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# **The Arrest of Ships: Comprehensive View on the English Law**

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# Summary

There is always an interesting side for any lawyer or law student concerning the study of the ship arrest. The continuous development for this type of action in the maritime law gives it a significant importance. This action implemented against the ship to secure a claim that is of a maritime nature, in other words directed against the ship and not the ship owner. Since the adoption of the 1952 Arrest Convention by different countries worldwide, it was obvious that this convention tried to keep the suitable balance between both the ship owners and the claimants commercial interests. The arrest procedure in itself is an act that arises as a last solution to force the ship owner to fulfil his financial obligations. In this thesis, the focus will be on ship arrest in general and on English law in particular. It is necessary to recognise and know what the action *in rem* is and what the action *in personam* is. The author thought it is appropriate to show to which level the 1952 Arrest Convention succeeded in bringing a unified arrest body between the member countries. Demonstrating the important features of the two Arrest Conventions of 1952 and 1999 can help readers and scholars get a better understanding for the ship arrest jurisdiction and procedures worldwide.

The significant provisions of section 20 of the English Supreme Court Act 1981 make it worth study and focus. Looking to the historical development of the admiralty jurisdiction and law in England can give us a better knowledge about the ship arrest in England today. In this thesis, the author talked about the ship arrest in some Arabic countries and especially in the Gulf region. By demonstrating the ship arrest procedures and jurisdictions in these countries, the author wanted to show the reflection of the 1952 Arrest Convention on their laws and the impact of Islamic jurisprudence on the legislation of some of the Gulf countries concerning ship arrest. Ship arrest as an active and advanced method of obtaining and securing the maritime debt will witness dynamic developments in the near future. The current system for fulfilling the arrest according to a closed list of claims that must be of a maritime nature will not satisfy later the rapid and fast growth in the maritime transport and industry. The arrest is a quick and easy way to secure the rights of the claimants, whether they are private persons, institutions, or governments and can play a vital role in times of economic crises. On the other hand, implementing the arrest to seize the ship in case of pollution damage caused by a ship is an important argument too; these are the main issues to be examined by the author in this paper.

# Acknowledgments

I want to dedicate this work to my beloved parents God bless them and I am thankful for their love and support in spite of the long distance between us. My gratitude and deep appreciation to my dear supervisor and teacher, Professor Proshanto K. Mukherjee for his kind support and wonderful guidance, that helped me in writing this master thesis. Special thanks to the library staff members at the World Maritime University in Malmö-Sweden for their cooperation and help. All the love and respect and appreciation to my teachers and to the staff members at the law faculty in Lund university-Sweden, they did a great and wonderful work in order to make this master program successful with a high quality level.

# Abbreviations

MSA	Merchant Shipping Act
SCA	Supreme Court Act (Senior Courts Act)
CPR	Civil Procedure Rules
P&I	Insurance and Indemnity Club
UNCTAD	United Nations Conference On Trade And Development
CMI	Committee Maritime International
UAE	United Arab Emirates

# 1. Introduction

In order to understand the idea and the function of ship arrest we must take a look at, and define what is the meaning and the definition of the ship. The Merchant Shipping Act (MSA) 1995 provides that “ship includes every description of vessel used in navigation”<sup>1</sup> so the ship according to this definition must be a vessel used for navigation purposes. In the case of *Steedman v Scofield*<sup>2</sup> there is a broader definition provided by Sheen J he stated:

“A vessel is usually a hollow receptacle for carrying goods or people. In common parlance ‘vessel’ is a word used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transportation on water”.<sup>3</sup>

It is obvious from the above definitions that the ship is structured to work in water; the vessel and the ship are not the same because the term vessel is broader in meaning than ship. The increase in ship building industry was because of the great demand on transportation by the sea, rapid development in the commercial sector and trade needed an easy and cheap method to carry different types of goods and passengers. This huge exchange of goods and using different types of ships to carry out various types of cargos led to the appearance of multiple disputes concerning ships and goods at the same time. Many claims started to appear in the maritime law field, claims like compensation for damages resulted from collision and claims related to unpaid maritime debts and many others. The continuous navigation for ships will expose the owners and the crew of any ship to different laws and to liability for certain claims. The only method to secure the fulfillment of a maritime debt and to settle a claim is through the method of arresting the ship.

The arrest will be implemented on the ship and not the ship owner, it is a successful method to force the ship owner to comply and fulfill his legal obligation. The arrest will prevent the ship from moving until the claim is settled; in that case the ship owner will be prevented

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<sup>1</sup> See the article What is a Ship: *R.v. Goodwin* in the Court of Appeal, by Bruce Grant , New Castle Law School 2006, available at: <http://webjcli.ncl.ac.uk/2006/issue2/grant2.html>

<sup>2</sup> [1992] 2 Lloyd’s Rep 163 (Sheen J).

<sup>3</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 28.

from gaining any profits from his ship. Instead he is just losing money and unable to continue his business and many ship owners will put a form of bank guarantee or protection by a P&I Club as a way of securing the ship and to avoid these hard procedures. If the act to pursue the arrest is taken in another place and country than the country in which the jurisdiction of the court applies, still the court has the authority to arrest the ship to start arrest proceedings. In case there is more than one claimant then it is not necessary to take separated arrest procedures.<sup>4</sup> In English law it is one of the significant features to observe that when the plaintiff will get or obtain the writ in the *in rem* action so the plaintiff can directly apply for a warrant for arresting the ship. The judgment will be decided after assessing the claim and examining the property of the concerned defendant in order to seize the property to fulfill the claim.<sup>5</sup> Although an action *in rem* in English law practically carried out together with the ship arrest to secure a maritime claim but there is no necessity in arresting the ship to begin with *in rem* proceedings. Both proceedings can work in an independent way and function separately.

The maritime lien is very important because of its nature that gives the right to arrest a ship or go further with the proceedings to sell the ship although in some cases the ship owner sold the ship after the rise of the claim. Maritime claims that are a result of different trade transactions like for example towage that is charged by steam tugs claim and many others started to appear after the nineteenth century due to the development in technology and in commercial exchange of goods. There was a need to find and create some protection for these transactions in spite the fact that they not represent or clarify as a maritime claim. That is why the statutory rights of an action *in rem* related to towage were established by the Admiralty Court Act 1840 s 6. During the years other rights having the same nature were added to the list.<sup>6</sup> The Supreme Court Act 1981 name was changed by the Constitutional Reform Act 2005 in Sched 11 to be the Senior Courts Act 1981.<sup>7</sup>

This is why it is important to follow the new developments concerning what constitutes a maritime lien and what is not. The 1952 and 1999 Ship Arrest Conventions have closed list of claims but arguably both of the two mentioned conventions provide open lists of claims. The

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<sup>4</sup> Chorley & Giles' Shipping Law, 8th Edition, Pitman Publishing, Great Britain 1987, p 7-8.

<sup>5</sup> Chorley & Giles', p7.

<sup>6</sup> Same source, p 74.

<sup>7</sup> Slapper, Gary & Kelly, David, The English Legal System, Twelfth Edition 2011-2012, Routledge Publishing , Great Britain 2011, p 114.



Article 1(d) of the 1999 Convention came with such open claim type regarding environmental damage.<sup>8</sup> Claims related to pollution and damages incurred from pollution by a ship and other claims that are not of a maritime nature need more focus and clarification from legislators and law scholars. The function of the ship arrest in itself is an amazing procedure that is fast and easy, not so complicated compared to procedures in other claims. The level of unification that was carried out by the 1952 Arrest Convention member states is important and must be analyzed in order to reach a better and higher level of cooperation between member countries when it comes to ship arrest procedures.

## 1.1 Purpose of the Study

The purpose of this thesis is to give a better understanding for the jurisdiction and procedures concerning ship arrest. Investigate and analyze the unified body of procedures in some member states in the 1952 Arrest Convention. The focus in this thesis will be on English law and English jurisdiction. This thesis can give the reader easy and direct information about the ship arrest in general and ship arrest in some Arab countries in the Gulf region in particular. The author wanted through this work to demonstrate for the reader the most new developments and legal arguments about ship arrest, to show the critical problems facing the arrest procedures. In the eyes of the author it is appropriate to view through this thesis the salient features for the 1952 Arrest Convention and the most recent one the 1999 Ship Arrest Convention. To see how the two conventions succeeded in creating a balance between the interests of the ship owners and the claimants at the same time. Ship arrest jurisdiction is witnessing rapid changes globally due to the emerging economic changes and the recent financial crises in many developed countries. That is why the author found it necessary to follow the recent developments and arguments in this field of maritime law.

The author found a necessity in researching and discussing the jurisdiction of arrest in some Arabic countries in the Gulf region and the focus will be on two States Iraq and Kuwait. Some of these countries are members of the 1952 Ship Arrest Convention and others not, it is suitable to research the impact of the Islamic law on their domestic laws when it comes to ship

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<sup>8</sup> Blackmore, Clair, The International Convention on the Arrest of Ships 1999, An article written in September 2011, Available at:  
<http://www.simsl.com/Publications/Articles/99ArrestConvention0911.htm>

arrest. In the eyes of many scholars a damage resulting out of pollution by a ship is not to be given the status of a maritime lien. The author's view is to give a broader understanding for the nature of the maritime liens; the English jurisdiction is very developed in the matter of giving the legal recognition for maritime liens. Although, for now and for a long time no new liens were added to the list of claims under section 20 of the 1981 Supreme Court Act but there is an urgent need to give rise to new liens in the near future. The author's aim is to give a successful and clear explanation regarding ship arrest in England in spite of the difficulty and span of the topic which makes it very hard to cover. The 1999 Arrest Convention will strongly influence the development of better regulations for facilitating the ship arrest which will satisfy modern development globally.

## **1.2 The Research Question**

The main research question here is whether it is permissible to arrest a ship for a claim which is not of a maritime nature and when the arrest is permissible according to the English jurisdiction. Also if the 1952 Ship Arrest Convention succeeded through its provisions in unifying ship arrest procedures between member states and how the implementation of the convention function. Did the convention influenced the domestic jurisdictions for some Arabic countries in the Gulf region?

## **1.3 Methodology**

The methodology in this master thesis depends primarily on library sources and common law legal literature. Case law is used to give solid and strong ground for the argument, internet sources and online articles are used according to the validity and the quality of the material online. Library books were great help in this work and the literature carefully examined to ensure a high quality level regarding the researched topic.

## 2. History of Admiralty Law in England

The English Admiralty law and jurisdiction went through very important and significant periods of development. The office of the Lord High Admiral used the High Court of Admiralty as a tool established according to an authorization from the Crown to the Admiral to deal with maritime issues. The judge of the court received and practised his position under many names and titles like Lieutenant or Deputy, even appointed by the Admiral himself and not according to the English Crown.<sup>9</sup> First, the jurisdiction of the court was different from the one in the courts of common law, and then by the time the admiral started to deal and take claims in civil issues related to the sea. In 1296 and due to the great influence of the Admiral's jurisdiction in claims concerning common law, which were refused by common law lawyers so the Common Pleas refused the jurisdiction of the Admiral in claims of seizure at sea. At the time of Richard II, the Admiralty Jurisdiction Act 1389 implemented a statutory restriction on the Admiral's jurisdictional authority. In the 1391 Admiral Jurisdiction Act, many issues like quarrels, contracts claims were separated from the Lord Admiral's jurisdiction, and are applicable in the courts of common law.<sup>10</sup>

In the time of William IV in 1830, the continuous dispute among the common law courts and the Admirals caused the abandons of the Admiralty Court. However after a time the jurisdiction of the court gained power again in disputes of admiralty law like property rights, salvage, wrecks at sea, bottomry, and wages of the seamen.<sup>11</sup> When the 1840 Admiralty Court Act (ACA) appeared it helped to tolerate the restricted matters of the court jurisdiction implemented at the time of Richard II Act. The act jurisdiction addressed the matters of legal title, sale on suits of possession, claims of salvage services and towage claims. Although the Act gave extended authority to the jurisdiction of the court but it cannot be compared to the authority

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<sup>9</sup> F.L Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice Since 1800*, Cambridge University Press, Great Britain 1970, p 4.

<sup>10</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 5.

<sup>11</sup> Sheppard, Aleka Mandaraka, p 6.

of the Admiral and the court jurisdiction in the old times.<sup>12</sup> In *Bridgman's Case*,<sup>13</sup> Hobart, C.J., extended more the statutes language settled by Richard II, that considered any contract done at the sea, to be settled by the common law if the created debt will be paid on land.<sup>14</sup> Looking to what Fry LJ commented in the *Zeta Case*<sup>15</sup>

[He] considered that the admiralty jurisdiction, which existed in the year 1868 was of a double character. There was the original jurisdiction, which existed in the ancient Court of Admiralty, the jurisdiction of the Lord High Admiral, and there was the enlarged jurisdiction given by the statute 3 & 4 Vict and by the statute 24 Vict. Those statutes, for the first time, gave admiralty jurisdiction within the body of a county. It requires no very great stretch of imagination to imagine rafts of timber, or some such structure, getting permanently attached to a coral reef, or rocks, or a sand bank, and to imagine a collision between that object upon the high seas and some vessel.<sup>16</sup>

In spite of all that, it was clear that the Admiralty Court considered as court of record after the year 1861. Before that time, the court was only exclusively preserving practitioners who have titles like advocates or proctors in order to be recognized and to be separated from the common law courts lawyers.<sup>17</sup> The expansion of the admiralty jurisdiction due to the Acts of 1840 and 1861 led to the focus and more exclusive benefits for the action *in rem* proceedings. When Sir Robert Phillimore was the judge of the Admiralty Court a report submitted in 1869 by the Royal Commission regarding the court structure, the report constituted the need for an extension in the jurisdiction of the Admiralty Court due to the mistakes and misrepresentation of the common law procedures general system. The Supreme Court of Judicature Act 1873 included all types of courts and the Admiralty Court too into a Supreme Court of Judicature. The Consolidation Act 1925 led to the modification of the Judicature Act, many new claims added like claims in the nature of towage. The Crown Proceedings Act 1947 and the Civil Aviation Act 1949 both influenced the admiralty jurisdiction. The greatest chance for expanding the jurisdiction of the admiralty court came with the Administration of Justice Act 1956, which gave a strong confirmation to the existing court jurisdiction and helped to include provisions of the 1952 Ship

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<sup>12</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 6.

<sup>13</sup> (1614) Hob. II [No.23].

<sup>14</sup> F.L Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice Since 1800*, Cambridge University Press, Great Britain 1970, p 6.

<sup>15</sup> *The Zeta* [1892] p 285,pp 297-301.

<sup>16</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 7.

<sup>17</sup> Messon, Nigel and Kimbell A, John, *Admiralty Jurisdiction and Practice*, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 1.

Arrest Convention. England ratified this Convention in 1959 and the English law did not include all the provisions of this convention.<sup>18</sup>

## 2.1 Modern Admiralty Jurisdiction

When we mention the term “Admiralty” these days then we simply mean the maritime jurisdiction related to the federal courts. In the English historical sources in the Late Middle times, the meaning was the domination or the practise of supremacy at the sea, implemented according to the jurisdiction of the appointed admirals in which it already clarified and settled to them from the authority at that time and it is the king. Professor Sharpe mentioned that the jurisdiction is a way of referring to the governmental authority description on a territory or any court powers. There can be misinterpretation of the jurisdiction as a word to describe the powers of the court.<sup>19</sup> According to the writings of Professor Bourguignon:

For half a century English kings were troubled by claims of various nations of piracy and illegal captures perpetrated by English vessels. Edward III had settled some claims of Genoese and Venetian merchants out of his own pocket. Other attempts by common law courts or by arbitrators had failed to silence the complaints.<sup>20</sup>

The development of admiralty jurisdiction was because of the continuous need for new legal solutions for the newly appeared disputes related to the sea. The common law courts and lawyers were not able to fill this gap between existed jurisdiction at that time and the emerging disputes. The main origins and references of admiralty jurisdiction are observed and seen in rules of courts, Conventions, judicial doctrines and statutes. The Supreme Court Act 1981 is a recent statute example. The Civil Procedure Rules 1999 are an outcome of the Woolf Reform of Civil Justice and they are together with the new practise directions depend mostly on procedures. The main purpose behind such procedures is to urge the disputed parties to solve

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<sup>18</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 7-8.

<sup>19</sup> Staring, Graydon S., *The Admiralty Jurisdiction of Torts and Crimes and the Failed Search for its Purposes*, *Journal of Maritime Law & Commerce*, Vol. 38, No.4, October 2007, p 438-439.

<sup>20</sup> Staring, Graydon S., p 439.

their disputes faster; it imposes an obligation on them and on their legal representatives to proceed their defence properly and not to be late.<sup>21</sup> England is a common law country and rules of admiralty gain supremacy and recognition by the time through different statutory enactments. The shipping law depended mostly on international conventions and agreements, England tried to give a strong impact and implementation for the International Convention on the Arrest of Sea-going Ships in 1952, that is why the 1956 Administration of Justice Act appeared. This act caused so many problems and received too much criticism because of this attempt to include the arrest convention. The misinterpretation and judicial problems caused by this act of 1956 were solved in 1982 through the amendments applied on the Supreme Court Act 1981 legislation.<sup>22</sup>

The claims related to admiralty usually treated in the same level of the Commercial Court actions. The Civil Procedure Rules (CPR) part 61 related to Admiralty Claims is the one governing Admiralty Acts and Claims; it is together with the Practise Direction ruling the admiralty disputes. The courts play a vital role through guiding in an official way to the procedures. Generally, all types of claims governed by the Admiralty Court are to be called multi-track types of claims.<sup>23</sup> The Admiralty Court deals with the following types of claims:

- (i) a claim in rem;
- (ii) a claim for damage done by a ship;
- (iii) a claim concerning the ownership of a ship;
- (iv) any claim under the Merchant Shipping Act 1995;
- (v) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her appeal or equipment;
- (vi) any claim for loss of life or personal injury sustained in consequence of the wrongful act, neglect or default of
  - (a) the owners, charters, or persons in possession or control of the ship; or
  - (b) the master or crew of a ship or any other person for whose wrongful acts, neglects or defaults the owners, charters or persons in possession or control of a ship are responsible;
- (vii) any claim by a master or member of a crew for wages;
- (viii) any claim in the nature of towage;
- (ix) any claim in the nature of pilotage;
- (x) any collision claim;
- (xi) any limitation claim;
- (xii) any salvage claim;<sup>24</sup>

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<sup>21</sup> Sheppard, Aleka Mandaraka, Modern Admiralty Law, Cavendish Publishing Limited, Great Britain 2001, p 9.

<sup>22</sup> Hill, Christopher, Maritime Law, Sixth Edition, Informa Professional, Great Britain 2003, p 88.

<sup>23</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 2-3.

<sup>24</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 3.

From the above-mentioned claims, we see that the Admiralty Court will apply jurisdiction on the claims with a maritime nature. It is good to notice that claims related to the mortgage of a ship or claims of possession of a ship both not listed with other types of claims which is strange and difficult to understand or to find a logical justification.<sup>25</sup> In the jurisdictions applying the common law like the English jurisdiction, the *in rem* action functions and appear with the ship arrest and the substantive relation between the codified rules, the claim and the jurisdiction work together to secure the maritime claim. The jurisdiction established and based on the merits and if there is no substantive relation between the jurisdiction and the claim so, it is enough with only the existence of the ship arrested. The 1952 Arrest Convention adopted in article 7, a way to make something between both the civil and the common law, that is by giving the court, which the arrest to be implemented the jurisdiction based on merits if it is permissible by their own domestic legislation and the related parties allowed to choose different law. The 1981 SCA clearly gave the ways to implement the claims of a maritime nature listed in Section 20(2); they are *in rem* actions with a statutory right nature. Nevertheless, the existence of a substantive cause is necessary to proceed with the action.<sup>26</sup>

## 2.2 Limits on Exercising the Jurisdiction

Ships belonging to the English Crown enjoy immunity together with those ships owned by foreign countries from any *in rem* claim. This is according to the Crown Immunity Act 1947 in section 38, this immunity in accordance with section 29 of the Immunity Act which prevent any proceedings of *in rem* type towards any crown properties no matter whether cargo or ship. The SCA 1981 and in section 24(2) kept this protection treatment. The act *in personam* is practised as a jurisdiction towards the Crown together with the 1947 Crown immunity Act.<sup>27</sup> The State Immunity Act 1978 and section 10(1)(2)(3) gave the foreign ships immunity position from both the actions *in rem* or actions *in personam*, this applies both to ships and sister ships as well. The act in section 10(4)(a) declared that the immunity applies if both of the ship or sister ship and the cargo or goods on board the ship are not of a commercial type or used for business then

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<sup>25</sup> Messon, Nigel and Kimbell A, John, taken from footnote 18, p 3.

<sup>26</sup> Sheppard, Aleka Mandaraka, Modern Admiralty Law, Cavendish Publishing Limited, Great Britain 2001, p 11.

<sup>27</sup> Sheppard, Aleka Mandaraka, Modern Admiralty Law, Cavendish Publishing Limited, Great Britain 2001, p 14.

action *in rem* will apply towards such cargo of foreign country ship. In section 10(4)(b) the action *in personam* will be permissible in claims when the cargo carried out by a state ship intended or used for commercial or trade reasons.<sup>28</sup>

## 2.3 District Registries

The Practise Direction did not give any specific details about the District Registries, however the High Court District Registry can issue an Admiralty Claim but in order to process and proceed with this claim it must be forwarded to the Admiralty and Commercial Registry in London. The Admiralty Register will decide by giving a written direction if the Admiralty Court will look on this claim or it must be send to other court. If the claim stays with the Admiralty Court then it should be decide whether the Register will settle this claim or a judge will do the settlement, he will look to the place too it could be London or somewhere else. The Register is acting towards these issues in accordance and application of the CPR Part 26.8. The register plays an important role in the use of procedures and practise concerning the district registries matters and proceedings.<sup>29</sup>

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<sup>28</sup> Sheppard, Aleka Mandaraka, p 14.

<sup>29</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 3.



### 3. What is Ship Arrest?

The main purpose of applying ship arrest is to satisfy a judgment in a claim *in rem* from the court, nevertheless the seizure of the ship can commence when there is a property on the ship related to the claimant rather than the ship itself. Arresting bunkers is an example for property arrest on a ship and it was allowed in both the High Courts in Italy and Australia.<sup>30</sup> Under the English SCA 1981 jurisdiction obtained by serving the writ *in rem* despite the fact that ship arrest to follow or not, however the jurisdiction on the merits to be a natural consequence according to the 1952 Ship Arrest Convention.<sup>31</sup> The claimant will do the application of the arrest warrant after the issuing of the claim form. The arrested vessel will be under the power of the court, the owner of the ship will be unable to stop this action or procedure unless after releasing and solving the debt or the claim. The arrest aims at preventing the ship from continuing its movement in order to apply the court decision concerning an action *in rem*. The whole arrest operation is like a bargain or trading of some claim of a maritime nature with the ship.<sup>32</sup> The 1952 Ship Arrest Convention gave this definition for arrest:

“Arrest” means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.”<sup>33</sup>

The arrest is the most effective legal function used to settle claims of *in rem* type and the claimant can apply the arrest directly after the judgment. If the arrest implemented before the judgment then the ship will be seized to secure any possible judgment. When the arrest applies after the judgment then it is an arrest to touch the arrested property. The arrest will urge the ship owners to provide willingly the needed security to prevent any threats of arrest against their properties. They can submit different types of security like a P&I Club letter, insurance or bank guarantee to avoid the arrest process.<sup>34</sup> Lord Esher MR mentioned:

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<sup>30</sup> Berlingieri, Francesco, Arrest of Ships, Fourth Edition, Informa Law, London 2006, p 106- 107

<sup>31</sup> Berlingieri, p 40-41.

<sup>32</sup> See the Article, Arrest of a Vessel Under English Jurisdiction, written by Shoosmiths, April 2006, Available at: [http://www.hg.org/articles/article\\_1443.html](http://www.hg.org/articles/article_1443.html)

<sup>33</sup> The International Convention Relating to the Arrest of Sea-Going Ships in 1952, Article1(2).

<sup>34</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 151.

“the moment that the arrest takes place, the ship is held by the Court as a security for whatever maybe adjudged by it to be due to the claimant”<sup>35</sup> Looking to what Fry LJ said:

“the arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgement.”<sup>36</sup>

A new modern definition of ship arrest can be seen in Article 1(2) of the 1999 Ship Arrest Convention, although it is not so different from the old definition in the 1952 Arrest Convention but it still simple and obvious definition.

“Arrest” means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument”.<sup>37</sup>

It is clear that arrest is a remedy in the judicial scope aims to secure claims of a maritime nature, the detention of the ship and the process of authorizing the seizure all done by judicial authority. The ship itself will be under the observance and control of the court, it was clear in the 1952 Arrest Convention that any arrest for crimes like smuggle of persons and drugs or other types of crimes is not within the view of the arrest convention.<sup>38</sup> The English jurisdiction gives this view to ship arrest:

Maritime arrest is a legal action to seize a vessel, cargo, container or other maritime property as security for a claim or to enforce a maritime lien. The claim may be brought "in rem", namely against the arrested property itself and not necessarily against the property's owner (which may be unknown). Arrest differs from "attachment" in that the property itself is not the named party in the action and the defendant must own the property for it to be subject to attachment. "Arrest" is literally just that – the vessel will be prevented from moving or trading pending resolution of the outstanding claim.<sup>39</sup>

The 1952 Arrest Convention and in article 7 gives the courts in the country where the arrest took place the jurisdiction to assess the case based on its merits. The court will decide if the national jurisdiction will apply and if the nature of the claim is in relation to the list of claims

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<sup>35</sup> Messon, Nigel and Kimbell A, John, p 153.

<sup>36</sup> Messon, p 153.

<sup>37</sup> International Convention on the Arrest of Ships 1999, Article1(2).

<sup>38</sup> Berlingieri, Francesco, Arrest of Ships, Fourth Edition, Informa Law, London 2006, p 89-90.

<sup>39</sup> United Kingdom: Maritime Arrest Under English Law, an Article written by Leila Woollam in May 2010, Available at: <http://www.mondaq.com/article.asp?articleid=97606>

described in the same article. In some situations, the courts need to use the jurisdiction not according to the domestic law but to the case merits.<sup>40</sup> To understand ship arrest in a better way we must understand the nature of the action *in rem* and that is what we are going to discuss later.

### 3.1 The Action In Rem

The roots of the action *in rem* since the nineteenth century in England belong to the Roman law action *in rem*. Many admiralty court judges during the sixteenth century were dealing with *in rem* cases with a personal nature. In the eyes of many legal scholars, the modern action *in rem* in England driven originally from an action called *processus contra contumacem*. This action developed by the time in Europe and found establishment in England court of admiralty in the sixteenth century. The action aim was to counter any attempts from the defendant to deny the appearance in a court where there is a claim to be settled against him.<sup>41</sup> In English law this action used as a securing tool for the claimant's right against the defendant, the essential difference between the action *in rem* and the action *in personam* is that the ship together with the owner are both the defendant and sometimes the bunkers, cargo or freight as well. The action *in rem* works to implement maritime liens, the 1981 Supreme Court Act is the one governing other types of maritime disputes and statutory right *in rem*. As mentioned previously the arrest *in rem* although it is a judicial security for the claim put it is not permissible against ships of the Crown or other ships of foreign country unless used for commercial needs.<sup>42</sup> Lord Steyn gave a unique description concerning the action *in rem* type:

It is now possible to say that ... an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or, where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service.

... From that moment the owners are parties to the proceedings in rem.<sup>43</sup>

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<sup>40</sup> Niklasson, Anna-Karin, A Comparison Between the Jurisdictional Rules in the EU and the US in the Light of the Arrest Convention and the Possibility to Shop for Forum, Department of Law in Göteborg University 2003 , p 11-12, Available at: <http://gupea.ub.gu.se/bitstream/2077/2216/1/200383.pdf>

<sup>41</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review 1999, Vol. 73:1895, p 1900-1901.

<sup>42</sup> Tetley, William, p 1905-1907.

<sup>43</sup> Myburgh, Paul, Richard Cooper Memorial Lecture Admiralty Law-What is it Good For?, University of Queensland Law Journal 2009, Vol. 28 (1), p 34.

The action *in rem* is independent under the English jurisdiction from the *in personam* action. The judgment *in rem* is applicable to be enforcing worldwide, the owner of the ship can protect his property through his respond to the *in rem* action by submitting a security in spite of the fact that the action touches his property and not him personally.<sup>44</sup> The significant features of this action according to the English procedural law can be seen in the way that it helps the claimant to get security for his claim, the English court jurisdiction to be included according to the claim merits. The right *in rem* kept for the claimant in the case of non-truly *in rem* claim on the defendant property when issuing the claim form for the *in rem* action.<sup>45</sup> After the judgment in *The Indian Grace*<sup>46</sup> and the strong judging opinion of Lord Steyn, which serves the scope of the procedural theory, shipowners are vulnerable to unfairness when arresting a vessel within the action *in rem*. The view of Lord Steyn was under strong criticism because it effected the nature of the claim *in rem* and the commercial balance for the shipowners. The admiralty courts will face many unsatisfied arguments from shipowners if the action *in rem* is also an action *in personam* against the defendant shipowner. However, this legal approach refused by court majority, the action *in rem* remain in theory and practise different from the action *in personam* and the procedural theory frame is not applicable.<sup>47</sup>

The procedure of the *in rem* action in England is under the jurisdiction of the 1981 Supreme Court Act and in case of damage by a ship and there was no property to bring then an action *in personam* is to be brought (s.20(2)(d)). The Merchant Shipping Act runs any type of limited actions where the action *in personam* can function. The action *in rem* within the jurisdiction of the Admiralty Court, practised according to an *in rem* claim form, the Admiralty and Commercial Registry are the one responsible for issuing the prescription of this form. Separated form to be presented in case there was an intention to proceed with claims of both *in personam* and *in rem*. In case there are many ships falling under the scope of the same claim then many claim forms can be brought but the action *in rem* claim form will touch only one ship. If many ships were listed in the claim form then all other ships mentioned must be removed except the ship that the claim form will serve. There is no need to mention the names of the parties in

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<sup>44</sup> Hill, Christopher, *Maritime Law*, Sixth Edition, Informa Professional, Great Britain 2003, p 100.

<sup>45</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 75-76.

<sup>46</sup> *The Indian Grace* (No1) [1993] 1 Lloyd's Rep 387.

<sup>47</sup> Myburgh, Paul, Richard Cooper Memorial Lecture: Admiralty Law-What is it Good For?, *University of Queensland Law Journal* 2009, Vol. 28 (1), p 34-35.

the *in rem* claim form, there must be some details concerning the claim described in the form. In case there are no clear details about the claim then within the period of 75 days a statement describing the nature of the claim submitted. The validity of the *in rem* claim form is for the period of 12 months with a possibility to renew it for some extra time in case the writ not fulfilled.<sup>48</sup>

### 3.1.1 In Rem Claim Form

As previously described, the *in rem* claim must be served through a claim form, same fees to be paid in the situation of any other claim form. The issuing of this claim form is under the jurisdiction of the Supreme Court Act 1981, if there was a claim form issued by mistake then the court can remove it and not consider it. The claim form *in rem* serve only one ship despite the fact that more than one ship can be listed only one ship will remain served and others will not be under consideration. The claimant have the right to divide his claim into different claims for more than one ship in case of submitting bunkers or supplying more than one sister ships.<sup>49</sup> The description of the parties in the claim form is permissible without naming details. The full details about the claim to be mentioned in the claim form and when it is not described then there is a period of 75 days from the time of activating the claim form *in rem* to submit the necessary particulars about the claim. The importance of issuing an *in rem* claim form appears in case of any changing in the ownership then the claimant claim can be dismissed. From the moment of issuing the claim form the statutory right for the claimant to practise the claim *in rem* to be granted, the change of ownership would not defeat the claimant claim in spite of the fact that it will not serve the claim form.<sup>50</sup>

In case of urgency the court, give permission to issue the claim form by using fax despite the fact that the registry is closed. A suitable claim form to be sent to the court through the fax line connection. The validity of the claim form is 12 months but if the form did not serve the needs for serving the claim then the court can renew it for an extended time of 12

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<sup>48</sup> Hill, Christopher, *Maritime Law*, Sixth Edition, Informa Professional, Great Britain 2003, p 100-102.

<sup>49</sup> Messon, Nigel and Kimbell A, John, *Admiralty Jurisdiction and Practice*, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 143.

<sup>50</sup> Same source, p 144-146.

months. The authority of the court extended to do proper amendments on the claim form after the issuing of the judgment, or even a defendant to be added in a claim *in rem*. In part, 17 of the CPR when amending the claim form after the serving of the claim it will apply on anyone who has relation or defendant in the claim. If no defendant showed any knowledge about the service then this amended claim form can be forwarded again like the original form. The whole process of issuing the claim form is very important and it is solid pillar to process the *in rem* claim.<sup>51</sup>

### 3.1.2 Advantages of an Action In Rem

One of the main reasons that made the action *in rem* favourable in many places worldwide by the claimants specially is that the action can bring effective results and merits, which cannot be obtained by the action *in personam*. The court permit will satisfy the claim form out of the jurisdiction. The exception that can be ruled by Part 6 of the CPR is when the defendant resident in a European country or in a country outside the European Union and there must be a necessity to serve the claim.<sup>52</sup> The case of *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran*<sup>53</sup> is a good example of what was mentioned above concerning the jurisdiction of another country for the defendant. The plaintiff is the one responsible to apply a claim form against the defendant in an action *in personam*; this is not difficult if both parties fall under the same jurisdiction but when the jurisdiction is not the same for both parties then many obstacles to appear. The continuous sailing for the ships for different marine purposes make them vulnerable to different jurisdictions, the legal nature of the action *in rem* makes it very popular as legal remedy. Another advantage of this action is the way to find the jurisdiction in a very independent way regarding the fact that the res owner is available or not. The most important advantage is that it supplies the security for the judgement, which encourages the claimant to choose this type of legal action rather than choosing the action *in personam*.<sup>54</sup>

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<sup>51</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 146-147.

<sup>52</sup> Hill, Christopher, Maritime Law, Sixth Edition, Informa Professional, Great Britain 2003, p 100.

<sup>53</sup> *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 Lloyd's Rep. 1, HL.

<sup>54</sup> Okoli, Stanley Onyebuchi, Arrest of Ships: Impact of the Law on Maritime Claimants, Master Thesis presented to the Faculty of Law at Lund University, Sweden 2010, p 23-24, Available at:

<https://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=1698588&fileOid=1698590>

The action *in rem*, which is taken originally from Latin words, which mean *against the thing*, this action, proved since the issuing of it in English courts of admiralty especially, strong effectiveness and sufficiency in serving the needs of the claimants and in urging the shipowners to settle their disputes. The author's opinion is that this is the best legal tool to serve a claim despite the jurisdiction differences and the English jurisdiction succeeded since the launch of this action in the Elizabethan era to take straight actions towards the ships, which fall under the jurisdiction of this action.<sup>55</sup>

## 3.2 The Action In Personam

Since the nineteenth century, the impact of the procedural theory on the English admiralty courts was strongly obvious. When the *in rem* action launched this led to the avoidance of the personification doctrine. In the *in personam* action, the identification of the person who will be under *personam* responsibility will be on the plaintiff. That means the plaintiff will define the human factor to be the defendant regardless of any *in rem* jurisdiction. The plaintiff must prove there was a continuous relation regarding ownership between the ship and the defendant *in personam*.<sup>56</sup> An action *in personam* is an action based on personal liability that can lead to a judgement against the defendant. The action *in personam* is similar to actions in contracts or tort, it is essential in this action to identify the person's liability at the moment when the action took place. Enforcing the sought claim on the defendant in order to make the defendant act or seize his movement is the aim of the action *in personam*. Generally, all kinds of actions touching the person himself and demanding the person to respond or not, take a certain behaviour or action are *in personam* actions.<sup>57</sup>

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<sup>55</sup> Caldwell, Brad, Arrest of Fishing Vessels, An article written in May 1998, Available at: <http://www.admiraltylaw.com/fisheries/Papers/arrest%20of%20fishing%20vessels.htm>

<sup>56</sup> Myburgh, Paul, Arresting the Right Ship: Procedural Theory, The In Personam Link and Conflict of Laws, M Davies (ed) Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force (Kluwer Law International, The Hague, 2005), p 6-8.

<sup>57</sup> Okoli, Stanley Onyebuchi, Arrest of Ships: Impact of the Law on Maritime Claimants, Master Thesis presented to the Faculty of Law at Lund University, Sweden 2010, p 21, Available at: <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1698588&fileId=1698590>

### 3.3 Maritime Liens

The roots of maritime liens have a very significant aspect and of great historical importance in the recent admiralty jurisdiction. Inquiring into the roots of maritime liens we see they conclude a part of the rules in customary and transnational mercantile law, which ruled the relations among the merchants travelling by sea in the Middle Ages and their goods or cargo. Although the roots of maritime liens are very deep in history and especially since the time of Medieval Europe but one of the important sources and considered as a developed codification are the *Rôles of Oléron* starting from the late twelfth century. The effect of the rules spread to Scotland and England and to different European countries and the Baltic region. Many other codes followed, like the *laws of Visby*, which depended most on the *Rôles of Oléron* and the code regulating maritime procedures in the Mediterranean, which is named *Consolato del Mare*. All these legal codes together created great influence and impact during the drafting process of the *Ordonnance de la Marine* at the time of Louis XIV in 1681, and the French commercial codes with other codes included provisions formulated the concept of maritime liens.<sup>58</sup> In the case of *The Tolten*<sup>59</sup> we see the view of Scott, L.J explaining maritime liens as follows:

The phrase “maritime lien”, was not the original expression in our admiralty diction. We borrowed from the French, who had in their word “privilege” a clearer and less ambiguous name: hence their telling phrase “creances privilegiees” to describe the secured rights of the sea creditors ... There is no difference of meaning, so far as anything in the present appeal is concerned, between the “privilege” of Continental law and our maritime lien. And our judges in early cases used our word “privilege” with the same meaning as that in which “maritime lien” was subsequently used ... The essence of the “privilege” was and still is, whether in Continental or in English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the “*privileged*” creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take procedure over mortgages.<sup>60</sup>

So the maritime lien is a right rises automatically with no need for any formalities as long as it is related to the ship or the cargo of the ship or any property rights

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<sup>58</sup> Tetley, William, Maritime Liens in the Conflict of Laws, Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren, Transnational Publishers Inc., Ardsley, N. Y. 2002, p 3-5, Available at: <http://www.1215.org/lawnotes/work-in-progress/maritime-liens.pdf>

<sup>59</sup> *The Tolten*, [1946] P. 135 at pp. 149-150, (1946) 79 LI L. Rep. 349 at p. 356.

<sup>60</sup> Tetley, William, Maritime Liens and Claims, Second Edition, International Shipping Publications, Canada 1998, p 59.



related to the ship. Actually, the view of Professor Tetley concerning the nature and the definition of the maritime lien is so important and convenient, he concluded:

A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritima*). It is a privilege against property (a ship) which attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret lien which has no equivalent in the common law; rather it fulfils the concept of a “privilege” under the civil law and the *lex mercatoria*.<sup>61</sup>

There are no registration requirements for the maritime liens; they appear when an action related to the ship happened. They are like hidden rights and cannot be destroyed or eliminated because they are connected to the ship. In other words, even when the ship is sold and there is a maritime lien attached to it, then it can be arrested. Despite the fact that a new buyer of the ship did not know about the maritime lien or not related to the incident bought the ship, he must secure the ship with a claim security or he will lose his ship. This is different from the action *in rem* in which the right comes in the time of issuing the claim form. Selling the ship will harm the claimant in an action *in rem* and deprive him from arresting the ship, while this is not the issue in the maritime lien, which remains in existence even after the selling. Nevertheless the right to arrest a sister ship is permissible under the action *in rem* and it is not the same with the maritime lien.<sup>62</sup>

When the claim is paid then the court considers the claim cleared through satisfaction between the parties, which lead to the discharge of the maritime lien. The lien can be discharge in case of a delay that makes it impossible to enforce. Other ways of discharge like when the res is destroyed, when the lien is sold to Crown or foreign authority then immunity gained. In addition, when the admiralty court sells the res according to *in rem* procedures or any similar foreign court procedures this can discharge the maritime lien. The maritime lien cannot be discharged in case the *in personam* judgement not fulfilled. On the other hand, when releasing a claim *in personam*, or when arbitration award not fulfilled, the maritime lien will not discharge too. When the taken security for the claim is insufficient then the maritime lien will not be discharged too, or when the selling pursue to statutory rights.<sup>63</sup> It is obvious that the maritime

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<sup>61</sup> Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 59-60.

<sup>62</sup> Institute of Maritime Law, *Southampton on Shipping Law*, Informa, London 2008, p 362.

<sup>63</sup> Messon, Nigel and Kimbell A, John, *Admiralty Jurisdiction and Practice*, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 20-21.

lien remains a very significant right attached to the ship and it is an operative right enforced by the action *in rem* through the issuing of the claim form. We will see later the nature of the maritime lien in case of pollution damage, which is important to be recognized.

### 3.3.1 Maritime Liens and the Conflict of Laws

In many common law countries and jurisdictions like France or the United States claims like general average, or any cargo damage have the standard position as maritime liens according to the domestic legislation for these countries or according to any international agreement signed by them. That is why we notice the conflict between the laws in England and those civil law jurisdictions when a maritime claim is presented to the English courts and in the English *lex fori* there is no maritime lien statutes for such claim.<sup>64</sup> When a court is facing a claim, which constitutes a maritime lien in one law and according to the other jurisdiction not a maritime line, then the court must take a decision whether to consider this maritime lien with foreign origin or not to recognize it. In the case when the court gives recognition to this maritime lien with foreign origin, then the decision will be about the ranking of this specific claim in the judicial selling distributing procedures. The procedures mentioned above can be different between one state and another depending on the conflict as if the dispute between the United States and England for example.<sup>65</sup>

The decision taken in *The Colorado* case<sup>66</sup> about a repairs claim carried out in Wales and a French origin ship regarding the ranking give a better clarification for this concept. The decision used by Lords Salmon and Scarman, which concluded:

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<sup>64</sup> Tetley, William, *Maritime Liens in the Conflict of Laws*, Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren, Transnational Publishers Inc., Ardsley, N. Y. 2002, p 8-9, Available at: <http://www.1215.org/lawnotes/work-in-progress/maritime-liens.pdf>

<sup>65</sup> Tetley, William, p 12.

<sup>66</sup> *Hills Dry Docks & Engineering Company, ltd. v. Colorado* [1923] P. 102, (1923) 14 Ll. L. Re. 251 (C.A.).

A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law.<sup>67</sup>

### 3.3.2 Pollution and Maritime Liens

In the recent years pollution and the damage caused by pollution took strong interest from many jurisdictions including the English jurisdiction. In the case of *The Eschersheim*<sup>68</sup> the *Erkowitz* caused pollution damage after an inappropriate salvage operation carried by the *Rotesand*. If we examine the jurisdiction of the admiralty court, we can reach a conclusion that the pollution damage by a ship as a jurisdiction exists. As a result, the traditional maritime lien damage can follow and arise. Supreme Court Act 1981 and in section 20(5) and in the amendment in 1995 together with the previous mentioned case, showed without any doubts the clarifying position of the High Court jurisdiction regarding pollution damage by ship.<sup>69</sup> This is stipulated in Section 20(5)(a) and Section 20(2)(e) which stated “any claim for damage done by a ship extends to:

- (a) any claim in respect of the liability incurred under Chapter III of part VI of the Merchant Shipping Act 1995 (concerning liability for oil pollution); and
- (b) any claim in respect of a liability falling on the International Oil Pollution Compensation Fund or on the International Oil Compensation Fund 1992 under Chapter IV of Part VI of the Merchant Shipping Act 1995.”<sup>70</sup>

Section 146(1) gives an authorization to seize and sell a ship if the ship attached with a fine for oil pollution, also expenses or a cost regarding oil pollution that must be paid and

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<sup>67</sup> Tetley, William, *Maritime Liens in the Conflict of Laws*, Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren, Transnational Publishers Inc., Ardsley, N. Y. 2002, p 14, Available at: <http://www.1215.org/lawnotes/work-in-progress/maritime-liens.pdf>

<sup>68</sup> [1974] 2 Lloyd’s Rep. 188, at p. 193.

<sup>69</sup> Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 152.

<sup>70</sup> Tetley, William, *Maritime Liens and Claims*, p 152.

the owner of the ship or the master did not pay according to the settled time determined by the court. Merchant Shipping Act 1995 and in Section 163(7) gives a permission to detain any ship trying to leave the port of the United Kingdom with no insurance certificate against any pollution liability demanded according to the same section.<sup>71</sup> The incorporation of the 1952 Ship Arrest Convention in the English jurisdiction makes the arrest permissible at any time there is an action *in rem*. Section 20(2) Supreme Court Act 1981 listed all the claims with a maritime nature (maritime liens) according to English jurisdiction, also the 1952 Arrest Convention in article 1. The English law acknowledged the existence of a maritime lien for actions of *obsolescent respondentia*.<sup>72</sup>

What is to be notice here is that this sort of claims is not in the list or declared by both the 1981 Supreme Court Act and the 1952 Ship Arrest Convention. From the Supreme Court Act 1981 in Section 21(3) we see it stated clearly that the *in rem* Admiralty action can be served in the time when the maritime lien appears in any case. This is an obvious confession that permits the jurisdiction to apply the arrest of an aircraft or a ship in case there is a maritime lien attached. From a theoretical perspective, the mentioned section gives arrest jurisdiction for a claim with a domestic maritime lien security and not on the list of the 1952 Arrest Convention in article 1(1). The fact is that in the English law there is no existence for this claim because Section 21(4) cleared that the action *in rem* availability is only according to specified listed claims in Section 20(2). This list of claims is similar to the claims listed in article 1(1) of the Ship Arrest Convention 1952. This difference led to the amending of the 1981 Supreme Court Act to permit any arrest according to the Salvage Convention 1989; therefor the interpretation for any future amendment can be wider in scope and can touch other claims when the maritime lien attached to those claims.<sup>73</sup>

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<sup>71</sup> Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 154-155.

<sup>72</sup> Nicholas, Gaskell, *Implementation of the 1952 Arrest Convention*, Institute of Maritime Law-University of Southampton, England 1999, Available at:

[http://www.bmla.org.uk/documents/implementation\\_of\\_the\\_1952\\_arrest.htm](http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm)

<sup>73</sup> Nicholas, Gaskell, Available at:

[http://www.bmla.org.uk/documents/implementation\\_of\\_the\\_1952\\_arrest.htm](http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm)

### 3.3.3 Arrest for Enforcing a Lien

Section 21(3) of the *English UK Supreme Court Act 1981* constituted the jurisdiction of the *in rem* action in order to give enforcement for the maritime lien. The maritime lien is a claim with security status whether against a ship or bunkers, cargo or freight, for any ship service or losses incurred from the ship. The maritime liens do not need registration and they come with the claims they are securing. They do not end with the change of possession and they move to the new ship owner and stay attached to the ship, their ranking is directly after fixed rights in the jurisdiction, any custody costs or previous possession liens. Maritime liens have a better position over ship mortgages when it comes to judicial procedures regarding reselling. The English jurisdiction limits maritime liens to seaman's and master's wages, bottomry, salvage, damage, master's disbursements, and the *respondentia* which is only a theoretical claim.<sup>74</sup>

### 3.3.4 Ship Mortgages

Lord Templeman, gave a good description regarding ship mortgages in the modern English law, he constitutes that:

A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment or demise or by a change on any interest in real or personal property. An equitable mortgage is a contract, which creates a charge on property, but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.<sup>75</sup>

Mortgage in the English law, considered as secured property transfer, the ownership is moved to the mortgagee and when the loan is paid together with loan interests then the mortgage moved back to the mortgagor. The other view sees the mortgages nature as security for registration made by the Merchant Shipping Acts. They remain a property transfer according to the act and the mortgagor is the owner, in other words, mortgages are statutory security.<sup>76</sup> They differ from the maritime liens in the way that the maritime liens are independent rights.

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<sup>74</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, *Tulane Law Review* 1999, Vol. 73:1895, p 1909-1910.

<sup>75</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 350.

<sup>76</sup> Sheppard, Aleka Mandaraka, p 348-350.

## 4. Arresting the Ship

The action *in rem* can be brought to the admiralty court and arrest the ship at any time there is a maritime lien, this is according to the Supreme Court Act 1981 in Section 21(3). Changing the ownership is not important during the time of the maritime lien attachment and arresting the ship. Claims under section 20(2)(a), (c) or (s) or any question described in section 20(2)(b), where the *in rem* action can be brought when there is a relation between the property or the ship under arrest and the claim, this is according to the SCA 1981 in section 21(2). It is important to demonstrate *in personam* link regarding the *in rem* action and the implemented arrest in any claim under section 20(2)(e) until (r).<sup>77</sup> After the arrest of the ship, it will be in the hands of the Admiralty Court and the movement of the ship is restricted, thus the ship cannot do trade nor do business in spite of the fact that the ship is in the English waters territory. Any attempt to move the arrested ship by any person is a violation to the court order and can lead to prison or a fine to be paid. The English jurisdiction establishment based on the merits is an important consequence for the arrest in English law. The ship under arrest will be the claimant financial security; this will lead to the selling of the ship and paying the claimant if the shipowner fails to submit security in order to release the ship. In case the ship is arrested but not the ship cargo or the cargo is under arrest and not the ship, then this can create problems in applying the procedures. However, under such conditions the Admiralty Marshal can contact the court in order to discharge the goods and release any property not under arrest.<sup>78</sup>

In section 21(4), we see the word charterer and there is no restriction here to the demise charterer but a time charterer as well. The *Tychy Case*<sup>79</sup> gave the explanation and the right meaning for the charterer in the SCA 1981 in section 21(4) and the meaning of the charterer extended not only to the demise charterer but to a slot and time charterer too.<sup>80</sup> The slot charterer then is just the other side or implementation of a voyage charter in a ship part, Clarke LJ concluded:

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<sup>77</sup> Hill, Christopher, *Maritime Law*, Sixth Edition, Informa Professional, Great Britain 2003, p 103.

<sup>78</sup> Institute of Maritime Law, *Southampton on Shipping Law*, Informa, London 2008, p 357.

<sup>79</sup> [1999] 2 *Lloyd's Rep.* 11

<sup>80</sup> Hill, Christopher, *Maritime Law*, Sixth Edition, Informa Professional, Great Britain 2003, p 104.

The purpose of the 1981 was to ensure that before a person's ship could be arrested in respect of a maritime claim that person had some relationship with the ship in connection with which the maritime claim arose; there was no reason in principle why a time of the voyage charterer of the ship should not have been regarded as having a sufficient relationship and no reason to narrow the scope of that relationship by giving words of Section 21 (4) other than their ordinary and natural meaning; and in the case of a sistership the ship being arrested must be wholly beneficially owned by the person liable in personam; the expression "the Charterer" in Section 21 (4) was not confined to a demise charterer. If charterer included a time charterer it must include a voyage charterer; and it included a voyage charter of part of a ship.<sup>81</sup>

As a result the demise charterer will have a binding force on the ship for a maritime claim and thus the ship will be arrested as stipulated in SCA in 1981 in section 20(2)(e)-(r). To give rise to this maritime claim the charterer must be the one in charge of the vessel, when the action starts he holds the personal liability for the claim cause and he must be the demise charterer at the time when the action *in rem* starts. Comparing this right to the demise charterer in Canada, we see that it is not binding for the ship; the restriction of this right only given to the beneficial owners in which they exclude the demise charterers even if they are in charge of the ship. The law of the United States on the other hand is much more liberal than the English law. The English law does not give an authorization to make the ship binding *in rem* if there is no evidence that the voyage charterer, time charterer is practising real authority in order to bind the demise charterer's credit at the time when the claim commences.<sup>82</sup>

After issuing the claim form in an *in rem* claim the claimant can make an application for an arrest warrant either after or before judgement. The same position is applicable for a defendant who wishes to arrest the ship to satisfy a counter claim. In part 61.5(1) of CPR it is obvious that any counterclaiming defendant is in demand for issuing the claim form *in rem* for himself to be eligible to make an application for an arrest warrant. It is important to send a notice to the consular office whether in the port of arrest or the main office in London. If there is any binding convention or treaty for the United Kingdom, which lowers the possibility of ship arrest in other countries a copy of such rules or binding convention must be added to the file used for obtaining the arrest warrant.<sup>83</sup>

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<sup>81</sup> Hill, Christopher, *Maritime Law*, Sixth Edition, Informa Professional, Great Britain 2003, p 104.

<sup>82</sup> Tetley, William, *Arrest, Attachment, and Related Maritime Law Procedures*, *Tulane Law Review* 1999, Vol. 73:1895, p 1912-1913.

<sup>83</sup> Messon, Nigel and Kimbell A, John, *Admiralty Jurisdiction and Practice*, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 156-157.

## 4.1 Arrest Warrant

The right to arrest the ship will come after the rise of a claim *in rem*, by applying a claim form as mentioned previously. After applying a suitable application to the Admiralty Court, a warrant will be issued in order to arrest the ship. To give effectiveness to the arrest application prepared by the claimant, he must undertake the obligation to pay the costs for implementing the arrest to the Admiralty Marshal. The claimant must give accurate and declared facts about his claim in other words sworn details. Only the Admiralty Marshal or any chosen representative can empower the arrest. The arrest empowerment can be achieved by serving the arrest warrant on the ship under arrest, the warrant can be fixed outside the property or by giving notice that, the warrant is issued on the ship or anyone controlling the ship. Issuing the warrant and serving it to the shipowner or any other director will not bring the necessary results intended for issuing the warrant; the master of the ship is the one in control of the ship so the arrest warrant must serve him in order to obtain the expected results.<sup>84</sup>

## 4.2 Wrongful Arrest

In case of arresting a ship that should not be under arrest or is mistakenly arrested, the shipowner will undergo substantial and essential costs and maybe damages. It is important to know when a wrongful arrest commences who will compensate the owners of the ship for all these losses and whether it is the claimant or the other party that seized the ship in a wrong way. The shipowners can seek compensation for losses and damages if the other party is liable of a *mala fides* or *crassa negligentia*.<sup>85</sup> In the case of *The Evangelismos*<sup>86</sup> while giving his judgment and view to the Privy Council Mr Pemberton said:

Undoubtedly there maybe cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages maybe obtained. ... The real question in this case ... comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought with so little colour, or so little

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<sup>84</sup> Institute of Maritime Law, Southampton on Shipping Law, Informa, London 2008, p 357.

<sup>85</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 154.

<sup>86</sup> (1858) 12 Moo PC 352 (PC).



foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?<sup>87</sup>

## 4.2.1 Liability for Wrongful Arrest

When the court is convinced that, there was a bad faith in the arrest practised against the shipowner then the claimant can be under the obligation to pay for damages. The defendant entitlement is only to be paid back all costs and losses. This is a strange view and unjustifiable not to allow the defendant full recovery of damages and narrow the scope only to recovering costs.<sup>88</sup> In the previous mentioned case, *The Evangelismos*, the court did not recognize the negligence side during the arrest and constituted that there was only bad faith from the claimant side based on justified reason in suspecting the defendant's ship.<sup>89</sup> Nevertheless in some cases damages were given when the claim commenced by transferring a mortgage previous to the due time of the debt.<sup>90</sup> The 1952 Arrest Convention gives a free hand to the state parties to decide and determine the suitable remedy for wrongful arrest. The modern development to improve the remedy and to compensate the defendant in case of wrongful arrest came with the 1999 Ship Arrest Convention in Article 6, which give permission to the court to ask the claimant for some type of security in order to apply the arrest. This security will be used to cover loses in case there was wrongful arrest, in other words this is a financial protection to secure the arrest operation from any mistakes or unexpected results of practising a wrongful arrest.<sup>91</sup> Dr Lushington said in the *Cathcart case*:

the plaintiffs had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel. Add to this, the arrest of the vessel by the plaintiffs was made on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim, and the

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<sup>87</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 154.

<sup>88</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review 1999, Vol. 73:1895, p 1915.

<sup>89</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 154.

<sup>90</sup> Messon, Nigel, p 155.

<sup>91</sup> Sheppard, Aleka Mandaraka, Modern Admiralty Law, Cavendish Publishing Limited, Great Britain 2001, p 132.

plaintiffs have attempted to support the proceeding by making charges of fraud against the defendant, which they have quite failed to prove.<sup>92</sup>

What Dr Lushington constituted in his judgment, is an important decision towards developing the English arrest jurisdiction when it comes to the liability for wrongful arrest, in the eyes of the author his explanation is very logical. In this case, he did not follow the lines established in the case of *The Evangelismos* and the requirements for bad faith or negligence.

## 4.2.2 Releasing the Arrested Ship

The shipowner can release the ship under arrest after submitting the security, which takes many forms like a bank guarantee, paying the money to the court, a letter from the shipowner's P&I Club or a bail bond. The court will decide the security amount and generally, it cannot be more than the real value of the arrested ship. It must be enough for the claimant to cover his expenses and any incurred interests. The court will give the final binding judgment for the benefit of the claimant against the alternative security in the same way as against the ship under arrest.<sup>93</sup> In spite of the strong consequences resulting from arresting the ship and the losses that the shipowner may suffer, the courts do not put any obligation upon the claimant to submit a countersecurity to protect the defendant from any unexpected losses. In some jurisdictions like Australia, for example there is a liability upon the defendant for damages resulting from demanding security excessively.<sup>94</sup> There are however some special situations and circumstances when the release of the ship is applicable as well as in the following situations:

“(a) Where a shipowner constitutes a limitation fund in accordance with the Merchant Shipping Act (MSA) 1995 and the rules of Court, he will be entitled to the release of the ship as of right, if the prerequisites of the Art 13(2)(3) of the Limitation of Liability Convention 1976 are satisfied.

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<sup>92</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 155.

<sup>93</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review 1999, Vol. 73:1895, p 1914-1915.

<sup>94</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review 1999, Vol. 73:1895, p 1915.

(b)When a claim is subject to an arbitration agreement and in rem proceedings have commenced, the court will stay the proceedings upon the application of the defendant, and may order the release from arrest, provided sufficient security for the claim is given (s26 of the Civil Jurisdiction and Judgements Act (CJJA) 1982).<sup>95</sup>

The consequences for releasing the ship represented in the guarantee condition that gives a protection for the ship from another arrest in order to get security for the same claim. It is important to observe that when there is no agreement or contractual rules regarding security issue to prevent the ship from re-arrest, the ship can be vulnerable to get arrested once more in some cases. In the provision of Part 61 of the CPR, it is possible to see the new remarkable developments that give the court the authority to give arrest order at any level, where the claimant has permission to apply the arrest or re-arrest in order to get more security. The whole security to be covered should not exceed the property value at the time when the arrest applied or when the security submitted when there was no arrest. In other words, when someone seeks to arrest a ship but the security taken for specific claim is lower than the real value or cost of the ship when the arrest implemented, the claimant here can ask for a permit to re-arrest the ship to equalize both the value of the arrested ship and the demanded security. The reason behind such action is when the claim turns to be bigger than expected or the calculations of the costs or expenses are much higher because of the difficulties in the security from the beginning.<sup>96</sup>

### **4.2.3 The Possibility of Re-arrest**

The matter of re-arrest is different regarding each case for example if the judgment based on liability which is not yet settled then the court in case the bail submitted not enough can order the re-arrest to fulfil the justice and satisfy the claimant. The Ship Arrest Convention 1952 gives in Article 3(3) the right for arrest only for one time regarding any maritime claim. Article 5 of the 1999 Arrest Convention gives a conditional re-arrest for the claimant under some special situations. It is clear that no re-arrest is permissible after the

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<sup>95</sup> Sheppard, Aleka Mandaraka, Modern Admiralty Law, Cavendish Publishing Limited, Great Britain 2001, p 131.

<sup>96</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 167-168.

judgment regarding liability and no arrest to be issued.<sup>97</sup> The SCA 1981 is clearly prohibits the re-arrest of ship or a sister ship this is in Section 21(8) for the type of claims stated in Section 20(2)(e)-(r) regarding the procedures in England. The release of the ship depending mostly on providing the demanded security and this security generally obtained through a contractual agreement between the parties, that is why re-arresting the ship based on some differences in the agreed amount as a security can create suspicions about the fulfilment of justice.<sup>98</sup>

### 4.3 Arrest of Sister Ships

Sister ship arrest actually is a sort of attachment, obviously the meaning of attachment is that when the maritime lien is enforced on the ship that not give the enforceability automatically to the sister ship. In other words if a claimant who possesses a maritime lien for the purpose of collision damage against the other ship is not entitled the same maritime lien towards a sister ship, only the collided ship which offended the claimant's ship is under a maritime lien enforcement. Any claimant who seeks the enforcement of his security on a sister ship is ranking maritime liens limits against a sister ship.<sup>99</sup> Although the United Kingdom ratified the 1952 Ship Arrest Convention in 1959 but the convention did not fully incorporated into the English law by the 1956 Administration of Justice Act. There were strong differences between the act provisions and the 1952 Arrest Convention. There were some conditions inflicted by the act regarding ship arrest like the personal liability in the time when the cause of the action commenced, in order to make the arrest applicable as mentioned in section 3(4) of this act. The consequences for limiting the arrest, led to make the sister ship owned beneficially regarding the shares to the defendant which to be considered liable. The word beneficially owned in section 3(4)(a) actually means equitable ownership, the demise charter was not covered by this term so it had a narrow scope. In section 3(4)(b) the word like considered the limits of sister ship arrest to a ship in which all shares belong to the offending ship owner. This can be seen as a reflection of the arrest convention in article 3(3), however the arrest convention allows the arrest

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<sup>97</sup> Sheppard, Aleka Mandaraka, *Modern Admiralty Law*, Cavendish Publishing Limited, Great Britain 2001, p 133-134.

<sup>98</sup> Sheppard, Aleka Mandaraka, p 137-138.

<sup>99</sup> Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 1032.

in article 3(4) for the demise charterer's ship when there is a maritime claim liability upon him.<sup>100</sup>

The Supreme Court Act 1981 gave a better incorporation and interpretation for the 1952 Ship Arrest Convention compared to the 1956 Administration of Justice Act and specially in section 21(4)(b)(ii) which permits the arrest for other ship in case the beneficial owner is the relevant person regarding all shares of the ship. Using the word relevant person is an indication to the liable person on a claim *in personam* and this can be not the owner merely but the person controlling the ship or the charterer of the vessel. That is why the SCA 1981 in section 21(4)(b) is very near to article 3(4) of the arrest convention in 1952. It is clear that it is permissible to arrest the sister ship when it is beneficially owned regarding all the shares by a demise charterer and according to the convention a voyage or time charterer as well if he bears the claim liability in person. It is remarkable to see that the SCA 1981 did not fully comply with the 1952 Convention in covering all claims; the focus of the act was on claims where person's liability is *in personam*.<sup>101</sup> According to Professor Tetley the provisions in section 21(4)(b) of the SCA 1981 will give significant results to the claimant and a broader scope in choosing the ship for arrest and he concluded that the claimant can arrest in the following cases:

- a) the offending ship (if, when the action is brought, it is beneficially owned as respects all its shares or chartered by demise by the person who would be personally liable on the claim); or
- b) any other ship, beneficially owned as respects all its shares when the action is brought by the party who, when the cause of action arose, was personally liable on the claim and was either:
  - (1) the owner of the offending ship, or
  - (2) the charterer of the offending ship, or
  - (3) the person in possession or control of the offending ship.<sup>102</sup>

The SCA 1981 according to this section moved a very advanced step towards complying and giving strength to the provisions of the 1952 Arrest Convention. The author agree with professor Tetley in the way the SCA permitted the arrest of the sister ship beneficially owned, not only

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<sup>100</sup>Tetley, William, Maritime Liens and Claims, Second Edition, International Shipping Publications, Canada 1998, p 1033-1034.

<sup>101</sup> Tetley, p 1034-1035.

<sup>102</sup> Tetley, William, Maritime Liens and Claims, Second Edition, International Shipping Publications, Canada 1998, p 1035.

the demise charterer but added both the time and voyage charterer too taking into consideration the personal liability for the owner regarding his title. Nevertheless, it is not yet obvious when the sister ship to be regarded as opposing the offending ship, whether it must be under the ownership of the related person at the time when an action brought or when the action commenced. In sections 20(2)(d) and 21(4) of the SCA there is no worthiness and availability anymore to apply arrest on grounds of damage received by a ship on the sister ship.<sup>103</sup>

## 4.4 Senior Courts Act 1981

The SCA 1981 is the one governing the Admiralty Jurisdiction and especially in section 20-24 together with other Acts. In 1982, the SCA replaced the Administration of Justice Act 1956 and became a law. The Act of 1956 aimed to incorporate the 1952 Arrest of Ships Convention in the English law and all types of claims are under the jurisdiction of the English Admiralty Court according to section 20(1). The claims to be considered by the Admiralty Court are listed in closed list of claims.<sup>104</sup> The admiralty jurisdiction in the United Kingdom is practised by both the action *in rem* and *in personam*, the list mentioned in section 20(1)(a) and 20(2) shows the claims where the admiralty jurisdiction is applicable. The legal articles legally applies for all types of ships despite the nationality whether English or not, no matter where the claims commenced or the residency of the shipowners.<sup>105</sup> As previously mentioned some changes were made to the Supreme Court Act and the name was changed according to the Constitutional Reform Act in 2005, to be the Senior Courts Act 1981. These new changes in the act are already binding since the first of October 2009 and more impact will be given to the judicial system of the English High Courts and to the role of the House of Lords.<sup>106</sup>

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<sup>103</sup> Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 1036.

<sup>104</sup> Hill, Christopher, *Maritime Law*, Sixth Edition, Informa Professional, Great Britain 2003, p 90.

<sup>105</sup> Niklasson, Anna-Karin, *A Comparison Between the Jurisdictional Rules in the EU and the US in the Light of the Arrest Convention and the Possibility to shop for Forum*, Master Thesis Presented to the Department of Law-Göteborg University, p 20, Available at: <http://gupea.ub.gu.se/bitstream/2077/2216/1/200383.pdf>

<sup>106</sup> Slapper, Gary & Kelly, David, *The English Legal System*, Twelfth Edition 2011-2012, Routledge Publishing, Great Britain 2011, p 114-115.

## 4.5 The Closed List of Claims

The closed list of claims described according to the SCA 1981 in section 20(2) and its function under the jurisdiction of the Admiralty High Court mentioned in section 20(1)(a) they give permission to enforce the procedures according to *in rem* or *in personam* actions. The list is a reflection for article 1(1) presented in the 1952 Arrest Convention. All the claims in section 20(2) of the SCA 1981 are with a maritime nature and the enforcement is *in personam* according to section 21(1). The claims, which are permissible under this section, are regarding possession and ownership of ship. Other types of claims like mortgages, employment or possession are under the *in rem* action but they also can be governed under the statutory rights *in rem* and maritime liens too. Generally, the enforceability of most of the maritime claims in English law is under the action *in rem* which give rise to the claim.<sup>107</sup>

## 4.6 Arrest for the Purpose of Supporting Foreign Procedures

When there is a claim still going on the court of one of the member states then the ship can be under arrest in England. In Part 61.5 of the CPR, the arrest in the English law is just a protection type of remedy according to the interpretation of Article 31, stated in the Brussels Regulation. There is an obvious absence for arrest in order to support foreign proceedings in Article 31, while this arrest is permissible under Part 61 of the CPR in the English national law.<sup>108</sup> It is good to see what Hohouse J said regarding this matter:

it is permissible and proper that there should be an arrest of a vessel in one jurisdiction in support of a determination of the merits of a dispute by a court of competent jurisdiction in another contracting state and to provide security for the satisfaction of the judgement given by that court.<sup>109</sup>

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<sup>107</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review 1999, Vol. 73:1895, p 1908-1909.

<sup>108</sup> Messon, Nigel and Kimbell A, John, Admiralty Jurisdiction and Practice, Fourth Edition, Informa Law and Finance, Great Britain 2011, p 152-153.

<sup>109</sup> Messon, p 152.

## 5. The Features of the 1952 and 1999 Conventions

Many countries are members to the 1952 Ship Arrest Convention and we can see that article 2 gives arrest, detention or seizing the ship permission to any of the contracting countries. This arrest is practised under the court authority according to article (4) and the ship liable for a maritime claim as listed in article 1(1) is raising the flag of a contracting country. In article 8(1) even the arrest applied mainly to any ship of a contracting state the convention permitted the arrest in a contracting state for a ship which belongs to non-contracting country whether for a maritime claim or other type of claims.<sup>110</sup> It is clear that the 1952 Arrest Convention took a common law perspective through the adoption of the closed list of maritime claims as previously described in article 1. Article 3 gave the permission to apply sister ship arrest, in case of wrongful arrest it is permissible to seek damages, however this seems a theoretical right because the requirements for proving bad faith committed by the arrestor seems very hard to establish. Nevertheless the convention in the eyes of many scholars and states an outstanding successful international agreement with this huge number of ratifying countries up to 70 state. Many views find the closed list of claims impose a strong restriction upon the claimants, many are in the favour of an open list of claims or extending the current closed list of maritime claims.<sup>111</sup>

The 1999 Ship Arrest Convention came with many new developments and created some change compared to the 1952 Arrest Convention. It is remarkable that the list of claims which give rise to arrest were increased in the 1999 Convention jumping from 17 categories under the 1952 Convention to 22 categories in the new convention adding 6 new arrest heads added after removing bottomry. The list of claims remained closed in the 1952 Convention while the 1999 Convention added a provision regarding damages for environment in article 1(d) in spite the fact it is hard to determine type of environmental damage but the provision referred to damage and costs of damage. It is important to mention that the 1952 Arrest Convention drafting was under

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<sup>110</sup> Tetley, William, *Maritime Liens and Claims*, Second Edition, International Shipping Publications, Canada 1998, p 958.

<sup>111</sup> Deering, Bob and Reese, Jonathan, *United Kingdom: An Overview of the 1952 and 1999 Arrest Conventions*, An Article Written in October 2011, Available at: <http://www.mondaq.com/x/147542/Marine+Shipping/An+Overview+of+the+1952+and+1999+Arrest+Conventions>



criticism because of many drafting mistakes and the vague wording sometimes led to the wrong interpretation between the courts of the civil and common law, while we see a better and clear interpretations in the new Arrest Convention 1999.<sup>112</sup> A significant development in the 1999 Convention regarding the re-arrest of the ship stated in article 5 of the convention, which gave a free hand to the claimant to re-arrest a released ship or any other ship to satisfy the demanded amount of his claim. This given right of re-arrest can start in the following circumstances:

- “the security already provided is inadequate (in the case of re-arrests, the security can never exceed the value of the vessel in question); or
- the person who provides the security is not, or is unlikely to be able to, fulfill its obligations; or
- the ship or the original security was released either with the consent of the claimant acting on reasonable grounds or because he could not by taking reasonable steps prevent the release.”<sup>113</sup>

The scope of applying the jurisdiction in the 1999 Arrest Convention is wider and applicable to the ships which fall under the jurisdiction of the contracting state without considering the flag of the contracting or not contracting state. Unlike the 1952 Arrest Convention, the 1999 Convention is not only regarding sea-going ships, the countries nevertheless keep the right not to apply the convention concerning non-sea-going ship or ships with no flag of a contracting country.<sup>114</sup> The 1999 Convention took an important step in providing remedy for the shipowner, when the convention gave the court the right to decide if the claimant has to submit a form of security in case any damages or expenses to be on the shipowner when it turns that the arrest is wrong or unjustifiable. When it comes to the release of the ship the 1999 Arrest Convention kept the original provisions of the 1952 Convention. The release is obligatory after the demanded security is submitted; when the parties do not reach an agreement regarding the satisfaction of the amount or the security form then the court is permitted to take the decision in respect of the nature and the limits of the security.<sup>115</sup>

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<sup>112</sup> Deering, Bob and Reese, Jonathan, United Kingdom: An Overview of the 1952 and 1999 Arrest Conventions, An Article Written in October 2011, Available at: <http://www.mondaq.com/x/147542/Marine+Shipping/An+Overview+of+the+1952+and+1999+Arrest+Conventions>

<sup>113</sup> Same source.

<sup>114</sup> See the Review of Maritime Transport 2011, Report by the UNCTAD, United Nations, New York and Geneva 2011, Chapter 5, p 111.

<sup>115</sup> Same UNCTAD Report, p 112-113.

## 5.1 The 1952 Ship Arrest Convention

This convention was the first convention to regulate and unify ship arrest in different countries in the world. In spite of the criticism for this convention but the author, see it as a successful attempt to simplify the rules and grounds for arrest, this convention created a significant balance between the claimants and the shipowners commercial needs. The author talked about this convention previously in this paper so it is appropriate to talk little about the history of this convention and how it was implemented, especially under English law. This Convention of 1952-Ship Arrest will be under review and surely, some amendments can come after that the 1999 Ship Arrest Convention entered into force in 2011.

### 5.1.1 Historical Overview

The roots of the 1952 Arrest Convention go back to the 1930 in Antwerp when there was a preparation for the Committee Maritime Conference. The associations of the Italian, German and the French were invited by the CMI, to come up with new topics and they come with the matter of ship arrest. The German association at that time referred to arrest as a matter attached to maritime liens and not only collision, they wanted to give some protection for ship shareholders from claimants seeking arrest. Some questions were given later regarding the right to arrest and the sale of ship. In 1932, a request was made by the International Sub-Committee to start a first draft preparation. The prepared draft delivered to the International Sub-Committee meeting in London during the year 1933. During the Oslo conference in 1933, some associations give their comments, emerging discussions also showed the differences regarding the civil and common law countries. In the Paris conference 1937 article 5 strongly criticised, the final suggestion approved by the conference was to leave the court that ordered the arrest decides matters of damages incurred from wrongful arrest. The CMI decided in the 1947 conference in Antwerp to submit the draft of the 1937 Paris conference to the Diplomatic Conference. The draft was described as restrictive, and lacks the unifying body of rules according to the comments of the Dutch association.<sup>116</sup>

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<sup>116</sup> Berlingieri, Francesco, Arrest of Ships, Fourth Edition, Informa Law, London 2006, p 1-5.

In the Amsterdam conference, 1949 a summary were made of all the previous work of the committee and the matter of how the English law is different from other jurisdictions was under discussion. The matter of liability incurred for wrongful arrest left unsolved, the draft of this conference made the arrest permissible only for maritime claims. In the Diplomatic Conference in Brussels 1952, the ship arrest convention received approval with 13 votes favouring the convention and one vote against and six members were absent, actually even in this conference, no remarkable changes were done on the original draft. Most of the matters under discussion in the conference were matters of requiring from the claimant to give security and the amount of this security in which the courts can base the jurisdiction according to merits. Wrongful arrest liability was also under discussion in this conference.<sup>117</sup>

## 5.1.2 The Implementaion of the Convention

The implementation of the 1952 Arrest Convention is not the same in all countries. Some member countries gave the force of law to the convention by issuing an order or through the publishing in journals of the state. The countries that gave such status to the convention are first group countries and they are Poland, Germany, Slovenia, Italy, Greece, Belgium, France, Croatia, Netherlands, Portugal, and Haiti. Spain and Ireland are in the second group of countries.<sup>118</sup> Other countries incorporated the convention provisions or part of the provisions in their domestic laws. Sweden, Nigeria, Denmark, Finland, Norway and the United Kingdom are the states with provisions incorporation.<sup>119</sup> It is a long process writing in details about each country that implemented the convention that is why the author thought it is appropriate to demonstrate the English law view, and how some of the provisions incorporated in the English maritime system. The United Kingdom did not enforce the 1952 Arrest Convention as a binding law in the English domestic law but reproduced some of the convention's provisions. The start was with the 1956 Administration of Justice Act and later on the 1981 SCA. The arrest in Scotland is still under the rules of the 1956 Administration of Justice Act.<sup>120</sup>

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<sup>117</sup> Berlingieri, Francesco, Arrest of Ships, Fourth Edition, Informa Law, London 2006, P 5-7.

<sup>118</sup> Berlingieri, p 15-19.

<sup>119</sup> Berlingieri, p 24.

<sup>120</sup> Berlingieri, p 34.

The author refers to what Professor Gaskell explained about the incorporation of some provisions of the 1952 Arrest Convention in the English law and specially article 3(1) of the arrest convention he said:

The relevant provision of the Supreme Court Act 1981 is s.21(4), which resembles Art. 3(1) of the 1952 Arrest Convention. Section 21(4) states “in the case of any such claim as is mentioned in s. 20(2)(e) to (r) where (a) the claim arose in connection with a ship and (b) the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship, an action in rem may ... be brought in the High Court against: a) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or b) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it” Thus, the effect of that provision is that when the action is brought, an in rem claim form is issued (CPR Practise Direction 49F, paragraph 2.1(1)), and the person liable in personam for the claim is the owner or demise charterer of the ship, the latter can be arrested.<sup>121</sup>

The SCA did not talk or describe the possibility for re-arrest but there is an indication to this matter in rule 6.7(3) of the Admiralty Practise Direction. The difference is that the convention in article 3(3) gives permission for multiple arrests regarding the matter of providing the security for the claimant. There is a prohibition from the SCA 1981 to re-arrest or multiple ship arrest in section 20(8). The matter of damages incurred for wrongful arrest and the submission of a security by the claimant is not described in both the Practise Direction and the SCA 1981. Nevertheless, any re paying or compensation for damages by the claimant to the shipowner is controlled by rule 6.3(3) in the Practise Direction and is permissible only when the arrest implemented in spite of the existence of a caveat filed to stop the arrest. Provisions regarding the trade of the ship under arrest are not available in the SCA but only rule 6.4(3) in the Practise Direction clarified that property under arrest cannot be in movement in the absence of a permission from the Admiralty Court to the court to issue this permit.<sup>122</sup>

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<sup>121</sup> Nicholas, Gaskell, Implementation of the 1952 Arrest Convention, Institute of Maritime Law-University of Southampton, England 1999, Available at:

[http://www.bmla.org.uk/documents/implementation\\_of\\_the\\_1952\\_arrest.htm](http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm)

<sup>122</sup> Berlingieri, Francesco, Arrest of Ships, Fourth Edition, Informa Law, London 2006, p 43.

## 5.2 The 1999 Ship Arrest Convention

The 1999 Arrest Convention is very new convention and entered into force starting from September 2011. This convention is expected to amend and replace the old arrest convention in the coming few years. The definition of arrest in this convention extended to refer to the restriction implemented on the ship movement and not only detaining the ship. The goal of such extension is to provide more security for the claimant to get his claim before the trial; it also can bring orders like freezing as a type of security before trial.<sup>123</sup> This convention gave recognition to a lot of unique legislative rights or in other words these rights allows the governments or any of the governments entities to detain and be the seizure of the ship and sometimes sell the ship just to fulfil specific claims like wreck removal expenses, harbour dues and pollution damages. The governments can use it also as a sort of punishment for some type of crimes like illegal immigration, violating fishery rules or drugs trafficking.<sup>124</sup>

The right to arrest a sister ship belongs to a company or private person with a maritime claim is given again in the 1999 Arrest Convention. It is good to notice that the drafting of the provisions in article 3(2) is much clearer but there is an absence for the definition of what establish or build the ownership, or what is the definition of the owner? In addition, this matter was strongly under discussion and took many long debates in the Diplomatic Conference. On the other hand, the matter of the corporate veil took long discussions and unfortunately, no uniform body established. There was failure to deal with issues like in which situations and conditions the piercing of the corporate veil is possible and as a result, if the ships belongs to a firm with not the same corporate identity of the other company, which a maritime claim will rise against, this ship can be under arrest. However, there is no prohibition of the corporate veil piercing and that is why the member states will use their domestic laws to solve such matters.<sup>125</sup>

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<sup>123</sup> See the Review of Maritime Transport 2011, Report by the UNCTAD, United Nations, New York and Geneva 2011, Chapter 5, p 111.

<sup>124</sup> Tetley, William, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review 1999, Vol. 73:1895, p 1963-1964.

<sup>125</sup> See the Review of Maritime Transport 2011, Report by the UNCTAD, United Nations, New York and Geneva 2011, Chapter 5, p 112.

## 6. Ship Arrest in the Gulf Region

The Arab Countries in the Gulf region play a vital role in international trade that is why the matter of ship arrest is of a great importance for many codes in these countries. Although none of the Gulf Countries ratified the 1952 Ship Arrest Convention but it is obvious from the legal provisions regarding ship arrest that they are taken from the 1952 Ship Arrest Convention. The word executory arrest is the equivalent in the codes of the Gulf States to terms like post-judgment arrest or the judicial sale. The ship arrest is applicable when there is a maritime debt and the arrest order is issued by the court. Most of the provisions regarding what constitutes the arrest depended on articles 1 and article 4 of the Ship Arrest Convention 1952. The codes of Qatar, Bahrain, and Oman include a provision of a significant importance, which prohibits the arrest at any of the ports of the mentioned states when the master received an authorization to sail. They permitted the arrest in this case only when the claim arose because of debt related to the voyage of the ship preparing to sail.<sup>126</sup>

The Saudi Arabia is also not a member of the Ship Arrest Convention 1952, many complicated issues, which arise in relation to the 1952 Ship Arrest Convention, is with no such importance and not related according to the Saudi jurisdiction. The judicial arrest and ships selling is regulated however by part II, chapter 2 of the Commercial Court Law and the ship arrest proceedings can apply only after issuing the judgment.<sup>127</sup> The *Sharia* law inflicted most of the Arabic jurisdictions including Saudi law but when the *Sharia* law cannot satisfy the matter under discussion then it is permissible to issue legal rules in compliance with the *Sharia* law to satisfy the matter, this is especially in the Saudi laws, which are based on the *Sharia* law almost completely.<sup>128</sup> The code of the UAE stated in a provision that the shipowner is entitled to limit his liability and to release the arrested ship if the ship's limited amount paid by the shipowner to the court or he can supply evidence that the fund is settled.<sup>129</sup>

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<sup>126</sup> Price, Richard, *The Maritime Laws of the Arabian Gulf Cooperation Council States*, Vol I, Graham&Trotman Ltd, Great Britain 1986, p 196-197.

<sup>127</sup> Haberbeck, Andreas and Galloway, Mark, *Saudi Shipping Law*, Fairplay Publications Ltd, 1990, p 53.

<sup>128</sup> Same source, p 7.

<sup>129</sup> Price, Richard, *The Maritime Laws of the Arabian Gulf Cooperation Council States*, Vol I, Graham&Trotman Ltd, Great Britain 1986, p 199.

## 6.1 Ship Arrest in Kuwait

The Kuwaiti Maritime Law No.28 in 1980 is the one governing ship arrest in the country, in some districts this law is completed by the Civil Procedure Code. It is obvious that many provisions of this law are written according to the 1952 Ship Arrest Convention provisions. The arrest according to the law is in two sorts, the executory arrest and the preservatory arrest. In order to apply the arrest according to Article 73(2) to secure the paying of maritime debt the claim must come out of damage in any collision caused by a ship. Any injury or death the ship caused, salvage or assistance, ship towage, pilotage, any luggage or goods lost or damaged on the ship, ship ownership disputes, mortgages, carriage of goods contracts, and many other claims of a maritime nature.<sup>130</sup>

### 6.1.1 Ship Arrest Jurisdiction

The courts in Kuwait will apply the jurisdiction on any maritime claim or debt when the claimant is resident or practise his business in Kuwait, or if the maritime debt came out as a result of an assistance or collision and it is in the jurisdiction and territory of the court. If the maritime debt came out in Kuwait or outside Kuwait, in a way that the arrest can be effective as an example during a voyage. It is important to know that the ship arrest in Kuwait can be only to secure a maritime debt and implemented on the ship, which is inside the Kuwaiti territorial waters with an extension up to 12 miles offshore. That means the effectiveness of the Kuwaiti courts jurisdiction is according to the above-mentioned conditions, all this can be understood from the Articles 23 and 24 of the Kuwaiti Civil Procedure Code. It should be noticed that the arrest cannot be applied in Kuwait to secure a claim which is related to any arbitration procedures or foreign laws.<sup>131</sup>

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<sup>130</sup> Hill, Christopher, *The Arrest of Ships Series- V.6*, Lloyd's of London Press Ltd, Great Britain 1987, p 69-70.

<sup>131</sup> Hill, Christopher, p 70.

## 6.1.1.2 Arrest of Chartered Ships and Sister Ships

The Kuwaiti law gave any person the right to arrest the ship if he was aiming to claim a maritime debt on this ship or any other ship owned by the debtor in the time when the debt appeared. The law clearly mentioned the exceptions of the claims in Article 73(2) of the Maritime Law, which restrict the arrest of the ship to the debt, arose according to Article 74. The law did not define the common ownership so we do not see it in the Maritime Code; the courts in Kuwait generally will consider and deal with individual ship owning companies as an entity, which is legally independent. In Article 75 of the Maritime Law, the claimant can arrest the ship when the maritime debt is the liability only of a ship charterer who is managing and affectively controlling the ship. Any other ship can be also arrested if the owner was the charterer, any other ship belongs to the chartered vessel's owner cannot be arrested in respect for this provision and it should be noticed that this will apply on all cases when the liability for a maritime claim upon a person who is not the owner of the vessel.<sup>132</sup>

## 6.1.1.3 Wrongful Arrest

The arrestor will bear all liability for any damages resulted from the wrongful arrest or when the arrest was applied in bad faith or negligence. If the court found that there was no convenient reason, which led the arrestor to practise the right of arrest, then the court will consider the arrest here as wrongful.<sup>133</sup> To proceed the arrest procedures the person who wish to arrest a ship to secure the payment of a maritime debt must submit an application to get the arrest order. To pursue a *prima facie* for a maritime claim the documents and all evidence must be in original copies. The original copies must be certified and legally stamped in the Kuwait embassy or Consulate in the origin country of the issued documents. Foreign lawyers not accepted in the Kuwaiti courts, that is why the arrestor must authorise a local lawyer. Any copies and not original documents will not be accepted even if the case is urgent; any authorisation of attorney to be issued by faxing or other way is not accepted. The courts in Kuwait differs from other jurisdictions in the Gulf countries because there is no demand for security from the arrestor in

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<sup>132</sup> Hill, Christopher, *The Arrest of Ships Series- V.6*, Lloyd's of London Press Ltd, Great Britain 1987, p 71.

<sup>133</sup> Hill, Christopher, p 73-74.



case the arrest was wrong. The wages paid for the lawyers according to 5 to 10 percent of the real amount of the claim.<sup>134</sup>

## 6.2 Ship Arrest in Iraq

The current Iraqi maritime law is taken in all of its provisions and regulations from the old Ottoman Commercial Law in 1863 and still binding in Iraq, which in the eyes of the author an old law and there is a strong need to change it immediately. Due to the continuous wars in Iraq, this field of maritime law severely neglected. The suggested new Iraqi maritime law in 2005, still not ratified by the Iraqi parliament which is an obstacle towards developing and amending the current maritime laws and also to ratify more international conventions. Anyway, Iraq is not a member to the 1952 Ship Arrest Convention and the creditor who wishes to claim or possess his debt can apply to the court in order to get a decision to arrest the property whether this property movable or not and the property consider the ship as well. A recognized written paper can be enough sometimes for the creditor to get his claim despite the fact that he do not have a deed. The court will decide the validity of such recognition; this is in accordance with articles 231 and 248 of the law No.83 in the Civil Procedures Law 1969. In article, 235 of the same law the arrest can be permissible even before the issuing of a court decision.<sup>135</sup>

The arrest is for jurisdiction and security claims only this is regarding the Law of Civil Procedures in article 37, according to same article the ship arrest can apply only if the defendant's resident place or the agreed place by parties is Iraq. In article, 234 the claimant is obliged to give security to be cash paid up to 10% of the amount of the claim. The costs for arrest in the Iraqi jurisdiction are 2% of action value and the lawyer's expenses must be paid too. The release of the ship according to the owner's request in case the claimant did not proceed the action to obtain his arrest right in a period of eight days starting from the day of notifying the debtor according to article 237 of the Civil Procedures Law. Using fax is permissible but in Arabic language with a notary certification.<sup>136</sup>

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<sup>134</sup> Hill, Christopher, *The Arrest of Ships Series- V.6*, Lloyd's of London Press Ltd, Great Britain 1987, p 71-72.

<sup>135</sup> McArdle, A.D, *International Ship Arrest: A Practical Guide*, Lloyd's of London Press Ltd, Great Britain 1988, p 153.

<sup>136</sup> McArdle, p 154.

# Conclusion

The ship arrest is a unique function to obtain the right by the claimant and a practical way at the same time. The arrest is against the ship and not the shipowner and that is why it is not a criminal procedure inflicted against the person himself, it is much more a commercial procedure to secure the claimants rights. Under English law, the right to arrest rises when there is a maritime lien attached to the claim, or to the ship under arrest. The arrest is permissible to satisfy a pending jurisdiction of other state. The action *in rem* works in the English law together with the ship arrest procedure to secure the claim this is in practise but arguably, they can work in a separate way, the enforcement of the action cannot be made without the existence of a maritime lien. The 1952 Arrest Convention and the English law share the same common law perspective when it comes to the closed list of claims. As the author mentioned previously there are no claims added to the 1952 Arrest Convention closed list of claims and the SCA 1981 as well. The 1956 Administration of Justice Act was an attempt to invoke and incorporate the provisions of the 1952 Arrest Convention; in the eyes of the author, it was not successful. There is a prohibition in the English SCA to arrest a ship for a claim not listed as a maritime claim, so it is not permissible to inflict arrest for such claims. The SCA succeeded in a way in incorporating many provisions of the Arrest Convention 1952 into the English law but not fully comply with other important provisions of the convention.

The list of claims where an action *in rem* can be enforced in section 20(2) are similar to the list of claims in article 1(1) in the 1952 Arrest Convention, nevertheless there is a non-similarity in wording. That is why an amendment of the SCA regarding the claims within Salvage Convention 1989 gave a bigger scope to salvage, which was not cleared by article 1(c) of the arrest convention.<sup>137</sup> The 1999 Ship Arrest Convention came with new improvement for the first time regarding the arrest, according to the closed list of claims and in article 1(d), it is permissible to arrest in order to seek environmental damages as the author mentioned previously. The level of implementing the 1952 Arrest Convention was different between the member states,

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<sup>137</sup> Nicholas, Gaskell, Implementation of the 1952 Arrest Convention, Institute of Maritime Law-University of Southampton, England 1999, Available at: [http://www.bmla.org.uk/documents/implementation\\_of\\_the\\_1952\\_arrest.htm](http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm)

some of them gave a force of law to the convention in their local laws, and others tried to apply some of the provisions by issuing special directives or regulating acts. In the eyes of the author, this method is not legally active or practical for many reasons, like the differences in interpretations or language difficulties; this can create gap between the two different provisions. The English jurisdiction does not recognize the claims for damage resulted from claimant liability when a wrongful arrest is inflicted upon the defendant. The difficulty to prove this liability in the English law and the demanding of definite evidence of commencing bad faith committed by the claimant is not logical. It is very hard to prove the bad faith or intention. English law should follow the Scottish law perspective; Scottish law commission lately advised that the law in Scotland must take a different perspective than the English law to give power to courts to ask for previous security to be delivered in order to recover damages of wrongful or incorrect arrest.<sup>138</sup> The impact of the 1952 Arrest Convention on many Arabic States in the Gulf region is remarkable. All the states in the Gulf region except Iraq and Saudi Arabia used provisions taken from the 1952 Arrest Convention. The Type of claims to apply the arrest and the judicial procedures were identical, while sometimes changing the name of the action and most of them are civil law systems so they do not specify a list of maritime claims. Iraq and Saudi Arabia are still using until now the Ottoman Marine Commercial Law in 1863, still binding for both countries. Therefore, there is no reflection of the 1952 Ship Arrest Convention on their maritime laws regarding ship arrest. The fact that Saudi Arabia *Sharia* law is the one controlling legal procedures in the Kingdom makes it hard to comply with other laws with no or limited Islamic roots as well.

Despite the great success of the 1999 Ship Arrest Convention that is recently in force there are still some matters not cleared, like the incorporate veil piercing about which there was no agreed statement in the preparatory meetings. They left the matter to the court of each country to apply according to domestic law; this is gap in this convention, which is not fulfilling the role of an international convention, if not creating to the best possible limits of unification in laws and decisions. The Arrest Convention 1999 gave the courts of every state the freedom to determine the remedies for wrongful arrest and that is not a modern approach from the convention. It is necessary to create a balance of interests between the claimant's demand for security and the shipowner, because the shipowner can be vulnerable for damages and massive

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<sup>138</sup> Nicholas, Gaskell, Implementation of the 1952 Arrest Convention, Institute of Maritime Law-University of Southampton, England 1999, Available at: [http://www.bmla.org.uk/documents/implementation\\_of\\_the\\_1952\\_arrest.htm](http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm)

losses in case of wrongful unjustifiable arrest. Giving each court of member states the right to decide can lead to judgment based on the national jurisdiction of this country, which maybe does not recognize liability for wrongful arrest at all so the shipowner will suffer great losses.<sup>139</sup> The author think that the 1952 Ship Arrest Convention in spite of all the gabs and wording mistakes succeeded in creating a balance between both the shipowners and the claimants commercial interests and maybe the 1999 will reach this advanced level of uniformity by the time after replacing the 1952 Ship Arrest Convention in the coming few years .

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<sup>139</sup> See the Review of Maritime Transport 2011, Report by the UNCTAD, United Nations, New York and Geneva 2011, Chapter 5, p 111-113.

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# Supplement A

## **International Convention Relating to the Arrest of Sea-Going Ships**

*(Brussels, May 10, 1952)*

[Preamble Omitted]

### **ARTICLE 1**

In this Convention the following words shall have the meanings hereby assigned to them:

(1) "Maritime Claim" means a claim arising out of one or more of the following:

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(J) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of Masters, Officers, or crew;

(n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;

(o) disputes as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

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

(3) "Person" includes individuals, partnerships and bodies corpo-rate, Governments, their Departments, and Public Authorities.

(4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

## **ARTICLE 2**

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall

be deemed to extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or harbour authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

### **ARTICLE 3**

(1) Subject to the provisions of para. (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) 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: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, 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.

(4) 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 ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no

other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions 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.

#### **ARTICLE 4**

A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the contracting State in which the arrest is made.

#### **ARTICLE 5**

The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, (o) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest. In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof. The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitations of liability of the owner of the ship.

#### **ARTICLE 6**

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent 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.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

#### **ARTICLE 7**

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely:

(a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;

(b) if the claim arose in the country in which the arrest was made;

(c) if the claim concerns the voyage of the ship during which the arrest was made;

(d) if the claim arose out of a collision or in circumstances covered by article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910;

(e) if the claim is for salvage;

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

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with article 5 to procure 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 Court having jurisdiction so to decide;

and the Court or other appropriate judicial authority of the country in which the claimant shall bring an action before a Court having such jurisdiction.

(3) 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 appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceeding is not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17 October 1868.

## **ARTICLE 8**

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this convention any government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.



(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or other-wise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

#### **ARTICLE 9**

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.

#### **ARTICLE 10**

The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve:

(a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o ) and (p) of article 1, but to apply their domestic laws to such claims;

(b) the right not to apply the first paragraph of article 3 to the arrest of a ship within their jurisdiction for claims set out in article 1 paragraph (q).

#### **ARTICLE 11**

The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

#### **ARTICLE 12**

This Convention shall be open for signature by the States represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

### **ARTICLE 13**

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

### **ARTICLE 14**

(a) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

### **ARTICLE 15**

Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14(a).

## **ARTICLE 16**

Any High Contracting Party may three years after coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

## **ARTICLE 17**

Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

## **ARTICLE 18**

(a) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that

the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c ) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

DONE in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

# Supplement B

## International Convention on the Arrest of Ships

*(Geneva, March 12, 1999)*

The States Parties to this Convention, Recognizing the desirability of facilitating the harmonious and orderly development of world seaborne trade, Convinced of the necessity for a legal instrument establishing international uniformity in the field of arrest of ships which takes account of recent developments in related fields,

Have agreed as follows:

### Article 1

#### Definitions

For the purposes of this Convention:

1. "Maritime Claim" means a claim arising out of one or more of the following:

(a) loss or damage caused by the operation of the ship;

(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;

(c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;

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

(e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

(h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;

(i) general average;

(j) towage;

(k) pilotage;

(l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;

(m) construction, reconstruction, repair, converting or equipping of the ship;

(n) port, canal, dock, harbour and other waterway dues and charges;

(o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

(p) disbursements incurred on behalf of the ship or its owners;

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

(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

(s) any dispute as to ownership or possession of the ship;

(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;

(v) any dispute arising out of a contract for the sale of the ship.

2. "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship

in execution or satisfaction of a judgment or other enforceable instrument.

3. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

4. "Claimant" means any person asserting a maritime claim.

5. "Court" means any competent judicial authority of a State.

## Article 2

### Powers of arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected.
2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.
3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.
4. Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

### Article 3

#### Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
  - (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
  - (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
  - (c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or
  - (d) the claim relates to the ownership or possession of the ship; or



(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

#### Article 4

##### Release from arrest

1. A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, paragraphs 1 (s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

2. In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.

3. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

4. If a ship has been arrested in a non-party State and is not released although security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the Court in the State Party.

5. If in a non-party State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:

(a) the claim for which the ship has been arrested, or

(b) the value of the ship, whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.

6. Where, pursuant to paragraph 1 of this article, security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified, or cancelled.

## Article 5

### Right of rearrest and multiple arrest

1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

- (a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or
- (b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or
- (c) the ship arrested or the security previously provided was released either:
  - (i) upon the application or with the consent of the claimant acting on reasonable grounds, or
  - (ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

- (a) the nature or amount of the security already provided in respect of the same claim is inadequate; or
- (b) the provisions of paragraph 1 (b) or (c) of this article are applicable.

3. "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.

## Article 6

### Protection of owners and demise charterers of arrested ships

1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a

result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and provided.

2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful or unjustified, or

(b) excessive security having been demanded and provided.

3. The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.

4. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.

5. Where pursuant to paragraph 1 of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

#### Article 7

##### Jurisdiction on the merits of the case

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine

the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

2. Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

4. If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.

5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:

(a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and

(b) such recognition is not against public policy (ordre public).

6. Nothing contained in the provisions of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

## Article 8

### Application

1. This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.

2. This Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

3. This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

4. This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

5. Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.

6. Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual

residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

#### Article 9

##### Non-creation of maritime liens

Nothing in this Convention shall be construed as creating a maritime lien.

#### Article 10

##### Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following :

- (a) ships which are not seagoing;
- (b) ships not flying the flag of a State Party;
- (c) claims under article 1, paragraph 1 (s).

2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in article 7 of this Convention.

#### Article 11

##### Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

#### Article 12

##### Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the Headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval;  
or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

### Article 13

#### States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare

that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has two or more systems of law with regard to arrest of ships applicable in different territorial units, references in this Convention to the Court of a State and the law of a State shall be respectively construed as referring to the Court of the relevant territorial unit within that State and the law of the relevant territorial unit of that State.



## Article 14

### Entry into force

1. This Convention shall enter into force six months following the date on which 10 States have expressed their consent to be bound by it.
2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect three months after the date of expression of such consent.

## Article 15

### Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one-third of the States Parties.
2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

## Article 16

### Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.
2. Denunciation shall be effected by deposit of an instrument of denunciation with the depositary.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the depositary.

## Article 17

### Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT Geneva this twelfth day of March, one thousand nine hundred andninety-nine.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.