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IMPLEMENTATION OF THE ARREST CONVENTION

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Qualifications

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Key Publications

Author of more than 100 books and articles on Maritime and Commercial Law
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Curso de Derecho Marítimo, Madrid (Civitas-Thomson), 2005, 2nd ed., 996 pages; *Estudios de Derecho Marítimo*, 3 vols. Barcelona (Alferal, S.L.), 1995-2001.
Legislación marítima y fuentes complementarias, 3rd edition, Madrid. Tecnos, 2004.
International Maritime Conventions, 3 vols. Barcelona. Editorial Bosch, 1986-2002.

Professional Activities and Recognition

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II. ABSTRACT

SUMMARY. I. The International Maritime Convention on the Arrest of Ships, 1952 and 1999. - II. Ratifications and entry into force. – III. Different legal methods of implementation. - IV. Similarities and differences between the 1952 and 1999 Conventions. - V. Conclusion.

I. There are two International Maritime Conventions on the Arrest of Ships under consideration: the 1952 and the 1999. The first has been replaced by the second. However, does this mean that the 1952 has been derogated and is therefore no longer applicable? There are three possible answers: yes, no and maybe. In other words, does the fact that the draft of the second Convention was both voted and signed (***rectius,*** adopted) at the Geneva Diplomatic Conference the 12th of March 1999, mean that it can be used by any ship-owner or shipper under any jurisdiction? The answer is no. You may have noticed the difference between the two questions, which are different, and the answers are different too. This paper will attempt to explain some of the current issues that any maritime lawyer faces almost everyday: the relationship between International law (the so-called international maritime conventions) and domestic law (e.g., Spanish, Croatia or USA national law).

II. Voting, approval, signature, accession, ratification, approval, deposit, entry into force, declaration, reservation, statement, denunciation, implementation, publication,

promulgation, application, language, interpretation and scope of application: these are the key concepts. International uniformity in Maritime Law is a long and complex procedure that requires an acute legal approach.

III. Not all States have the same method of implementation of the international maritime convention. Besides that, the Convention can be either self executing or non self executing In most States some form of implementation of domestic legislation is required. Needless to say, the different legal methods of implementation may affect the desired uniform interpretation of the Convention. Spain, Croatia and Italy are examples of implementation.

IV. Analogies and differences between the conventions 1952 and 1999. Definition of arrest. Power to arrest. Release of the ship from arrest. Re-arrest and multiple arrest. Protection of owners and demise charters of arrested ships. Jurisdiction. The List of maritime claims. The amount and nature of the security. The scope of application.

V. Conclusion. Contrasts and nuances of the 1999 Convention with respect to the 1952 Convention.

I. INTRODUCTION. THE INTERNATIONAL MARITIME CONVENTIONS ON ARREST OF SHIPS, 1952 AND 1999

There are **two** International Maritime Conventions on the Arrest of Ships under consideration: that of 1952 and that of 1999. Assuming that the first has been replaced by the second, I would like to raise two questions:

Question1: does this mean that the 1952 Convention has been derogated and is it therefore no longer applicable? The possible answers are three: yes, not and maybe.

Question 2: does the fact that the draft of the second Convention was both voted and signed at the Geneva Diplomatic Conference the 12th of March 1999 mean that it is applicable in any jurisdiction? The answer is no.

You may have noticed the **difference** between the **two questions**. Indeed, they are different, and the answers are different too. The first question deals with the 1952 Convention and tries to determine whether it was or not derogated and is no longer applicable. The second one deals with the 1999 Convention and tries to determine whether it is applicable or not.

I understand your initial perplexity but, please believe me, I do not intend to complicate your life. This paper intends to explain some of the current issues that any maritime lawyer faces almost everyday: The relationship between International Law (the so called international maritime conventions) and domestic law (e.g. Spanish, Croatia or USA national law).[1]

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[1] Kelsen called this issue the *Hauptproblem*, KELSEN, "Les rapports de syst□me entre le Droit international et le Droit interne", en *Recueil des Cours de l'Academie de Droit International de la Haye,* 1926, vol. XIX, p. 275. Most distinguished scholars have dealt with this argument cfr. TRIEPEL, *Volkerrecht und landsrecht*, Leipzig, 1899; LA PERGOLA, *Costituzione e adattamento dell'ordinamento interno al Diritto internazionale*, Milano (Giuffr□), 1961 and ibi cit. The same question with specific reference to Maritime Law my own work in ARROYO, Ignacio: "Convenios internacionales y derecho interno. Referencia especial a la limitación de la responsabilidad por abordaje", *Estudios de Derecho Marítimo*, vol. I, pp. 341 y ss.;

II. RATIFICATIONS AND ENTRY INTO FORCE

1. The 1952 Convention was approved in Brussels the 10th of May 1952 and came into **force** on 24thFebruary 1956. It has been ratified by more than 75 countries and put into effect during the last 50 years in many countries. It can be said without hesitation that this has been one of the most popular Conventions in the maritime community. However, there are five important exceptions: Liberia, Panama, USA, Canada and Japan which, for different reasons, have never ratified the said Convention.[2]

2. On the other hand, the 1999 Convention was passed in Geneva, the 12th of March 1999 and **is not in force yet**. The Convention was signed by a significant number of States but for the time being only 7 States have expressed their consent to be bound by this Convention.[3] Therefore, the consent of 3 more States is required before the Convention can take effect. [4]

3. Voting, approval, signature, accession, ratification, approval, deposit, entry into force, declaration, reservation, statement, denunciation, implementation, publication, promulgation, application, language, interpretation and scope of application are the **key words**, in order to understand my two previous questions. International uniformity in Maritime Law is a long and complex procedure that requires a careful legal approach.

4. I have just mentioned **19 different words**, in the English language because that is our working common language in this Symposium, but can I assume that everybody here understands the "same common language"? I certainly doubt it because even people with the same mother tongue (English, Spanish, French or Croatian), may have different views and interpretations about the **meaning** of these 19 key words. Needless to say, we lawyers face problems about the precise meaning of words or constructions in our respective national languages and national law every day. A relevant amount of case litigation is due to different **interpretations** of the law.

5. The arrest Convention, from its origins –when it was voted at the Diplomatic Conference- to the final point of enforcement –when the Judge rules about its possible application- goes through a long and **complex legal procedure** (*iter legis*) which is worth our attention. I have already mentioned 19 steps. All of them have to be approved in order to reach a definitive decision, whether the Convention will be applied or not. This paper deals only with one of these topics, that is, the **implementation** of the arrest Convention. Therefore, I assume that you are familiar with this and have no problems with the interpretation of the 18 topics left. The

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[2] Cfr. The list CMI, *Yearbook 2005-2006 Annuaire*, ISSN 0778-9890, pp. 432 ss.

[3] Albania (a) 4.10.2004; Algeria (a) 7.5.2004; Bulgaria (r) 27.7.2000; Estonia (a) 11.5.2001; Latvia (a) 7.12.2001; Spain (a) 7.6.2002 and Syrian Arab Republic (a) 16.10.2002. cfr. CMI, *Yearbook 2005-2006 Annuaire*, ISSN 0778-9890, p. 520.

[4] Art. 14 states "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."
It is interested to make two comments. The Convention does not require other conditions as i.e. ship tonnage. On the other hand, the 1952 Convention required the consent of only 2 States, after 6 months the date of deposit of the second instrument of ratification. The 1999, 10 States after 3 months.

Vienna Convention on the Law of Treaties is the main legal tool to understand the interpretation of the Maritime Conventions. [5]

III. DIFFERENT LEGAL TECHNIQUES OF IMPLEMENTATION

6. Not all States have the same method of implementation of the international maritime convention. Besides that, the Convention can be either **self executing** or **non self executing.** In most States some sort of implementation of domestic legislation is required. It goes without saying that the different legal methods of implementation may have an impact on the desired uniform interpretation of the Convention. Spain, Croatia and Italy are examples of different ways of implementation.

7. It is said that a Convention becomes self executing when the State is a signatory to the Treaty and its obligations are put into effect. A non self executing Convention instead requires the passing of domestic law or a change in the domestic law in order to fulfill the Treaty obligations. In other words, the application of the Convention needs further national legislation. Should the Convention require implementing (enabling) legislation, a State may be in default of its international obligations by the failure of its legislature to pass the necessary domestic rules. This obligation is recognized in the Vienna Convention.[6]

8. From an academic point of view the above **distinction** seems rather clear but it is not so clear from a practical point of view. As a matter of fact, it is rather unusual that a so-called self executing Convention does not require any domestic legislation, at least regarding procedural aspects. Furthermore, Governments, for political reasons, take for granted that International Conventions cannot be implemented without due diligence (*rectius*, proper changes in domestic legislation). At the end of the day, States wish to preserve their exclusive legislative power and do not want to relinquish it to a supranational body.[7] They are reluctant to accept supra-national entities with jurisdiction over them.

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[5] For example, signature. Normally multilateral Conventions provide for signature subject to ratification, acceptance or approval, also called simple signature. The signature does not mean that the State has undertaken a positive legal obligation, as provided in the Treaty. Simply means a preparatory step on the way to ratification by the State. But also means that the signatory State can not do acts against the Convention. In other words, the State refrains in good faith from acts that would defeat the purposes of the Convention.
The so called "consent to be bound" depends on the final clauses of the Treaties. There are four techniques. Definitive signature, different from simple signature. Ratification when the State has previously signed the Treaty and after ratify. Acceptance and approval have the same value and do not require previous signature. Accession has the same effect to bind the State and there was not signature.

[6] Art. 2 Section 1 (d) of the Vienna Convention. The State party is bound by the Convention under international law (art. 2.1.g). The said Vienna Convention defines "State party" as the State that "has expressed its consent to be bound by that Treaty by an act of ratification, acceptance, approval o accession, where that Treaty has entered into force for that particular State.

[7] The Law of Treaties provides different tools to protect the interests of the State party such as reservations, declarations, statements and notifications.
For example, Italy in connection of the 1952 Arrest Convention "reserves the right not to apply the provisions of this Convention in cases of maritime credits provided in art. 1 (o) *-disputes as to the title to or ownership of any ship-* and (p) *-disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship-*, the arrest of the ship for such credits shall be governed by Italian law".
Reservation made by Yugoslavia and now applicable to Croatia "reserves the right not to apply, according to art. 10 of the said Convention, the arrest of ship in cases of credits provided in art. 1. (o)", *-disputes as to the title to or ownership of any ship.*

9. The **case histories** of some Maritime Conventions are the best examples of what has been said above. The 1910 Salvage Convention and the Hague Rules have been considered as self executing and being incorporated into national law. However, what is the explanation to the enactment of the Carriage of Goods by Sea Act, 1936? The 1952 Convention on Arrest of Ship is also a self executing Treaty, as the main obligation (that is the arrest of the ship) can be put into action or executed by a Court as soon as the State adheres to the Convention. Should the claimant prove that: i) the Convention is in force, ii) the instrument of ratification has been deposited, and iii) the case complies with the conditions required by the Convention? If so, the Court must be granted power to arrest the ship. In principle, no domestic legislation is required to implement the Convention.

10. However, in **Spain**, for example, the 1952 Convention was signed and ratified, but the Parliament enacted the Arrest of Foreign Ships for Maritime Claims Act, 1967. This Act was very short, only 3 articles. A half page of the Official Gazette stated that: Art. 1. To arrest a foreign ship for maritime claims it is sufficient **to allege** a maritime claim and to mention the cause of the credit (repairs, premium of salvage, damages, etc.). Therefore proof is not required, not even *prima facie* evidence. But, the Judge is obliged to fix a bond. Art. 2. Terms and conditions of art. 3 of the Convention will be applied. Art. 3. Once the ship has been arrested, the defense is limited to infringement of the conditions established in the 2 previous articles.

11. This national legislation was enacted in order to overcome some serious problems that jeopardized the direct application of the 1952 Treaty in Spain, mainly the question of the **written evidence** as, according to the Spanish Civil Code of Procedure; it was not possible to arrest without written evidence of the credit.[8] The Spanish Parliament wanted to give full legal effect to the Arrest Convention, but as written proof in case of the arrest of a foreign ship could be too cumbersome in view of the circumstances, a domestic law was passed in Parliament in order "to execute" a self executing Treaty. [9]

12. The examples given above are intended to explain that **"implementation"** and **"execution"** of the maritime Convention do not have the same meaning. Both try to apply an international legal instrument to national law through national jurisdiction. Needless to say that both institutions are linked: they are two sides of the same coin. But they are not identical legal institutions. Implementation is the method to incorporate the Convention into the national law. Execution is the application of the Convention by a national Court, once the Convention has been incorporated. Therefore, implementation comes first and execution afterwards. Implementation is a legislative function and Execution a judiciary task.

13. There are **different methods of national implementation** of international Conventions. In principle, unless expressly provided in the Treaty, ratification is the usual method of implementing a Maritime Convention and thus the Convention is automatically incorporated into the national legal system. Furthermore, domestic

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[8] Art. 1400 LEC

[9] The special circumstances of the sea are due to the well known fact that ships in general, and foreign ships in particular, are not so long at the port, and less subject to a foreign jurisdiction. This reason of time speed justifies the exception of the general principle of the written proof of the credit. Vid. ARROYO, Ignacio: *Curso de Derecho Marítimo*, Civitas Thomson, Madrid, 2006, 2nd, edition.

law is not required to say that the Convention is part of the domestic legal framework. However, in most countries, both civil and common law require some procedure of implementing domestic legislation, even when the Convention is self executing. Professor Francesco Berlingieri has mentioned three different methods of implementation: i) *promulgation* or publication of the enactment of the Convention (Spain); ii) *translation* of substantive provisions of a Convention into terms of national laws (UK), and iii) *application* of the convention within the framework of a more general law (Sweden, DK, Norway and Finland).[10]

14. The relevance of this discussion is not merely academic but rather of great importance for the **uniform interpretation** of the Maritime Convention. The most direct relevance is in the implementation; there are fewer problems in the uniform interpretation. Any step taken between the original text of the Convention and the final draft which is to be applicable by the Court, may introduce changes in the wording of the Convention and therefore jeopardize the uniform interpretation. But more important is the spirit of the Convention and particularly the methods of interpretation.

15. Let's assume that a particular country has incorporated some, but not all, the provisions of the Convention into, for example, a maritime code. [11] For instance, let's assume that the Convention states:

> *"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".* [12]

On the contrary, the national provision states:

> *"A ship may be arrested or released from arrest under the **authority of the State Party** in which the arrest is effected"*

The doubt of the interpretation arises about the meaning of the wording *authority of a Court of the State Party"* vs. *" authority of the State Party".* Does the marshal, the sheriff, the police, the port authority or the captain of the port, arrest or release the ship? Does only a judge arrest or release the ship? The different interpretation is about the meaning of the word **"authority",** competent to arrest or release the ship from arrest.

To resolve this matter, the different approaches endanger the uniform interpretation of the Convention. In such cases, the Judge will be inclined to read the said provision in accordance with to the national legal framework, as the Convention has been implemented by incorporating some provisions into a national law. Thus, the State Party is able to appoint –through implementing domestic legislation- the police as the "authority" competent to arrest the ship. Needless to say, this interpretation is against the spirit and the uniformity of the Convention because only a Court may arrest or release a ship from arrest. However, the Judge will decide correctly that the "**police**" is the relevant authority, according to the national legal system, because the

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[10] BRLINGIERI, Francesco: *Arrest of Ships. A Commentary on the 1952 and 1999 Arrest Conventions*, 4th ed., CMI, London, Informa, 2006, pp. 13 ss.

[11] Denmark has done it the Arrest Convention into the Danish Merchant Shipping Act. Spain has drafted a new "General Maritime Navigation Law", now in Parliament, that implemented –translated into Spanish- most of the articles of the 1999 Arrest Convention.

[12] Art. 2. Convention of 1999.

Convention has been implemented through the translation and incorporation of some articles of the Convention into the national maritime code and reads "authority of the State Party", instead "of authority of a Court of the State Party." [13]

IV. SIMILARITIES AND DIFFERENCES BETWEEN THE CONVENTION 1952 AND 1999. DEFINITION OF ARREST. POWER TO ARREST. RELEASE OF THE SHIP FROM ARREST. RE-ARREST AND MULTIPLE ARREST. PROTECTION OF OWNERS AND DEMISE CHARTERS OF ARRESTED SHIPS. JURISDICTION. LIST OF MARITIME CLAIMS. AMOUNT AND NATURE OF THE SECURITY. SCOPE OF APPLICATION.

16. The 1952 Convention was an important step towards the unification of maritime Law. It offered more guarantees to maritime creditors and security to ship-owners. However, there were some problems of interpretation and a desire to rebalance maritime commerce in favour of creditors. These were the grounds to consider the revision of the 1952 Convention. The result is the said 1999 Convention.
I would like to point out in this paper the basic **similarities and differences** between these two Conventions. My intention is not to analyze in depth the text of the Convention but rather to advise those national Parliaments that, according to their different methods of implementation, they may jeopardize the spirit of the Convention and, consequently, its desired uniform interpretation.

17. From the analogy point of view, the 1999 Convention follows the same objectives, patterns and techniques of the 1952 Convention. Indeed, as a general principle, it can be said that **both are identical** *(rectius*, similar or analogous), unless otherwise stated. The corner stone of both Conventions is the arrest of the ship in respect of a long list of maritime claims. The claimant is obliged to offer security and the arrested ship can be released upon a counter bond, as security for eventual wrongful or illegal arrest. This game of arrest, security and counter security, is the best guarantee that both litigants will receive justice, in the proper jurisdiction and on the merits.

18. The **list** of the main **differences** between the two Conventions is as follows:

    a. Definition of arrest.
    b. The power to arrest ships ready to sail or sailing.
    c. Re-arrest and multiple arrest (art. 5).
    d. Ships under arrest. Whether a ship can be arrested in respect of claims against persons other than the owner of the ship. The protection of owners and the demise charters of arrested ships. Whether and to what extent arrest should be permissible in respect of claims against the demise charter.
    e. Jurisdiction on the merits. Whether arrest in all circumstances should be brought to court (*lex fori regit processum*). (art. 7).
    f. Additions that should be made to the list of maritime claims. Closed vs. open list.
    g. The extent and nature of the security.
    h. Scope of application.

[13] In my view, such implementation and interpretation violates the Convention because the arrest of a ship is a judicial remedy, not an administrative o government measure to protect a claimant.

19. **Definition of arrest.** Arrest means the "detention of a ship" (1952/1999) but also a "restriction on removal of a ship" (1999)[14]. However, the article does not expressly mention that the ship must be "present". So, is it valid the written arrest, effected by means of endorsement of the warrant in the register of the ship? [15]

In my opinion, the Convention defines an arrest as a "physical o material detention", a kind of "immobilization", therefore, it seems doubtful that the concept of 'written arrest' was in the aim of the Convention. [16]

20. Whether the power is to arrest ships ready to sail or sailing: the 1952 Convention provided that power, "even though the ship arrested be **ready to sail**"[17]. This paragraph was deleted in the 1999 Convention. The new approach of the 1999 Convention raises two different questions: question one refers to a ship "ready to sail" and question two refers to a "**ship sailing**". Does the omission mean that the Convention takes the view that there is no power to arrest, either in both cases or only when it is "ready to sail"? Or does it mean that the answer is left to domestic law *(lex fori)*?.[18] Consequently, there is scope for different interpretations.[19]

In my view, I do not see any reason to restrain the power to arrest the ship, regardless of whether the ship "is ready to sail" or even "sailing". The main purpose of the arrest Convention is to arrest the ship as a guaranty to protect not the maritime credits *per se* (and against the ship-owner) but to **guaranty a due process** to litigants in maritime commerce. The detention of the ship is only one element of the whole legal institution called 'arrest of ship'. The Judge can countermand these special circumstances by increasing the amount of the bond.

21. **Re-arrest** and multiple arrest. The new Convention is clearer and more precise. Some Court decisions based on the 1952 Convention gave an interpretation out of the nature of the re-arrest. Thus, the Queen's Bench Division held, in *The Prinsegracht* case, that "if the arrest of the ship is necessary to preserve the jurisdiction of this court, it cannot be wrongful to arrest the ship" [20]. According to art. 3.3. of the 1952 Convention re-arrest was possible because "the bond had been released before the subsequent arrest or when there was another **good cause** to maintain the arrest". To preserve the jurisdiction was considered "other good reason" to re-arrest. [21] Now, the 1999 Convention states **three specific grounds**: *a)* the nature or the amount of the security is inadequate;

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[14] Art. 1.2 both Conventions

[15] Another difference is "or other enforceable instrument". "The arrest does not include the seizure of a ship in execution or satisfaction of a judgment (1958/1999) "or other enforceable instrument" (1999). The last wording includes, for example, arbitral awards.

[16] Takes different view and in favour of the documentary CACHON CADENAS: *El embargo*, Barcelona, Ed. J.M. Bosch, 1991, p. 369.

[17] Art. 1.3 Convention 1952

[18] CMI recommendation was in favour to delete any reference in the Convention in the understanding that the question should be solve by the *lex fori*. Cfr. A/CONF. 188/3 paragraph 146.

[19] Art. 584 Spanish Commercial forbides arrest the ship ready to sail.
The Latin American Association of Law of Navigation and the Sea (Asociación lationamericana de Derecho de la Navegación y del Mar) proposed a new paragraph forbidden the arrest of a ship loaded and in possession of the permit to leave the port. A/CONF. 188/3/Add. 3 paragraph 14.

[20] *The Prinsengracht*, (1993) 1 Lloyd's Rep. 41, dated the 24th June 1992, QB -Admiralty Division.

[21] The arrest was granted after bail had been provided because the defendant had decline expressly to agree to the jurisdiction of the court.
Other cases and good causes or reasons to rearrest vid. HILL, *Arrest of Ships*, London, 1985, p. 19; BERLINGIERI, op. cit., p. 199.

b) the person who has already provided the security is not, or is unlikely to be, able to fulfill that person's obligations;
c) the first arrest and/or the first security were/was released. In conclusion, it now seems clearer that the nature of the re-arrest and the multiple arrest is to preserve security because the previous bond was released but not sufficient or inadequate. Of these three reasons there is no scope for new elements (e.g. prevent jurisdiction on the merits, sailing away, satisfaction of a judgment, etc.). [22] There is a restricted list of causes for re-arrest.

In my opinion, the new Convention overruled decisions like the *Prinsegracht*, unless otherwise provided in domestic law through techniques of implementation. However, that kind of implementation is against the spirit of the Convention.

Another clarification of the re-arrest is that the aggregate amount of the security may not exceed the value of the ship. [23]

22. **Ships that can be arrested.** Whether a ship could be arrested in respect of claims against persons other than the owner of the ship was a controversial issue and was solved at the 1999 Convention. In other words, the question was whether, and to what extent, arrest should be permissible in respect of claims against the **demise charterer**. The 1952 Convention was in favour of arrest. [24] Most countries, following the Convention, had permitted the arrest of a ship regardless of whether the owner was liable for the claim or not. Thus, the arrest in respect of a claim against the bareboat charterer or, generally, a person other than the owner was legal[25]. On the contrary, the 1999 Convention seems to hold a different criterion against the arrest, unless some circumstances occurred. In this case, the Convention protects the owner more than the claimant, under certain conditions. The wording set up in Art. 3.3 (Exercise of right of arrest) is not so clear. In principle, the claimant cannot arrest a ship which is not owned by the person liable (i.e. the charter), *"unless 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."*

In my opinion, the application of the Convention is open to further discussion and different interpretations because leaving to the law of the State a decision as to when "*a judgment in respect of that claim can be enforced against that ship by judicial or forced*

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[22] Cases like *The Prinsengracht* and *The Despina GK* (1982) 2 Lloyd's Rep. 555. See also LA CHINA, "Due Novit□(d' Antica Data!) nel campo del Diritto processuale Civile Internazionale marittimo: le Convenzioni di Bruxelles 10 maggio 1952", (1978) IV *Foro Italiano*, n. 255, note 15, p. 52, cited by BERLINGIERI, opus loco cit., at 199.
On the contrary, decisions like the Court of Appeal of Barcelona (Audiencia Provincial), judgement 11.02.2002, in *Moya Maritime vs. Medbridge Shipping Co.* –"The Medlink" and "The Medbridge", based on the bankruptcy of the guarantor are included in the 1999 Convention.

[23] Art. 5.1.a- Right of rearrest and multiple arrest.

[24] Art. 3.4. of the 1952 Convention states "*When in the course 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 provision of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.*"

[25] The only condition used to be that the claim must have arisen in respect of the ship the arrest of which is applied for. Cfr. Denmark and Nigeria, cfr. BERLINGIERI, op. cit., p. 25-27.

sale of that ship" means to reopen the whole discussion. This is the main critique of the 1999 Convention. There is no clear, unique and definitive idea about the legal nature of the arrest. Is the arrest a **previous guaranty** –precautionary measure- in order to execute the final judgment on the merits? [26] Or is the arrest a right to **restrain** or stop (*immobilization*) the movement of the ship in order to protect a list of maritime claims?

Reading the 1999 Convention as a whole it seems that the arrest is more restrictive than before and I am against this new approach of the Convention.

During the last 50 years it has been proved that the arrest of a ship is a good and efficient legal tool to guarantee not merely the position of maritime creditors, but also the right to have a due judicial procedure. In maritime commerce the real and effective guarantee is the ship and the owner is closer to the bareboat **charterer** -(the charterer by demise and the mere charterer)- than the creditor. Therefore, the owner has to take the risk of the economic exploitation of the ship, regardless of the fact of who is in possession of the ship. The cost of the eventual counter bond to release the ship from arrest can be recovered, from the demise charterer, at the end of the contract of affreightment (charter with or without demise).

23. Additions that should be made to the **list of maritime claims**. Closed vs. open list. One of the main reasons to amend the 1952 Convention was the desire to enlarge the **list of maritime claims**. It is well known that the 1952 list was large, 17 different items or letters and about 30 claims.[27] However, some credits not included in the text were included by a flexible interpretation of the Convention given by national Courts and, consequently, led to a non uniform interpretation of the Convention. During the Geneva Conference three different proposals were put forwards. The new Convention should adopt: *i)* a closed list of claims; *ii)* an open list; *iii)* an open clause followed by examples of maritime claims. *i)* The closed list was maintained by the UK delegation and the International Chamber of Shipping, in favour of the shipowner's industry and, of course, arguing the certainty of the law and the uniform interpretation. [28] *ii)* The open list was supported by CMI, Italy and Japan arguing the flexibility in accordance with maritime commerce. [29] *iii)* The mixed system (open clause plus examples) had in its favour its conformity with the Convention on Maritime Liens and was supported by Slovenia, Mexico, Thailand and the Latin American Association of Maritime and Sea Law. [30]

    The final solution is not so clear because the list is closed but the wording of some items leaves room to a flexible interpretation with the possibility to include new claims.

    The claims added are the following: *i)* special compensation relating to salvage operations in respect of a ship which itself or its cargo threatens damage to the environment; *ii)* damage or the threat of damage caused by the ship to the environment; *iii)* costs or expenses relating raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned; *iv)* port, canal, dock, harbour and other waterway dues and charges; *v)* cost of

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[26] In civil law countries the so called *embargo preventivo* (Spain), *saisie conservatoire* (France) and *sequestro conservativo* (Italy).
[27] Art. 1.
[28] A/CNF. 188/3/Add.2. paragraph 4.
[29] A/CONF.. 188/3/Add.3, parr. 2, 25 and 140. See BERLINGIERI, op. cit. p. 8
[30] A/CONF.. 188/3/Add.3, parr. 12, 34, 61 and 80.

repatriation and social insurance contribution payable on behalf of master, officers and members of the ship; *vi)* insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the ship-owner or demise charterer; *vii)* any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the ship-owner or demise charter; *viii)* any dispute arising out of a contract for the sale of the ship. [31]

In my opinion, the new Convention has lost a great opportunity to solve the problem of overlapping and inconsistency with the Convention on Maritime Liens and Mortgages, 1993. A maritime claim protected by the arrest of the ship is a sort of maritime lien, at least in civil law systems. *(The Convention is expressly against this opinion: Art. 9-Non creation of maritime liens, states: Noting of this Convention shall be construed as creating a maritime lien).* In other words, this is **a kind of privileged claim** because it has a different legal status from others claims. Any other creditor is not entitled to arrest the property of his debtor, unless there is compliance with rigorous legal terms and conditions. Furthermore, the judge is not always obliged to grant the measure. He is normally free to decide upon the circumstances (*bonus fumus iuris*, risk of insolvency and urgency), whether or not to adopt the precautionary measure. And, in any event, it is not possible to grant it with a mere allegation of the credit. A common claimant must offer a *prima facie* written proof of the credit. In conclusion, taken into account the similarity between the arrest and a lien (*rectius*, privilege/special legal status) the list of claims may be called "privileged maritime credits". Should the maritime community protect in the future most maritime credits, the suitable formula could be an open list with words like "any other claim in connection with the maritime exploitation of the ship".

24. **Amount and nature of the security**. None of the Conventions specifies the amount and the nature of the security. Neither the amount nor nature of the first bond, required to ask for neither the arrest, nor the eventual counter bond to release the ship from arrest. [32]The issue is ruled by the *lex fori.* [33]

In my opinion, the criteria followed by both Conventions are highly critical in terms of uniform interpretation. There is much more room for a liberal implementation of the Convention. There is more space for many different interpretations of the Convention.

For these purposes, it is important to notice that the Convention does not oblige the Contracting State to impose security, as a condition to seek the arrest. The Convention says: **The Court may**. [34] It is well known to any maritime lawyer the so called *forum shopping paradise.* Claimants are seeking those jurisdictions where it is easier to arrest

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[31] I do not believe that there is a difference about the disbursement claim. The 1999 does not mention " Master's disbursement, including disbursements made by shippers, chaterers or agent on behalf of a ship or her owner", as the 1952 did. But the most general wording includes, in my opinion, all of them "disbursements incurred on behalf of the ship or its owners" (1999).

[32] A new provision is that the security to be provided for the release of the ship from arrest should not exceed the value of the ship.

[33] Art. 6.- *Protection of owners and demise chartered of arrest ships.* "1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already affected to be maintained, imposed 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 the Court** for any loss that may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, included but not restricted to such loss or damage as may be incurred by that defendant in consequences of: a) the arrest have been wrongful or unjustified; or b) excessive security having been demanded and provided."

[34] Convention 1999: Art. 6.1. The Convention 1952 stated "... for the costs of the bail or other security ... shall be determined by the Contracting State" (Ex Art. 6)

a ship. The different amount has been proven to have a deterrent effect in order to decide in what port (sic. jurisdiction) the ship should be arrested.

As I said, the system is a fair balance of three elements: arrest, security and countersecurity. The procedure should be: easy to arrest, compulsory bond in order to arrest, and release of the ship upon counter security. The Convention should be clear and uniform regulating these three basic elements: arrest, bond and counter security. Nothing else and nothing more.

25. The **scope of application** is likely to be the same in both Conventions. Both have adopted the same principle, the so-called **universal** application. The Convention shall apply to any ship within the jurisdiction of any State Party, whether or not the ship is flying the flag of the State Party. [35] Therefore, a vessel flying the flag of a non Contracting State could be subject to the application of the Convention, in respect of any maritime claims enumerated in art. 1.[36]
However, the scope of application has been enlarged to include ships which are not seagoing, unless they reserve the right to exclusion.[37]
The 1999 Convention contains a new paragraph stating that "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 services". [38] However, under the 1952 Convention the situation was not as different as the great majority of State had reserved this exclusion. The new text is better in terms of uniform application.

V. CONCLUSION

I am aware of the complexity to achieve uniformity in Maritime Law. No doubt it is a dream. However, this dream, probably like all dreams, is based on past experiences. And the application of the 1952 Convention is the past experience to continue to dream, and realize, that the new 1999 Convention has not adopted some criteria that could achieve a greater degree of uniformity.

I hope that my dissenting opinions on the new Convention may contribute to uniformity, now that the enabling legislation is pending.

Thank you for your attention and I remain at your disposal to await your comments.

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Barcelona, 1/V/2007

[35] Art. 8-Application.
[36] The wording is more simple and clear in the 1999 Convention.
[37] Art. 10. 1. a)
[38] Art. 8.2.