Code 17:13§, places criminal responsibility, such as fines or prison up to one year, on any person that breach the imposed "*kvarstad*" on the ship. [84]

If a breach is expected, measures like placing of a guard in the harbor or tie the ship to the dockside may be taken to make sure that the ship does not breach the imposed "*kvarstad*" on the ship. If needed, the ship´s machinery or other vital parts could be tampered with so the ship is unable to set sail.[85] But if the ship is anchored outside the port area, and the need for tampered with the ship´s machinery or other vital parts is necessary it is important that it is done in a way that the ship even after the tampering is still seaworthy since it still is consider to be at sea. If this is not respected and the ship becomes unseaworthy the ship could end up losing its class, and if doing so, this act will often be looked upon as a serious offence.[86]

6.1.3 The legal effects of "*kvarstad*"

The legal effects of "*kvarstad*" are very similar to the international concept of arrest such as; the owner, or any other user, is prevented from making use of the ship commercially.[87] The owner also loses the right to relocate the ship or perform any other transaction that may be harmful to the claimant. Once "*kvarstad*" has been imposed, the claimant has one month to bring his case to the courts before the "*kvarstad*" is lifted.[88] The "*kvarstad*" may also be lifted if sufficient security is provided by the ship owner.[89]

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[83] Prop. 1992/93:5, p. 31
[84] BrB 17:13§ (SFS 1962:700)
[85] Tiberg, Hugo. "Kreditsäkerhet i Fartyg", p. 267-268
[86] See Fartygssäkerhetslagen, SFS 1988:49
[87] Tiberg, Hugo. "Kreditsäkerhet i Fartyg", p. 268-269
[88] RB 15:7§ (SFS 1942:740)
[89] RB 15:8§ (SFS 1942:740)

The creditors that have been granted "*kvarstad*" on a ship have a better right in relationship to other creditors. But "*kvarstad*" does not prevent other creditors from applying for "*kvarstad*" for the same ship during the time it is imposed by "*kvarstad*". Furthermore, there is nothing that hinders a maritime lien to be created during the time the ship is imposed by "*kvarstad*", i.e. wages of the crew etc. that obtain priority over a maritime claim which is not secured by an equivalent maritime lien. Consequently, a "kvarstad" on a ship over a long time could be of limited value for the creditors that don't have claims that are secured by a maritime lien.

The SMC chapter 3 section 40 provides a particular legal effect when imposing a ship with "*kvarstad*", because through this action the time bar related to a maritime lien is overridden.

6.2 Additional Comments

In Sweden the "*kvarstad*" institute, governs all attachment relating to ships. However, as a consequence of Sweden's membership in the EU the 1952 Arrest Convention was incorporated into chapter 4 of the SMC. But still the international term "arrest" is not used in Sweden but rather the Swedish term "*kvarstad*". This choice of wording has resulted in an intertwined relationship between these two concepts and this relationship is therefore important to understand before chapter 4 of the SMC is discussed in detail.

It is also because of this reason that the term "*kvarstad*" is not translated when examining chapter 4 of the SMC in the following chapter.

Another aspect of the choice not to translate the word "*kvarstad*" is that the word is not just simply a motionless word but rather a concept and by using the Swedish term "*kvarstad*" in the following chapter I hope the understanding would increase concerning the Swedish position to arrest of ships.

6.3 Chapter 4 in the Swedish Maritime Code

The provisions in chapter 4 of SMC are in conformity with the 1952 Arrest Convention and therefore deal exclusively with the matter of arrest of ships.

The SMC is a result of a united effort by the Scandinavian countries to achieve a Scandinavian uniformity in the field of maritime law.[90]

6.3.1 Section 1

In the first part of this section the provision outlines the general applicable legal area that chapter 4 of the SMC governs, i.e. the legal area of ”*kvarstad*” imposed on ships which are or may be adjudicated in Sweden or in another country because of a maritime claim. Public charges such as port, canal and other waterway dues are not covered by chapter 4.

The second part of this section states that the provisions in chapter 4 of the SMC will be applied on ships that are introduced in a foreign ship register irrespective of the ship´s flag, Contracting State flag or not. They will also be applied on ships that are introduced in the Swedish ship register, if the person that has his ship registered in it lacks a closer connection to Sweden such as habitual resident or principal place of business in Sweden. In cases when the SMC chapter 4 is not applicable could be, for example, when it is a question about non registered ships or in cases when it is a pure national dispute. In these cases the general provisions found in the RB are applicable.[91]

The third and the last part of this section simply states that ships that belong to or are used exclusively by the Swedish State may not be arrested. It also refers to another law concerning Foreign State Vessels etc. that contains provisions that certain ships may not be arrested.

6.3.2 Section 2

Section two is built on Article 6 in the 1952 Arrest Convention, i.e. questions related to the legal conditions for “*kvarstad*” and about the judicial procedure of “*kvarstad*” and about setting of security for the damage that through an incorrect or wrongful “*kvarstad*” shall be decided according to the law of the Contracting State.

This means among other things that the claimant must show “*probable reasons*” that he has a rightful claim that could, or can be assumed be brought before a Court. Furthermore, he has to show that there is a “*presumed risk*” that the defendant might slip away, hide assets or in other ways avoid payment.[92]

[90] Prop. 1993/94:195, p.2, 131-133
[91] Prop. 1992/93:5, p. 23
[92] See above: Chapter 6.1.1. The procedural of ”kvarstad”

Concerning the requirement to show "*presumed risk*", there is however one exception for a certain type of maritime claims. In the SMC 3:40§ part 3 it states that a Court has the authority to impose "*kvarstad*" on a ship according to RB 15:1§, if the claim is secured by a maritime lien on the ship, even if there is no "*presumed risk*" of the defendant slipping away, hide his assets or in other ways trying to avoid the payment.

6.3.3 Section 3

In the first part of this section the fundamental provision is given that "*kvarstad*" on ships may be announced only for a maritime claim.

Before Sweden became a Contracting State to the 1952 Arrest Convention; a ship could be declared with "*kvarstad*" for all types of civil law claims. But because of the exhausted list of maritime claims in the 1952 Arrest Convention, the signing of the 1952 Arrest Convention became a considerable limitation of the possibilities to obtain "*kvarstad*" against a ship owner. However in practice the difference was not as big as in theory since the claim that was normally used to obtain "*kvarstad*" on a foreign ship normally was found in the list given in the 1952 Arrest Convention.[93]

The second part of this section contains an exhaustive list of different maritime claim which is outlined in 17 points. These claims found in this list have to be used when applying for "*kvarstad*" on a ship. The list has its correspondence in Article 1 of the 1952 Arrest Convention.

- *Point 1*: Under this point it is stated that damage caused by a ship either in collision or otherwise, is a maritime claim. But apart from property damages caused by collision between a ship and with another object it also covers damages as been caused by the ship´s navigation. For example, damages on piers or ships at anchor as a result of big a wave made by a ship that goes by or if a ship is navigated so poorly that another ship has to make a maneuver that results in damage on that ship. Point 1 is linked with a maritime lien according to point 4 in the SMC 3:36§.[94]

- *Point 2*: This point treats deaths or personal injures/damage that has been caused by a ship or that has occurred in connection with the operation of a ship. Furthermore, it also covers situations like when a person slips on a slippery deck or falls from the ship over an

[93] Prop. 1992/93:5, p. 24
[94] Prop. 1992/93:5, p. 33

inadequate reeling and drowns. Also for a maritime claim off this kind it exist a maritime lien, according to point 3 in the SMC 3:36§.[95]

- *Point 3*: This point deals with salvage reward but also other certain claims that might arise during or in connection to a salvage operation. For example, damages that have taken place on the ship that was salvaged as a result of negligence by the salvor. Claims related to point 3 are also linked to a maritime lien according to point 5 in the SMC 3:36§. In addition, when a ship is rescued by the salvor the ship is not allowed to move without the salvor´s permission until salvage reward has been paid or security has been given.[96]

- *Point 4*: This point covers claims related to demise – or bareboat charter agreement.

- *Point 5*: This point intends claim that has its base on an agreement concerning the carriage of goods on board a ship on account of a charter party, bill of lading or similar. All types of failings in the fulfilling of the agreement or a contract breach is covered within this point with exceptions for damage on or loss of the transported goods.[97]

- *Point 6*: Claims that are based on the exception in point 5 is covered under this point, i.e. "loss of or damage to goods including luggage carried in a ship". "Luggage" in this point may here be considered to cover also hand travel luggage.[98]

- *Point 7*: This point deals with general average. This particular claim is also linked with a maritime lien according to point 5 in the SMC 3:36§.

- *Point 8*: This point deals with bottomry and even if the institute of bottomry in Sweden no longer exist it is included nevertheless in this particular legislation since the institute of bottomry still occurs in foreign legal system.

[95] Prop. 1992/93:5, p. 33
[96] Prop. 1992/93:5, p. 33
[97] Prop. 1992/93:5, p. 33
[98] Prop. 1992/93:5, p. 33

- *Point 9*: This point deals with claims that are related to towage. All kinds' of claims related to towage is covered under this point. For example, claims related to compensation for damages on a ship that was towed or the towing ship itself or if the damages was caused by a breach of contract.[99]

- *Point 10*: This point deals with pilotage. The pilotage dues are linked with a maritime lien according to point 2 of the SMC 3:36§.

- *Point 11*: This point deals with delivery of products or stock for a ship´s operation or for its maintenance. In the 1952 Arrest Convention it is stressed that it lacks importance where the delivery come about. The delivery can therefore have happened in the port as well as during the voyage. It is not even required that the delivery was necessary for the ship.[100]

- *Point 12*: This point deals with claims related to compensation for building, repairing or equipping of a ship or dock charges. All claims that a person has that falls under this point give that person a right to retain the property as a security for his right of payment or other compensation according to SMC 3:39§.

- *Point 13*: This point deals with wages of the master or any crew member on account of his employment on board the ship. Claims related to this point are linked with a maritime lien according to point 1 in the SMC 3:36§.

- *Point 14*: This point deals with claims related to disbursements made by the master or a sender, charterer or a shipper or an agent on behalf of the ship or its owner. According to SMC 6:8§ has the master the authority on behalf of the owner of the ship to enter into any transaction for the maintenance or the performance of the ship and its voyage. For cost that the master therefore can have had in connection with such transactions he has the right to obtain payment through applying for "*kvarstad*" on the ship.

- *Point 15*: This point deals with claims related to any disputes about the ownership of a ship.

[99] Prop. 1992/93:5, p. 33
[100] Prop. 1992/93:5, p. 34

- *Point 16*: This point deals with claims related to any dispute between co-owners of a ship or the possession of a ship or the operation of the earning from a ship. In cases when a ship is owned by a company and the dispute is between the owners inside the company or between the shareholders this point is not applicable.[101]

- *Point 17*: This point deals with any mortgage or other contractual hypothecation of a ship.

Fees related to port-, channel- and others similar water paths are not covered by the list in this section. But in situations when there is a clear public legal nature to the case a ship can still be declared with "*kvarstad*" according with the provisions found in the RB 15:1-2-§§ for this types of claims. The basic provisions for the execution of "*kvarstad*" for these types of claims are found in the Swedish Enforcement Regulation[102] and in the Swedish Enforcement Code chapter 16 sections 13-16.[103] This is considered to be in accordance with Article 2 in the 1952 Arrest Convention.[104]

6.3.4 Section 4

This section states which ship that can to be declared with "*kvarstad*" because of an existing maritime claim. The provisions corresponds against Article 3 (1) and 4 in the 1952 Arrest Convention.

The provisions found in the third part of this section are not just applicable to situations when a bare-boat charterer is responsible for a maritime claim, even though in most cases this would be the most common situation. Furthermore, such a limitation of responsibility would probably go against the second part of Article 3 (4) in the 1952Arrest Convention.

6.3.5 Section 5

The importance of the provision found in section 4 is largely limited by section 5 since according to this later section the conditions for "*kvarstad*" needs to be fulfilled if "*kvarstad*" will be granted.

In section 5 it is stated that "*kvarstad*" can only be imposed on a ship if, and only if, the ship is subject to distraint for a maritime claim in Sweden, or if the maritime claim does not intend a payment obligation, become object for

[101] Prop. 1992/93:5, p. 35
[102] Utsökningsförordningen (SFS 1981:981)
[103] Utsökningsbalk (SFS 1981:774)
[104] Prop. 1992/93:5, p. 35

other execution than execution of the imposed "*kvarstad*". Therefore through the provision in section 5, the possibility is limited to allege a ship with "*kvarstad*" for a maritime claim against other than the ship owner in cases when the maritime claim is linked with a maritime lien or other limited property rights in a ship. According to the Swedish view, the 1952 Arrest Convention does not put up any obstacle against such a condition for arrest which is found in section 5.[105]

If for example someone applies for "*kvarstad*" concerning a due payment obligation which is aimed against a so called sister ship, it is required that the ship can be distrained for the existing maritime claim if "*kvarstad*" shall be imposed on the ship. Has the sister ship in our case already been transferred and the registration has come about for the acquisition according to the SMC 2:9§, the ship may not at all be subjected to "*kvarstad*" of any other claim against the transferor than one secured by a lien or mortgage upon the ship or a right of retention therein.[106]

Another situation where the section becomes applicable is if it exist an agreement between the parties involved that the dispute in connection with their agreement will be examined by a foreign Court and that this judicial settlement cannot take effect in Sweden. In this respect the section therefore constitute a codification of a principle that has been declared by the High Court of Sweden in 1983.[107]

According to another principle that exists in the Swedish judicial procedure system is that the parties involved in a civil case has the main responsibility to show whether the conditions really exist for a specific law to be applicable in their particular case. Exception to this rule is if the Court just by the "*kvarstad*" application finds *prima facie* that the necessary conditions for granting the application exist. In this case the Court can make an interim "*kvarstad*" decision. But does the other party show afterwards, for example, that it exists an agreement between the parties that declare that if a dispute arises between them the dispute will be decided by a Court or by a arbitration committee whose decision cannot take effect in Sweden, the interim "*kvarstad*" decision will be revoked. The applicant for the original interim decision for "kvarstad" is then obliged to compensate the other party for the damage that has been inflicted through the incorrect decision that prevented the ship in question to set sail.[108]

[105] Prop. 1992/93:5, p. 36, 50
[106] Prop. 1992/93:5, p. 37
[107] NJA 1983 s. 814
[108] Prop. 1992/93:5, p. 37

6.3.6 Section 6

This section corresponds with Article 3 (3) of the 1952 Arrest Convention. The section's central rule is that a ship shall not be declared with "*kvarstad*" more than once for the same maritime claim by the same claimant.

In the section´s second part it states that an earlier set security, in order to avoid or to get the ship released from "*kvarstad*", is equated with "*kvarstad*" in this context. Would a claimant nevertheless succeeds to obtain a new "*kvarstad*" decision for the same maritime claim, shall this decision be cancelled and the ship should be released.[109]

This ban against repeated security measures in form of "*kvarstad*" is however not absolute. The same exception that exist in Article 3 (3) of the 1952 Arrest Convention also exist in this section of the SMC, i.e. if a claimant can show that the bail or other security has been finally released before the subsequent "*kvarstad*" or that there is other good cause for maintaining "*kvarstad*" on the ship, the ship could be imposed with "*kvarstad*" a second time for the same claim by the same claimant. This exception could be applied in cases when the security has been inadequate or insufficient because of circumstances that have occurred after the security was decided. For example, a maritime claim could show itself, after the security has been given for the same, be larger than what the claimant originally had reason to estimate or that the person responsible for the bail has gone insolvent.[110]

It should be stressed that the provision in this section does not cover situation where an interim "*kvarstad*" decision first is granted by a District Court, which later on, in its final examination, revoke the interim "*kvarstad*" decision. If the claimant thereafter makes an appeal against such a decision to the Court of Appeal, the Court of Appeal is of course allowed to take a new "*kvarstad*" decision. In such a situation, new execution of the "*kvarstad*" decision will take place, if it is practically possible.

6.3.7 Section 7

The section's first part corresponds with Article 1 (2) in the 1952 Arrest Convention. The other part of this section contains an exception from one of the most central rules when declaring "*kvarstad*" on a ship, namely that a ship must be prevented from departing as long the ship is imposed with

[109] Prop. 1992/93:5, p. 39
[110] Prop. 1992/93:5, p. 39

"*kvarstad*". This part corresponds with the first part of Article 5 in the Arrest Convention.

6.3.8 Section 8

This section deals with property brought on board a ship by a crew member. The section refers the matter to the SMC 22:1§. The provision in section 1 of chapter 22 of the SMC contain provisions related to seamen and states that after a ship has been cleared and ready to depart, no employed person may be preventing the ship from departing because of a debt, nor may any property that is needed during the voyage be detained or imposed with "*kvarstad*".

7 The Swedish position in some classic issues related to arrest of ships

7.1 Arrest of sister ship

Both the domestic and the international regime permit a claimant to arrest either the particular ship in respect of which the maritime claim arose, or any other ship, i.e. sister ship, which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship. This is applicable not just for the ship owner but also for a charterer that is liable for a claim.[111]

7.2 Piercing the corporate veil or associated ship

In the 1952 Arrest Convention the issue which is usually called "piercing the corporate veil" or "associated ship" is not regulated except that it speaks of an owner without giving any definition on which entity, or person this is referring to.[112] In general an owner considers being the person, or entity that legally have possession of, or controls a specific ship. The issue of "piercing the corporate veil" arises when the Court is facing various contractual formations, in which, a person, or entity do not legally own the ship or controls it but is *de facto* the ship owner. In these situations the Court could either accept the contractual formation of ownership or disagree with the contractual formation of the ownership of a particular ship and as an option look at who that is *de facto* the ship owner and thereafter apply the provision related to the issue of sister ship.

According to Swedish law, the Courts are limited to apply the rules related to sister ship. The Swedish Courts are only to apply the sister ship rules in such a way that the need for "piercing the corporate veil" is unnecessary, except when the beneficial owners of the ship have given a clear impression that they are to be liable.[113]

[111] Article 3 (1,4) in the 1952 Arrest Convention; SMC 4:4§
[112] Article 3 (1-2) in the 1952 Arrest Convention
[113] Berlingieri, Francesco "Berlingieri on Arrest of Ships – a commentary on the 1952 and 1999 conventions", p. 176

7.3 Third party liability

In article 3 (4) of the 1952 Arrest Convention the matter of third party liability is dealt with and it is intertwined with the matter of arrest of sister ships. Unfortunately the lack of clarity in this article has created some confusion in applying this provision.

For example, the article causes insecurity for the ship owners since they do not know if their ship might be arrested after their ship has been subject for a charter party.

Another matter is that the provision of this article is tied up to a specific ship and follows that ship through changes of ownership, it means that in the case of change of ownership of the ship the new ship owner could get his new ship arrested for a claim that arose during the ownership of the previous owner.

Under Swedish law the provisions of this article are found in the SMC chapter 4 section 4. In the Swedish preparatory works it states that article 3(4) of the 1952 Arrest Convention is to be interpreted broadly and that it should be left to the application of the courts to further specify what subjects the law shall include.[114]

Furthermore, even in these cases of third party liability the regulation found in SMC 4:4§ ought to be read in combination with section 5 of the same chapter. The effect of section 5 in cases of third party liability is that since arrest is only allowed if the ship is distrainable according to Swedish law, the maritime claim has to be secured by a maritime lien in order for arrest to be possible, when another than the owner is liable.[115] This combination between the 4 and the 5 sections effectively prevents the possibility of creating new maritime liens.

In the case of "The Russ" [116] an interim arrest was granted by the DC. The DC did apply SMC chapter 4 section 4 without regard to the important exception in section 5 of the same chapter. This decision was made regardless of the owner's statement to the DC that they were, in fact, owners of the ship and not liable with respect to the maritime claim incurred by the time charterer, as it was not secured by a maritime lien. The judgment was appealed to the Svea Court of Appeal the day after the DC decision. The

[114] Prop 1992/93:5, p. 36
[115] Prop 1992/93:5, p. 38
[116] Russ No.I (Stockholm District Court 23 September 1999; Svea Court of Appeal 1 October 1999 matter: Ö 6976-99

Svea Court of Appeal lifted the arrest from the ship in respect of the owners' argument in combination of section 5 of the SMC.

7.4 Re-arrest

The international regime prohibits a second arrest of the same ship for the same maritime claim by the same claimant. The exceptions to this rule related to re-arrest are in cases when security has not been released, or when there are circumstances relating to the last sentence, "other good cause" in article 3 (3) of the 1952 Arrest Convention. Under the domestic regime the Swedish position on re-arrest corresponds with the 1952 Arrest Convention, as the provisions in the SMC chapter 4 section 6, are very similar to article 3 (3) of the 1952 Arrest Convention. There is also nothing in legal doctrinal writings or in case law that should deviate from this statement.

7.5 Wrongful arrest

The amount of money involved on a daily basis in operating a ship is normally quite large. There are expenses such as crew salary, mortgages, fuel costs, ports or other fees etc. For a ship to be profitable it needs to continually produce money by being active in commercial activities. In some cases the ship owner are dependent on the income from the ship to pay the expenses related to it. If then a ship is put under arrest for securing a maritime claim, but is so on an insufficient or incorrect grounds, who is to be liable for the economical damages that the ship owner will then suffer? This matter is left to *lex fori* according to the 1952 Arrest Convention.[117]

Under Swedish law the claimant must always provide security just in case the arrest ends up being a wrongful or an unjustified arrest. The amount of money is decided by the Court, unless the parties by themselves agree on the amount.[118] The amount is based on the ship´s running expenses and the possible loss of profit the defendant might acquire if the arrest is decided. The Court may relieve the claimant of this condition if he is unable to provide security and has shown particularly "strong reason" that he has a rightful claim.[119]

Once the debtor has provided for a security the ship is immediately released from the arrest.

[117] Berlingieri, Francesco "Berlingieri on Arrest of Ships – a commentary on the 1952 and 1999 conventions", p. 248
[118] Berlingieri, Francesco "Berlingieri on Arrest of Ships – a commentary on the 1952 and 1999 conventions", p. 271
[119] RB 15:6§ (SFS 1942:740)

8 Conclusion

The conclusion is that there are two "regimes" that govern the arrest institute of ships in Sweden: the "international" regime found in Chapter 4 of the SMC, based on the 1952 Arrest Convention to which Sweden is party, and the "domestic" regime governed by a number a scattered different provisions in different laws. The most important of these are RB 15:1-2§§.

The international regime governs the arrest of ship flying the flag of a Contracting State to the 1952 Arrest Convention. The domestic regime governs the arrest of what this regime consider being a Swedish ship. Foreign ships that do not fly the flag of any Contracting State to the 1952 Arrest Convention may be arrested for any claim permitting "*kvarstad*" under the Swedish legal system. This is all in accordance to Article 8 (3) of the 1952 Arrest Convention, which gives authority to Sweden to exclude a non-Contracting State, or any person, who at the time of the arrest, has no habitual residence or principal place of business in Sweden. Ships under the international regime may only be arrested for maritime claims listed in Article 1 (1) of the 1952 Arrest Convention. Ships under the domestic regime may be arrested for any claim, whether maritime or not, provided that the claim could be presented before a Swedish Court.

The international regime and most Contracting States to the 1952 Arrest Convention does not have any other conditions in order to obtain arrest on a particular ship except that the ship has to have a maritime claim that relates to it and that the maritime claim corresponds to the list found in Article 1 of the 1952 Arrest Convention.

Sweden on the other hand is one of the very few Contracting State to the 1952 Arrest Convention that requires the claimant to prove according to domestic law that the defendant´s behavior gives origins for a "*presumed risk*" that the defendant might slip away, hide assets or in other ways avoid payment, unless an arrest is obtained.[120]

In additional to this evidentiary requirement the domestic regime also requires that the ship may be subject to distraint for a maritime claim in Sweden, or if the maritime claim does not intend a payment obligation, become object for another execution than execution of the arrest.[121]

[120] RB 15:1-2§§ (SFS 1942:740)
[121] SMC 4:4-5§§ (SFS 1994:1009)

The provisions that have these additional conditions for arresting a ship are found in the Swedish Code of Judicial Procedure as referred to in the SMC 4:2§.

The fact that Sweden did choose to implement the 1952 Arrest Convention by using the word "*kvarstad*" instead of the direct translation of the word "arrest" in additional to a reference directly to the main provisions that governs the Swedish "*kvarstad*" institute, makes this particular area a little bit difficult to have a clear overview in what is expected of the claimant and the defendant, since the implemented provisions that are supposed to correspond to the 1952 Arrest Convention intertwine the Swedish "*kvarstad*".

This lack of simplicity by intertwining these two regimes seems to be a conscious choice made by Sweden since it from the very beginning never really gave the 1952 Arrest Convention their full approval. It seems to me that they merely accepted to be part of this Convention since the desire to be part of EU was greater than the unpleasant position Sweden would find themselves in if they were to be part of the 1952 Arrest Convention. Also when examining the approach Sweden used when implementing the international regime into its own domestic legislation I see a clear mistrust against the efficiency of the international regime. I make this statement in the view of the fact that they have chosen to keep their old legal system that did cover situation when a ship could be arrested intact, as much as they possible could without breaking the agreement with other Contracting States to the 1952 Arrest Convention.

One of the main reason why Sweden have taken this position is probably because of the conclusion when examining the international regime related to arrest of ships and by examining the content of the provisions found in the 1952 Arrest Convention and Sweden´s relationship to it, is that the Convention is obviously a common law product. Because the Convention focuses on the ship being the debtor (*in rem*) and not the person that owns the ship while in Sweden, which is a civil law country, focuses on the person that is responsible for the debt (*in personam*) and not the object that caused the claim.

As a final remark I will just say that it seems to me that Sweden could manage very well without the international regime but because of circumstances that were without their power to change when they agreed to follow the international regime in order to get something more desirable, such as the membership in EU, they are obliged today to follow the international arrest regime, and they do it very well as long as a claimant is

able to convince the Swedish judge to come back from the tour he takes when he applies the SMC 4:2§.

Supplement 1

The 1994 Swedish Maritime Code

Chapter 4
On Arrest of Vessels in International Legal Relations [122]

Section 1. The provisions in this chapter apply to "*kvarstad*" of ships for civil claims which are or may be adjudicated in Sweden or in any other country in the order prescribed for civil cases or in that prescribed for private claims pursued in criminal cases. The provisions do not, however, apply to "*kvarstad*" for claims concerning taxes and charges levied by the State or a municipality.

The provisions apply to ships entered in the ship´s section of the Swedish Ship Register or a corresponding foreign ship register. The provisions do not, however, apply to Swedish ships if the applicant has his habitual residence or principal place of business in Sweden.

The Act (1938:470) with Certain Provisions concerning Foreign State Ships etc. contains provisions that certain ships may not be imposed with "*kvarstad*". Nor may ships owned or exclusively used by the Swedish State be imposed with "*kvarstad*". Act (2001:384)

Section 2. What is applicable in general to "*kvarstad*" of ships applies also to "*kvarstad*" according to this chapter, unless anything to the contrary is provided in the chapter.

Section 3. A ship may be imposed with "*kvarstad*" only for a maritime claim.

A maritime claim according to this chapter is a claim which is based on any one of the following circumstances:

1. damage caused by a ship either in collision or otherwise,
2. loss of life or personal injury caused by a ship or occurring in connection with the operation of a ship,
3. salvage,
4. demise charter agreement,
5. agreement concerning the carriage of goods on board a ship on account of a charterparty, bill of lading or any such document,

[122] This translation is *not* an official translation of the SMC Chapter 4. The official text to this chapter is found in Svensk författningssamling (SFS 1994:1009) but an official translation of this chapter to the english language does not exist. Therefore it is recommended for the reader to only use this translation as study material on the subject.

6. loss of or damage to goods including luggage carried in a ship,
7. general average,
8. bottomry,
9. towage,
10. pilotage,
11. delivery of goods or materials for a ship´s operation or maintenance,
12. building, repair or equipment of a ship or dock charges,
13. wages of the master or any other crew member on account of his employment on board the ship,
14. master´s disbursements and disbursements made by a sender, charterer or shipper or agents on behalf of the ship or her owner,
15. any dispute as to the ownership of a ship,
16. any dispute between co-owners of a ship as to the ownership or possession of the ship or the operation of or earning from the ship,
17. any mortgage or other contractual hypothecation of a ship.

Section 4. "*Kvarstad*" may be laid upon the ship to which the maritime claim relates.

If a maritime claim is based on any circumstances mentioned in section 3 second paragraph items 1-14, "*kvarstad*" may also be laid on any other ship belonging to the person who, at the time when the maritime claim arose, was owner of the ship to which the maritime claim refers.

If any other person than the ship´s owner is liable for a maritime claim according to the second paragraph, "*kvarstad*" may instead be laid either on the ship to which the maritime claim refers to or any other ship belonging to the debtor.

Section 5. "*Kvarstad*" may be imposed on a ship only if the ship is subject to distraint for a maritime claim in Sweden. If the maritime claim attaches for any other kind of obligation than payment, what has now been said of distraint shall apply to any other enforcement than enforcement by the ship´s "*kvarstad*".

Section 6. "*Kvarstad*" on a s ship shall only be allowed once in respect of the same maritime claim.

If bail or other security is given to release the ship from "*kvarstad*", "*kvarstad*" may not be granted for the same maritime claim. Such "*kvarstad*" may however be granted if the claimant can show that the security has ceased to be effective or that there is otherwise special cause for "*kvarstad*".

Section 7. A ship that is imposed with "*kvarstad*" shall be prevented from departing.

If "*kvarstad*" has been granted for a maritime claim based on such circumstances as are intended in section 3 second paragraph item 15 or 16, the court may however

1. permit the person having the ship in his possession to use it against bail or other security, or
2. decide about the use of the ship on other conditions.

Section 8. Concerning "*kvarstad*" on property brought on board the ship by a crew member is governed by provisions in chapter 22 section 1.

Supplement 2

Swedish Code of Judicial Procedure

Chapter 15:1-2§§
Provisional Attachment and Other Security Measures [123]

Section 1. If a person shows probable cause to believe that he has a money claim that is or can be made the basis of a judicial proceedings or determined by another similar procedure, and if it is reasonable to suspect that the opposing party, by absconding, removing property, or other action, will evade payment of the debt, the court may order the provisional attachment of so much of the opponents property that the claim may be assumed to be secured on execution. (SFS 1981:828)

Section 2. If a person shows probable cause to believe that he has a superior right to certain property that is or can be made the basis of a judicial proceedings or determined by another similar procedure, and if it is reasonable to suspect that the opposing party will conceal, substantially deteriorate, or otherwise deal with or dispose of the property to the detriment of the applicant, the court may order provisional attachment of that property. (SFS 1981:828)

[123] http://www.sweden.gov.se/sb/d/3926/a/27778

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