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**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**

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Abbreviations

CLC	Civil Liability for Oil Pollution Convention
EC	European Community
ECJ	European Court of Justice
EEA	European Economical Area
EFTA	European Free Trade Association
MLM	Maritime Lien and Mortgages Convention
OPA 90	Oil Pollution Act 1990
SMC	Swedish Maritime Code

1 Introduction

1.1 General

The 1952 Arrest Convention¹ was created in order to unify the rules relating to arrest of ships around the world. Before the Convention, the rules relating to arrest of ship were governed by the different countries national rules of law. This created problems for the shipping industry as a ship could be arrested in relation to any claim whatsoever if it was permitted by the domestic law of the country where the ship was. Also considering that many countries have exorbitant jurisdictional rules and sometimes on very loose grounds claim jurisdiction, this was a problem. Shipping is a very special kind of business as it involves movable property that often has a great value and suddenly can enter jurisdictional territory and a claimant can get hold of security he could not have counted on. These exorbitant jurisdictional rules made the shipping business insecure and something needed to be done about it. Therefore the Arrest Convention was created. The Convention regulates for what claims a ship can be arrested and therefore gives the claimant and the defendant an ability to foresee when there is a claim in relation to which it is possible to get an arrest. If the Convention had had the effects one wanted one would only have to know about the rules in the Convention and not about the numerous other national jurisdictional rules in the ports or the territorial waters that the ship may enter on its journey. However, the Convention, even though probably having made some applications of law easier, it has not been a pervading effect. Firstly, as with many international conventions the Arrest Convention has not been ratified by all countries although it has been ratified by many in comparison with a lot of other international conventions. Secondly, there are some questions on when the Convention shall apply before national rules and when it shall not. This has been especially clear in relation to the Brussels Convention on Jurisdiction and Enforcement of Judgements². Even though the Arrest Convention prevails there is still confusion in reality when applying the Conventions. Within the EU the uncertainty becomes even greater as one has to consider both the jurisdictional rules in the Arrest Convention, the rules in the Brussels Convention and the national rules relating to arrest. This makes the possibility to foresee what rules will govern a case even more difficult. However, these uncertainties can be used by forum shoppers that are trying to

¹ International Convention for the Unification of Certain rules Relating to the Arrest of Sea-going ships 1952

² Brussels Convention on Jurisdiction and Enforcement of Judgements 1968

find loopholes through which to avoid one jurisdiction and get the case taken on by another, more favourable, jurisdiction. The Arrest Convention's rules on jurisdiction can be used by a claimant to claim jurisdiction in a country where he might not have had jurisdiction if the Convention had not been in force. The same goes for the Brussels Convention. There being uncertainties in the relation between the Conventions and the Conventions and national law is a great incentive for a plaintiff or a defendant to try and stretch the rules in his favour. Sometimes the outcome of a case can be completely different from one jurisdiction to another. Forum shopping, which is the common term when choosing jurisdiction because of more favourable law rules, is used within all types of law having some kind of international connection and there are different opinions about it. The reason behind it is always to get the best outcome possible in a lawsuit, but what is the best possible outcome? In order to shop you also need to know what you are shopping for and where to find it. In international maritime law, being governed by many international conventions not always being signed by the same countries and sometimes having different application depending on if other relating conventions have been signed by the same countries, the best country in which to sue is not always obvious at a first glance. Consequently in order to make a sound decision on where to sue in order to get the most out of a lawsuit you have to look at the jurisdictional rules in order to find out where you can sue and you have to look at the procedural and substantial rules in order to see where you will get the decision you are looking for.

1.2 Method

This essay is divided in four parts. In Part I there will be a presentation of the 1952 Arrest Convention and the 1999 Arrest Convention. There will also be a go through of the important rules in the Brussels Regulation. Further there will also be a presentation of the different national legislations in the US, the UK and Sweden. There will also be a short background to the Arrest Convention and the Brussels Regulation³ and its predecessor the Brussels Convention⁴. There will also be short backgrounds in relation to the national laws as far as this has been found interesting. Part II is about the relationship between the different jurisdictional rules. Here will be a discussion in relation to the Arrest Convention and the Regulation, the Arrest Convention and national law and the Brussels regulation and national

³ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

⁴ Brussels Convention on Jurisdiction and Enforcement of Judgements 1968

law. In Part III there will be a look at forum shopping and what effects the possibility to choose jurisdiction can have on the outcome of a case. This will be shown with an example taken from the list of claims that have maritime lien status according to Article 1 of the Arrest Convention. In Part IV there will be a conclusion.

1.3 Delimitation

In order to make this dissertation tangible there was a need to choose some countries in the EU whose national law to use as a basis for comparison. The author being Swedish and England being one of the oldest shipping nations and also being a common law country in the EU made the choice easy. The US has been used as a country of comparison to the EU, both as a nation not having signed the Arrest Convention and being one of the largest shipping nations in the world and also to make a clear description of the reasons behind forum shopping because of the different outcomes. Also in relation to forum shopping the US has to be mentioned being, in general, one of the most favourable countries in the world for plaintiffs and thereby also for forum shoppers. When it comes to examples of where the material rules are more favourable for plaintiffs the example chosen is oil pollution. This example was chosen because oil pollution creates a maritime lien and therefore is a claim for which an arrest can be made under the Arrest Convention. The Articles and sections discussed mainly have to do with jurisdictional rules. However, sometimes the line is hard to draw as the Conventions and sections are parts of greater units where the Articles and sections are very closely interconnected. Therefore the reader might have a different opinion than the author of some Articles and sections existence or non-existence and there might be other cases stating the same things or supporting the same conclusions that although have not been mentioned.

Part I

2 The Arrest Conventions

2.1 The 1952 Arrest Convention

The work leading up to the 1952 Arrest Convention started as early as in 1930 when countries were invited to come with suggestions about what to be discussed at the Conference of the Comité Maritime International (CMI) in Antwerp.⁵ This was followed by some drafts and discussions on what subjects an Arrest Convention should cover. The differences between civil law countries and common law countries were acknowledged as in civil law countries a ship could be arrested as security for any claim, but in common law countries a ship could only be arrested in case of a maritime claim and where an in rem procedure could be used. In civil law countries there was a possibility for the owner of the vessel to claim damages for wrongful arrest which was not possible in common law countries. After the second world war the discussions were resumed and first at the Brussels Diplomatic Conference in May 1952 a convention was adopted.⁶

2.1.1 Application

The application of the Convention is set out in Article 8. As said above the provisions apply to all vessels flying the flag of a contracting state to the Convention. However, a vessel flying the flag of a non-contracting state can be arrested if the national law of the state permits arrest. It is left to the country's own discretion if one wants to let ships flying the flag of non-contracting states to benefit from the Convention or not.⁷ Subparagraph (3) of Article 8 says that contracting states can wholly or partly exclude any Government or any person not having

⁵ The Travaux Préparatoires of the International Convention for the Unification of certain rules of Law with respect to Collision between vessels 23 September 1910 and The International Convention for the Unification of certain rules relating to the Arrest of Sea-going Ships 10 May 1952, p. 271

⁶ Berlingieri, *Arrest of ships – A Commentary on the 1952 Arrest Convention*, p. 1 –13

⁷ The Travaux Préparatoires of the International Convention for the Unification of certain rules of Law with respect to Collision between vessels 23 September 1910 and The International Convention for the Unification of certain rules relating to the Arrest of Sea-going Ships 10 May 1952, p. 437

his habitual residence or principal place of business in one of the contracting states. Further, subparagraph (4) states that a country may also exclude the arrest of a ship that is within the State of her flag by a person who has his habitual residence or principal place of business in that state. The claims are in those cases not limited to the claims set out in Article 1, but can be all sorts of claims permitted by national law.⁸ This means that since the Arrest Convention does not apply to vessels flying the flag of non-contracting states other international private law rules apply e.g. The Brussels- and Lugano Conventions and the Brussels Regulation No. 44/2001. Hence, the effects can be very different between different ships depending on what conventions the state, which they are flying the flag of, is party to.

It is interesting to note that this was changed in the 1999 Arrest Convention as Article 8 states that the Convention shall apply to all ships whether or not they are ships flying the flag of contracting or non-contracting states. This means that all ships can only be arrested in respect of a maritime claim. However, there is still a possibility to exclude ships not flying the flag of a contracting state. This is done by reservation and is stated in Article 10(1)(b). This, however, has the effect that either all the provisions in the Convention apply, including the provisions where a ship can only be arrested in respect of a maritime claim, or none of the provisions apply.

2.1.2 Jurisdiction

According to the Arrest Convention arrest of a ship gives jurisdiction to decide a case on its merits. This means that in order to get jurisdiction there is a need to arrest the ship. If the ship is not arrested there is no jurisdiction. This makes the interrelationship between jurisdiction and arrest very close as arrest is a means to get jurisdiction over a case.

Article 4 states that the courts in the country where the ship is to be arrested has exclusive jurisdiction to authorize the arrest. Therefore it is not possible to arrest a ship in one contracting state pursuant to a warrant of arrest issued in another contracting state. Important

⁸ The Travaux Préparatoires of the International Convention for the Unification of certain rules of Law with respect to Collision between vessels 23 September 1910 and The International Convention for the Unification of certain rules relating to the Arrest of Sea-going Ships 10 May 1952, p. 434 ff

to note is that the Arrest Convention⁹ prevails over the Brussels- and Lugano Conventions¹⁰ and the Council Regulation No. 44/2001¹¹ and therefore a warrant of arrest issued in one country cannot be enforced in another country which is otherwise possible according to the Brussels Regulation. The State in which the ship is arrested always has jurisdiction on the merits if the prerequisites in Article 7 of the Arrest Convention are met. At first it was proposed that the arrest itself was to give jurisdiction on the merits and thereby adopting the common law approach. However, this was met by opposition by the French as such jurisdictional link did not exist in French law or in many other civil law countries. Thereby the cases giving jurisdiction on the merits were limited to the cases set out in Article 7. This means that one country can have jurisdiction for the arrest and another country can have jurisdiction on the merits. If the parties have a prorogation clause to submit a case to arbitration or to another court the possibility to arrest still stands but the court is to stay the proceedings in order for the plaintiff to bring an action in the chosen court, Article 7 (3).¹² This provision is not possible to evade by the parties with a special agreement. According to *Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli*¹³ also called *The Lisboa* the parties had tried through the agreement to evade this provision by writing that “any and all legal proceedings” should be brought in London under English law. However, Lord Denning concluded that: “Any and all legal proceedings” should be construed as relating only to proceedings to establish liability. They do not extend to proceedings to obtain a judgment or award or to obtain security. He also stated that the clause cannot prevent the claimants from enforcing the judgement in Italy, which was the country of arrest, which it would if the defendant got the ship released because of such a clause.¹⁴ Consequently it is not possible to evade an arrest on the grounds of having a prorogation clause.

A further implication and difference between countries can be found due to the fact that countries have implemented the Convention in different ways. Some have given it the force of

⁹ International Convention for the Unification of Certain rules Relating to the Arrest of Sea-going ships 1952

¹⁰ Brussels Convention on Jurisdiction and Enforcement of Judgements 1968, Lugano Convention on Jurisdiction and Enforcement of Judgements 1988

¹¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

¹² The Travaux Préparatoires of the International Convention for the Unification of certain rules of Law with respect to Collision between vessels 23 September 1910 and The International Convention for the Unification of certain rules relating to the Arrest of Sea-going Ships 10 May 1952, p. 421 ff

¹³ *Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli*; *Lisboa* [1980] 2 Lloyd’s Rep. 57

¹⁴ Berlingieri, *Arrest of ships – A Commentary on the 1952 Arrest Convention*, p. 117-119

law and some have incorporated it into national law. This, along with the sometimes ambiguous provisions in the Conventions leads to many difficulties of interpretation. Some of these ambiguities were brought up for discussion at one of the conferences by the Greek delegate. The question was if pursuant to Article 1 and 3 the right to arrest arises without the existence of the conditions needed for an arrest under the arresting countries national law, being assessed by the competent court. It was concluded that an arrest had to be granted by the authority of a court according to Article 4. However, it has not been solved whether national rules relating to arrest shall continue to apply. To understand this one has to look at the second paragraph of Article 6, which states that the rules relating to the procedure of arrest shall be governed by domestic law. A distinction must therefore be made between the procedure leading to arrest and the conditions for obtaining arrest. Countries that have not given the Convention the force of law, e.g. Sweden and England, can use their national rules relating to arrest while those countries having given the Convention the force of law similar provisions have been superseded by the rules in the Convention.¹⁵ Hence, looking at the verdict in the case of ESCO Maritime¹⁶ the judgement by the court was correct so far as it stayed within the applicable rules, however, it can be argued for other reasons that it was not a correct judgement. (see below 3.1.1) The case of ESCO Maritime was about an application in the Swedish Courts for arrest of a motor ship called the Mindaugus because of a collision in the port of Tallinn. The collision gave the claimant a maritime lien in the liable ship. At the time of the application for arrest the Mindaugus was in the port of Gävle getting ready to sail to Casablanca. The claimant argued that there was a risk that the ship soon left Swedish territory which would jeopardize his security. The Swedish court denied arrest as it stated that although there was a possibility to grant an arrest according to chapter 3 section 40 of the SMC the claimant had not shown that there was probable cause to believe that the defendant would not pay which is a prerequisite set out by the Swedish Law of Civil Procedure.

2.1.3 Article 7

According to Article 7 of the Arrest Convention the courts of a country in which an arrest is made shall have jurisdiction to determine the case on its merits in two cases. Firstly if it has jurisdiction according to national law and secondly if the claim can be related to one of the

¹⁵ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 163-164

¹⁶ ESCO Maritime, Stockholms tingsrätt T-11513-02

items set out in the Article. This Article consequently means that even if there are no rules concerning when there is jurisdiction on the merits in national law the items set out in Article 7 always give jurisdiction on the merits. These are accordingly circumstances under which a court always has jurisdiction to settle a case on the merits notwithstanding national law.

However, to be able to use the items in Article 7 in a correct way one needs to examine how to interpret the different situations. Arrest gives jurisdiction in any of the following cases:

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

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

The time when the damage occurred can be very different depending on what kind of damage it is. Also the time when the damage occurred is important because the claimant has to know when the claim has to be enforced and the time when the claim arises and when the time starts running might not be the same. For example, the claim for damaged goods arises when the loss arises, but the knowledge of the loss occurs only at delivery. Therefore the time limit begins to run from the delivery of the goods. When it comes to a seaman's wages the claim arises when the wages fall due, but often can it not be immediately enforced as the ship may be at sea. Therefore the time starts running at the time of the claimants discharge from the ship. However, for the purpose of the Arrest Convention reference must be made to the time when the claim actually arises as the jurisdictional link is based on the voyage during which the arrest is made. Usually the claim arises when the breach is committed. This goes for all tort claims and most contractual claims such as personal injury and damage to goods.¹⁷

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

The difficulty here is to establish what is meant by voyage. To do this one has to look at the 1926 Maritime Liens and Mortgages Convention where this term is also used. In one of the provisions one can conclude that the voyage relates to the period during which the ship is earning a certain freight. The voyage is therefore a well specified period of the commercial

¹⁷ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 206-208

operation of the ship. This means that a voyage can have different starting points and finishing points depending on the contracts.¹⁸

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

This Article corresponds directly with Article 1(1)(a). With reference to Article 13 of the Collision Convention also damages not caused by direct contact, but that are caused by “the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision had actually taken place” are included.

(e) *if the claim is for salvage*

This also confers with Article 1(1)(c). This is a provision that historically has had a wider interpretation in common law jurisdictions than in civil law jurisdictions. Today when the 1989 Salvage Convention has entered into force it should be clear at least for countries being parties to both the Salvage and the Arrest Convention what claims are meant in Article 1(1)(c) and 7(1)(e). Further, a claim for special compensation under Article 14 of the Salvage Convention can be treated as a maritime claim, but not claims in respect of preventive measures according the Civil Liability Convention 1969 and under the HNS Convention 1996.¹⁹

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

2.2 The 1999 Arrest Convention

The 1999 Arrest Convention was the result of a Diplomatic Conference held in March 1999 in Geneva. As of today only two countries have ratified it, Bulgaria and Estonia.²⁰ The Convention has therefore not entered into force yet and the 1952 Convention still applies.

¹⁸ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 211-214

¹⁹ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 79-81

²⁰ <http://www.comitemaritime.org/ratific/uninat/uni08.html>

When the Convention on Maritime Liens and Mortgages was adopted in 1993 it became necessary to revise the 1952 Arrest Convention to make sure that a claim giving rise to a maritime lien according to the Maritime Lien and Mortgages Convention gives a right of arrest under the Arrest Convention. Also, even though the 1952 Arrest Convention was widely accepted it was beginning to be out-dated and some parts were ambiguous and open to interpretation.²¹

2.2.1 Jurisdiction

Article 7 concerns jurisdiction on the merits and says that a state in which an arrest has been made or security for the claim has been provided shall have jurisdiction. However, this is only the case if the parties have not got a prorogation clause in the contract, according to which the parties agree to submit the dispute to arbitration or the courts of another country, which accepts jurisdiction. However, the courts in the state where the arrest has been made can refuse to settle the case. This can only be done if the national law permits it and another state accepts jurisdiction. If the court refuses jurisdiction or does not have jurisdiction to decide the case upon its merits it can order a period of time within which the claimant shall bring proceedings before the right court. If this has not been done within this period the ship shall be released. If, however proceedings are brought within this time the decision shall be recognized and given effect in the country where the arrest has been made if the defendant has been able to defend himself and the recognition is not against public policy (*ordre public*).²²

Article 2 of the 1999 Arrest Convention sets out on what grounds an arrest can be made. An arrest can only be made under the authority of a court in a state that is party to the Convention. Further, an arrest can only be made if the claim is a maritime claim. An arrest can also be made as a means of obtaining security even though the dispute is to be settled by arbitration or some other jurisdiction. As the last item Article 2 says that the procedure of the arrest shall be governed by the domestic law of the state in which the arrest is effected or applied for.

²¹ <http://www.unctad.org/Templates/Webflyer.asp?docID=3105&intItemID=1530&lang=1>, Press release *Towards a new convention on arrest of ships* 26/2/99

²² Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 343-345

The jurisdiction of the courts of the State where the arrest is made exists irrespective of whether such courts have jurisdiction on the merits or not. In the 1952 Convention this rule is implied in Article 7 (2). In the 1999 Convention it has moved to Article 2 (3). Sweden wanted to add that there was no need to arrest a ship if the judgement could not be enforced in the State where the arrest has been made. However, this was thought not to be needed as Article 2 (3) did not say that an arrest had to be ordered in every case, but that there was a possibility to arrest.²³

Article 2 (4) sets out that the procedure relating to the arrest should be governed by the domestic law in the country where the arrest is made. This was in the 1952 Convention set out in Article 6. Even though the wording has changed from the 1952 Convention the meaning is still the same.²⁴

Article 3 sets out when a ship can be arrested. 3(1)(a) sets out that a ship can only be arrested if the owner, when the claim arose, is the same as when the arrest is effected. The only other circumstances under which a ship can be arrested without the owner being the same at the time the claim arose and the arrest is made are set out in Article 3(1)(b)-(e). These include claims secured by maritime liens, (e). This makes the question of what a maritime lien is very important as a claimant will have a much more favourable position having a claim that is regarded as a maritime lien. Article 3 has therefore adopted much of what could be said to be a civil law approach where the “thing”, in this case a ship, itself can not be the carrier of an obligation or a debt but the person behind it. It was decided that countries that are parties to the MLM Convention will be restricted to the liens recognised there and countries that are not parties to that Convention could establish their own liens. This would severely limit a claimants ability to effect arrest in jurisdictions that have signed both Conventions.²⁵ However, at the 1993 Conference that lead up to the 1993 MLM Convention, one decided not to limit the maritime liens to the ones set out in Article 4(1), but to give states the right to grant other maritime liens against the owner, demise charterer, manager or operator under the conditions set out in Article 6 of the MLM Convention. It should be noted that for countries that are not parties to the 1993 MLM Convention the claims set out in Article 6 can not be

²³ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 329-330

²⁴ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 333

²⁵ Lynn, *Comment on the new international convention on arrest of ships*, 1999

used to arrest a ship where the owner has changed if the state has not got these rights according to its national law.²⁶

3 Domestic law

3.1 Swedish domestic law

The general rules concerning forum are to be found in chapter 10 of the Swedish Code of Civil Procedure. The main rule is set out in 10:1 saying that a defendant should be sued in the courts of his domicile. 10:3 and 10:4 are exceptions to this rule saying that people not having their domicile in Sweden can still be sued in the Swedish Courts. 10:3 states that if someone has a charge on a person who has got property in Sweden, that person can be sued in Sweden in relation to the charge. The first sentence is about any property while the second sentence sets out the possibility to sue where the property relating to the charge is. Further 10:4 gives the possibility to sue where the contract was agreed upon.

In chapter 15 the general rules of arrest are set out. Section 1 of Chapter 15 sets out that if someone can prove probable cause for having a claim and it can be reasonably feared that the defendant will evade to pay by getting rid of assets arrest can be granted on any of the defendants property but just as much as to cover his claim. Section 2 states that if someone proves probable cause for having a better right to certain property and that the debtor's behaviour gives reason to think that the claim otherwise will be lost or made significantly more difficult to pursue, an arrest should be granted. Further Chapter 15 sets out a demand for security in case of a wrongful arrest. Section 6 sets out that an arrest according to articles 1, 2 and 3 can only be granted if security has been set. The main rule is that the procedure for arrest is contradictory i.e. the defendant has a right to reply to the charge. However, when there is a risk that the defendant gets rid of property that is security there is a possibility to get a temporary decision for arrest, 5:3 paragraph 2. In order to protect the defendant a decision for arrest can only be granted if four prerequisites are fulfilled. These are: 1. The claim must be payable 2. the claimant shall put security for the damages the defendant can be caused by the arrest, 3. The claimant shall prove probable cause for his claim, 4. The defendant must

²⁶Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 320-322

prove that there is a probability that the defendant tries to get rid of property or in another way makes it harder for the claimant to get paid for his claim.²⁷

3.1.1 ESCO Maritime

The Swedish Court stated in the case of ESCO Maritime²⁸ on the 15 of June 2002 that even though the ship was ready to sail from the port of Gävle to Casablanca, which is a typical case of there being a risk that the claimant will not get paid, the court meant that the plaintiff had not given the circumstances that qualifies for an arrest. Such circumstances would be to prove that the defendant has shown aversion to settle the claim which the plaintiff in this case had not. Therefore there was no reason to grant an arrest. The plaintiff then made an adjustment in his suit where he pointed out that the court could grant an arrest even if there is no risk that the defendant evades to pay the claim, Chapter 3 section 40 the SMC. However, the court stated that there is no compulsory need to arrest according to the SMC only a possibility and that the court had to try the suitability of an arrest. The arrest was denied. Relying on the rightfulness of this decision this means that in an arrest case the general rules in the Code of Civil Procedure concerning arrest are applicable also in cases with non-Swedish parties. How accurate this decision was can be discussed. Looking at the Convention the word “may” is used explaining that a country can arrest a ship. Therefore there is no need for a country to arrest a ship as there is no demand from the Convention to make an arrest which also was stated by the Court. However, the rightfulness of the decision can be discussed from other viewpoints. As the court explains in the verdict there is no need, ever, to arrest a ship and according to the Court it is always up to the Courts own discretion whether to grant an arrest or not. This, however, sends ambiguous signals to claimants as even though you have a maritime claim and therefore should be entitled to arrest according to the Convention you cannot count on getting an arrest in Sweden, at least not if you do not look at national law and present evidence for the defendant not wanting to pay the debt. This could be argued to go against the spirit of the Arrest Convention as the Convention was developed to create similar rules around the world when it comes to arrest. The main incentive can be said to have been to protect the owners of the ships from getting their ships arrested for every claim one could ever think of that was not really related to the ship itself. On the other hand one could argue that

²⁷ Ekelöf, *Rättegång - Tredje häftet*, p. 10-15

²⁸ ESCO Maritime, Stockholms tingsrätt T-11513-02

since the list set out has been very closely looked at to get the most important claims covered and protected one should also try to follow the list and always grant arrest when such a claim is presented. Also, in Sweden, there are rules concerning wrongful arrest and also a security has to be set in case of a wrongful arrest. This should make the plaintiff more careful when applying for arrest as he can be liable in damages and does that there should have been no need for the court not to grant an arrest. Further one can ask how much evidence there has to be for the court to conclude that the defendant does try to escape to pay? If the event occurred in Sweden the question is if one can get an arrest even if not enough time has passed for a plaintiff to be able to know if the defendant refuses to pay i.e. not much time has passed since the claim arose and the ship is getting ready to sail. 15:1 of the Swedish Code of Civil Procedure sets out four prerequisites that have to be fulfilled for the court to make an arrest. There has to be a claim that is due to be payable. The plaintiff has to put up security in case of wrongful arrest. The plaintiff has to show probable cause for the claim and lastly the plaintiff has to show that it can probably be feared with good reason that the defendant by, in this case leaving Swedish territory, makes it more difficult for the plaintiff to get paid. The proof of guilt for this last prerequisite is less strong than the one for proving ones claim. According to Swedish doctrine the plaintiff does not have to make it probable that the defendant will make it more difficult, it is enough that his actions might have that effect. In this case that effect is imminent as the ship leaves and the plaintiff does not know when he gets the chance to, if necessary, get an arrest the next time. Also according to Chapter 3 paragraph 40 of the SMC the Court can, as the plaintiff argued, grant an arrest even if there is no risk for the defendant to try to escape liability. Further this conclusion, that the national rules relating to arrest should be used, may only be upheld in countries that have not given the Convention the force of law as it has been argued that Article 4 does not necessarily give the right to apply the domestic rules relating to arrest.²⁹

When the 1952 Arrest Convention was implemented into Swedish law the ability to get an arrest on a ship was limited to the maritime claims now set out in Chapter 4 of the Swedish Maritime Law (Sjölagen, SFS 1994:1009). This means that a ship can only be arrested on Swedish territory if the plaintiff has a maritime claim set out in 4:3. The reason behind this was that the rules in the Arrest Conventions say that a ship can only be arrested for a maritime claim. According to Swedish law before a ship could be arrested for any claim i.e. not only

²⁹ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 163-164, Ekelöf, *Rättegång - Tredje häftet*, p. 14

claims relating to a ship or the operation of a ship.³⁰ This chapter, as it entails the rules from the Arrest Convention, prevails the general rules of arrest according to 4:2 SMC.

Sweden ratified the 1952 Arrest Convention in 1993.

3.2 English domestic law

In the 14th century the Admiralty Court handled all sorts of commercial disputes. This was, however, not liked by the common law courts and in the 17th century the Admiralty Courts were deprived of all jurisdiction over matters not purely maritime. Today this can still be traced in the High Court. Disputes concerning hire of ships or the purchase of a ship still come before the Queens Bench Division and are determined by the common law. Only where maritime law is applicable the cases come before the Admiralty Court.³¹ The statutory right to arrest was developed in the Admiralty Court in the 19th century. Originally it was used to secure payment from foreign vessels for services rendered, such as towage, or materials supplied. Today the statutory right of arrest can be found in the Supreme Court Act 1981.³² There are also procedural provisions set out in the Civil Procedure Rules and in the Admiralty Practise Direction 49F. Paragraph 6 of this Direction sets out appropriate procedure in arrest cases. These rules do not implement the 1952 Arrest Convention, but they are relevant to arrest actions.³³

The Admiralty Court is very different from a common law court. A jury is not used and there are expert assessors who sit on the bench with the judge and help when nautical skills are needed. Also the procedures are different. The most noticeable difference is the *in rem* procedure as opposed to procedures *in personam*. The *in rem* procedure is a procedure that is aimed at the vessel itself and not at the person (owner) behind it, as a procedure *in personam* is. This means that it is in fact possible to sue a ship. However, the purpose behind the *in rem* procedure is to put pressure on the person behind the ship to pay his debt or at least appear in court to get the dispute settled. In cases where the person behind the ship has no other assets within the jurisdiction this can be used as a security for the debt. Usually if the ship has been

³⁰ Ds 1991:70, p. 48 ff

³¹ Jackson, *The machinery of justice in England*, p. 55-56

³² Hill, *Arrest of ships*, p. 1

³³ http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm

arrested the owners defend the action. If they choose not to, however, the ship can be sold and the earnings can be used to pay the debt. The arrest in rem, according to English law, is effected when the writ has been served on the ship in British waters.³⁴

3.2.1 Supreme Court Act 1981

Admiralty jurisdiction is governed by the Supreme Court Act 1981 sections 20-24. This law has replaced the former Administration of Justice Act 1956, which was passed to implement the 1952 Arrest Convention. The Convention has not been fully incorporated into English law though.³⁵ Therefore arrest is possible whenever an action in rem against a ship is available. This means that the list in Article 1(1) of the Arrest Convention has not been implemented as exhaustive. However, all the claims secured by a maritime lien under English law and therefore claims for which an in rem action can be brought are found in the list in Article 1(1) and in s. 20(2) of the supreme Court Act 1981.³⁶ All of the claims set out in s. 20(2) can be pursued in rem except for the claims in subparagraph (d). However many of those claims can instead fall under (e). Note that there is no need for the claim to have a maritime lien status for there to be an in rem action. Thus all maritime liens can be pursued by in rem actions according to s. 21(3) Supreme Court Act 1981.³⁷

In the UK the actions in rem and in personam are two ways of exercising admiralty jurisdiction. The list set out in the Supreme Court Act 1981 ss. 20(1)(a) and 20(2) shows claims for which there is Admiralty jurisdiction. These provisions apply to all ships whether British or foreign, wherever their residence may be and for all claims wherever they arise.³⁸ In the English legal system there is a close connection between arrest and jurisdiction. An arrest under an action in rem gives jurisdiction and therefore jurisdiction on the merits is not only given for the claims listed in Article 7(1)(a)-(f) of the 1952 Arrest Convention.³⁹

³⁴ Jackson, *The machinery of justice in England*, p. 55-56

³⁵ Hill, *Maritime Law*, p. 93

³⁶ http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm

³⁷ Albrecht, *Maritime Law Handbook*, p. 18

³⁸ http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm, The Anna H [1995] 1 Lloyd's Rep. 11

³⁹ http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm

England (the UK) ratified the 1952 Arrest Convention in 1959. It has thus not been implemented very well and has not been given the force of law.⁴⁰

3.2.2 The *in rem* procedure in the United Kingdom

The *in rem* procedure has developed under English law and is covered by the Supreme Court Act 1981. The *in rem* procedure is not available in civil law countries, but is a phenomenon of common law. In the *in rem* procedure it is the ship that is the object towards which the motion is filed. The action is thus brought against the ship and not the person behind the ship or the debtor.⁴¹ Whenever there is a maritime claim or other charge on the ship an *in rem* action can be brought against the ship. It does not matter if the ownership has changed from the time the claim was created and when the action is brought.⁴² An *in rem* procedure can also be brought against a sister ship. The writ for an *in rem* procedure is issued by the Admiralty and Commercial Registry in London or in one of the District Registries elsewhere in the UK. The warrant of arrest is obtained on a motion from the High Court and is valid for twelve months. The writ may only be served when the ship is within the jurisdiction. The owner does not have to appear to answer the writ. The action is against the ship and it is not the owners liability that is on trial. If, however, the owner does enter an appearance to the Admiralty action *in rem* the process becomes both a procedure *in rem* and a procedure *in personam*.⁴³ This means that the judgement is enforceable against both the arrested ship and the debtor.⁴⁴ The arrest is effected when the writ has been served on the ship to someone in charge e.g. the master.⁴⁵ This differs from the statutory *in rem* procedure which can be used for claims that are not maritime claims such as repairs, supplies etc. The statutory right *in rem* is effected when the writ is issued, but it does not follow the ship as does the *in rem* procedure when there is a maritime claim. This results in no possibility to arrest a ship after the ownership has changed, if the procedure is not based on a maritime claim. The person liable *in personam* must still be the owner of the ship for there to be a statutory *in rem* procedure. Since the statutory *in rem* procedure is effected when the writ is issued United Kingdom claims

⁴⁰ http://www.bmla.org.uk/documents/implementation_of_the_1952_arrest.htm

⁴¹ Hill, *Arrest of Ships*, p. 14

⁴² Hill, *Maritime law*, p. 106

⁴³ Hill, *Arrest of Ships*, p. 14

⁴⁴ Tetley, *Arrest, Attachment and Related Maritime Law Procedure*

⁴⁵ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*. p. 167

jurisdiction from this time. This means that jurisdiction is claimed before the arrest has actually been made and that there should be jurisdiction independently of there ever being an arrest. This is not in line with the Arrest Convention where Article 7 says that jurisdiction is claimed when the arrest is made i.e. arrest gives jurisdiction. This has sometimes led to United Kingdom having lost its jurisdiction as according to international law they have not had jurisdiction.⁴⁶

The in rem procedure in maritime law gives a chance to put pressure on the owner, the debtor, who is out of jurisdictional reach. To be able to “get” the ship, and if the debtor still refuses to settle the claim, the possibility of having the ship sold to cover the claim gives an excellent security for the claimants.⁴⁷

3.3 American domestic law

In the United States there are two primary sets of courts that deal with maritime disputes, the federal court system and the state court system. The two systems are geographically related as the state court has a branch of the federal system located in it. However, the processes are completely separated. As opposed to England there are no special admiralty courts or even judges or experts that handle these cases. The knowledge among judges about maritime law is very scarce since transportation by water is not as common as other ways of transportation in America. There are few people specialising in this area and therefore also the knowledge among judges is little.⁴⁸

The federal and state court systems both have the power to decide disputes of a maritime nature. However, some disputes are exclusively to be heard in the federal courts. There are no cases that cannot be heard in the federal courts. However, even though state courts sometimes do have jurisdiction it does not mean that they can apply state law on those disputes. Most maritime law is federal law and the state court should settle the disputes according to it.⁴⁹

⁴⁶ Tetley, *Arrest, Attachment and Related Maritime Law Procedure*

⁴⁷ Hill, *Arrest of Ships*, p. 15

⁴⁸ Hill, *Arrest of ships*, p. 81-82

⁴⁹ Hill, *Arrest of ships*, p. 81-82

Important to know is that if the United States Supreme Court, the supreme court for the federal court, has rendered an opinion that is law then cases should be decided in line with this decision. However, if there is no court that has rendered an opinion or has rendered one that is subject to interpretation, the federal circuit appellate courts may differ on an issue. State courts follow a similar system, however, there is no requirement that state law is consistent from state to state. This means that even though there is definitive statutory and procedural law the outcomes will still differ around the US.⁵⁰

United States law distinguishes between arrest of a ship and attachment of a ship. An arrest can only be made if there is a maritime lien and that action is then known as an *in rem* action. The *in rem* action is set out in the Supplemental Rules for Certain Admiralty and Maritime Claims. The actions are brought in the federal courts why the Federal Rules of Civil Procedure govern the action, except when they are inconsistent with the Supplemental Rules.⁵¹

Maritime liens can only be foreclosed in a federal district court in the district in which the ship physically is. In order to initiate an arrest a lawsuit must be commenced in the federal court where the ship will be arrested. A lawsuit is commenced by filing a complaint which states that the claim is based on a maritime lien. A complaint seeking an arrest must be signed under oath i.e. not only signed by the attorney handling the case but by the arresting party. Before initiating the arrest the claimant should be certain that it has a right to arrest the ship. If a wrongful arrest is made the arresting party will be liable in damages to the person entitled to the possession of the vessel.⁵²

Arrest is used only in maritime matters but attachment has a general use for almost all kinds of claims against almost all kinds of property. Attachments are actions in personam i.e. brought against the person behind the ship or the debtor. There are three bases for attachment and it can be used by both federal and state courts. It can be used to acquire jurisdiction over a prospective defendant, to obtain security for satisfaction of a claim if the judgement should be in favour of the claimant and to seize property to apply in satisfaction of a judgement.

⁵⁰ Hill, *Arrest of ships*, p. 81-82

⁵¹ Lynn, *A Comment on the New International convention on Arrest of Ships*

⁵² Hill, *Arrest of Ships*, p. 83-86

Attachment is used when the property is taken to assure a claim against the owner of the property.⁵³

Maritime attachment is used when the defendant is not within the territory over which the court can exercise its powers. If the defendant cannot be found the court can by attaching its property make the defendant come into the courts jurisdiction in order to claim its property. If the defendant does not appear the claimant obtains whatever portion of the attached property is necessary to satisfy its claim. It differs from state to state how much presence is required for attachment not to be used. Some states for example find the mere presence of one of the defendant's vessels sufficient enough to avoid attachment.⁵⁴

The US has not ratified the 1952 Arrest Convention

3.3.1 The *in rem* procedure in the United States – quasi *in rem* procedure

An action *in rem* can only be brought if there is a maritime lien. If it is another claim one has to use maritime attachment.

English *in rem* procedure is more analogue with Unites States quasi *in rem* procedure as the goal in English *in rem* procedure is to reach the person behind the vessel. Although British *in rem* procedure is broader than American *in rem* procedure, British *in personam* procedure is narrower than American. British *in personam* procedure follows the Brussels Regulation when it comes to jurisdictional matters. Therefore an English court will assert jurisdiction only if the defendant has a place of business in England or the collision took place within English waters. The American *in personam* procedure, however, goes a lot further. American maritime *in personam* procedure permits a maritime claimant to attach any property belonging to the defendant regardless of the character and thereby to acquire valid *in personam* jurisdiction over him. American courts seem to have a slightly greater reach when using *in rem* and *in personam* procedures together. Under American jurisdiction, one is not limited to the offending vessel, but one can obtain jurisdiction through the presence of other property such as defendant's freights, bank accounts and so on although only to the value of the claim.

⁵³ Hill, *Arrest of Ships*, p. 94-96

⁵⁴ Hill, *Arrest of Ships*, p. 94-96

This type of jurisdiction is called quasi in rem jurisdiction and is aimed against other of that persons property.⁵⁵

The great difference between the in rem procedure in the US and in the UK is that in the US the procedure is really only against the property itself. The aim is not to get the person behind the vessel to come forward and to make it an in personam case as it is in the UK. In the US if the defendant does not wish to come forward he can let them take the vessel, or other property, and maybe avoid having to pay more than they are asking for, which might be the case if there is a trial. In the US the defendant can also post a bond or put up other security and not expose himself to any greater liability than the value of the vessel. The mere appearance of the defendant does not give jurisdiction and does not make himself personally amenable to the court's jurisdiction and does not enable it to impose any personal liability. This is not the case in English jurisdiction. Posting a bond or attending a hearing in England will subject the claimant to full personal liability. The only thing the defendant can do which will not expose him to full personal liability is an action for setting aside the writ. In sum the difference between the two systems is that in England the in rem action is used to get an in personam action and procedure. In the US this can never happen. Either you use an in rem action which is solely against the ship or you use an in personam action or a consolidated action to create personal liability. In the US the in rem action can never be converted to an in personam action.⁵⁶

4 The Brussels Convention and Regulation

4.1 The Brussels Convention

The Brussels Convention was created in 1968 as a means to make free movement for verdicts. The problem of verdicts not being enforceable throughout the community was regarded as a hindrance for the economical integration. In the 1980ies the larger economical integration between the EFTA countries and the EC created a need for a convention that was also applicable to the countries in the EFTA. However, the Brussels Convention was only

⁵⁵ Smith, *Comparative Aspects of commonwealth and us law since the collision convention*

⁵⁶ Smith, *Comparative Aspects of commonwealth and us law since the collision convention*

open to countries within the EC and the possibility for the Court to interpret the Convention made it impossible for countries outside the EC to join. However, in 1988 another convention was adopted by the EC countries and the EFTA countries i.e. the Lugano Convention. The Lugano Convention is almost a complete copy of the Brussels Convention even as to the numbering of the articles. As Sweden is now a member of the EU the Lugano Convention is no longer applicable as the Brussels Convention and since 2002 the Council Regulation⁵⁷ has taken its place. The Lugano Convention is, however, still applicable in Island, Norway, Poland⁵⁸ and Switzerland.⁵⁹

The Brussels Convention can be said to be a “double” convention. By this one means that instead of national rules applying alongside the convention only the rules of the convention applies when it comes to forum. This has the effect that one loses the exorbitant jurisdiction that countries use to favour their own citizens against other countries citizens such as jurisdiction on the ground of property or citizenship. As the verdict also shall be recognised in all the other countries there is no need to let another court decide a case, where the connections are not as clear. This means that the decision of forum now is decided completely on which jurisdiction is the most suitable according to the relevant criteria and a case is stayed before it has even entered the court in a country that is not a relevant forum.⁶⁰

4.2 The Council Regulation No 44/2001

Even though the Brussels- and Lugano Conventions had worked well there were some things that needed to be looked at more closely. In May of 1999 the Amsterdam Treaty entered into force. As a consequence issues concerning jurisdiction and recognition of judgements were moved from the third pillar to the first. The most important consequence of the move was that rules concerning jurisdiction and recognition of judgements now could be enacted as regulations and directives. This new competence of the Commission was to be used immediately as the Commission in July of 1999 came with a proposal for a new Council

⁵⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

⁵⁸ There is a possibility for non EFTA and EEA countries to join the Convention

⁵⁹ Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 21-25

⁶⁰ Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 30-32

Regulation⁶¹ (below the Regulation or Brussels Regulation). However, the United Kingdom, Ireland and Denmark are not parties to part IV of the third part of the Amsterdam Treaty. This means that they are not bound by the Council Regulation. The United Kingdom and Ireland, however, declared that they were willing to be bound by the Regulation. Denmark did not, which means that the Regulation is not applicable in Denmark and Denmark is not bound to apply it. The Brussels Convention therefore still applies in Denmark and between Denmark and all other EU countries.⁶²

4.2.1 Interpretation of the Regulation

Before, when the Brussels Convention was in force, and this still applies for the countries in which it still applies, the European Court of Justice (ECJ) had authority of interpretation. However, there was also a protocol, the Luxembourg protocol⁶³, in which instructions were given on how to interpret it. Today, as the Regulation has entered into force the authority of interpretation is completely the Court's according to Article 234 of the Amsterdam Treaty. However, according to Article 68.1 of the Treaty questions relating to the interpretation of the Regulation can only be referred to the court of first instance from the last instance of the national courts. The possibility to get a decision from the first instance has consequently been made narrower than it was according to the Brussels Convention. In one aspect the possibility to get a decision from the first instance has been made wider as it under some circumstances is possible for an authority to demand a decision from the first instance even though one does not have a certain case that the question relates to. A question can be asked by the council, the Commission or a Member State. The interpretation will, however, probably continue to be almost the same as when the Brussels Convention was in force.⁶⁴ Important to keep in mind is, however, that the goals for the Convention and the Regulation are different and this might lead to a different interpretation. The Regulation shall be interpreted in line with the goals of the European Union much more strongly than the Convention should. What effect this will have, if any, is hard to say but one could expect more judgements where the goals of creating a uniform jurisdictional area is the main argument.

⁶¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

⁶² Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 25 ff

⁶³ The Luxembourg protocol

⁶⁴ Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 41-42

4.2.2 The Articles of the Regulation

The main rule as to where a person can be sued is to be found in Chapter II in the Regulation. Article 2 sets out the main provision that persons domiciled in a Member State shall be sued in the courts of that Member State. However, there are exceptions and these can be found in section 2 of Chapter II. The most frequently used exceptions can be found in article 5. According to 5(1) in matters relating to a contract a person can be sued in the courts of the place of performance. A person can be sued, if the contract is about delivery of goods, in the courts where the goods should have been delivered or were delivered. Article 5(3) in matters relating to tort or delict in the courts where the harmful event occurred or may occur.⁶⁵ Further to be mentioned is Article 6. Article 6 is about the possibility to hear a case in the court of one defendant if there are many defendants from different countries. This is possible if it is more expedient and avoids the risk of irreconcilable judgements. One more article that is important to mention is Article 23 that is about prorogation. The court that the parties have agreed upon shall have jurisdiction to settle the case. However, there are some formalities. The agreement shall be in writing or evidenced in writing, or in a form which accords with practises that the parties have established.

When jurisdiction exists according to the Regulation a court may not decline jurisdiction. This applies even if the ground for jurisdiction is unknown in the domestic law of that country. It is also forbidden to deny jurisdiction on the grounds of *forum non conveniens*. However, it has been argued that a court can deny jurisdiction in favour of another court in a third country. There can, however, be other reasons than jurisdictional rules for a country to dismiss a case and these can be allowed. For example in the case of ESCO Maritime⁶⁶ where the court dismissed a case on the grounds that the plaintiff had not shown the need for an arrest to be made as he had not shown that there was a risk for him not getting paid for his charge if the vessel was not arrested. In this decision the court found support in the Swedish procedural rules.

⁶⁵ see the case of Bier for the change from occurred in the Brussels Convention to occurred or may occur in the Regulation

⁶⁶ ESCO Maritime, Stockholms tingsrätt T-11513-02

4.2.3 The Regulation in relation to other conventions

According to Article 57.1 of the Brussels- and Lugano Conventions these Conventions shall not have an impact on the application of other conventions regulation of jurisdiction or recognition of judgements that the states have ratified or are going to ratify in the future. There is a similar provision in the Council Regulation in Article 71.1. In the Regulation, however, this provision is limited to conventions that the states have already ratified and it gives states no right to enter into new conventions after the Regulation has entered into force.⁶⁷ Article 7 of the 1952 Arrest Convention says that the courts of the state in which arrest has been effected has jurisdiction on the merits. This should, however, be contradictory to the Regulation if the arrest was made in an EU Member State where jurisdiction is to be decided according to the rules in the Regulation. However, this should not be a problem as long as the country in question has ratified the 1952 Arrest Convention before the Council Regulation entered into force, which all the EU countries have. The Convention shall consequently prevail over the Regulation. Also important to have in mind here is that not all countries within the European Union are parties to the Regulation e.g. Denmark. In Denmark the Brussels Convention still applies and in the EEA countries the Lugano Convention applies which does that conventions that they ratify still apply before the Brussels and- Lugano Conventions. This has no effect in relation to the 1952 Arrest Convention but it can have in relation to the 1999 Arrest Convention if it gets ratified. Then the 1999 Convention would still prevail in Denmark and the EEA countries as they are not parties to the Regulation, but it would not prevail in the rest of the EU countries as they are parties to the Regulation.

Most problems that can evolve concerning the application of Article 71.1 of the Regulation have been solved in Article 71.2. These rules are set out to create a uniform interpretation of Article 71.1. According to Article 71.2 (a) a Member State shall have jurisdiction if the “special convention”, i.e. the convention that was in force before the Regulation and prevails the Regulation, grants jurisdiction even if the defendant is not domiciled in a state that is party to that special convention. This rule in 71.2 (a) is contradictory to the provision in Article 3.1. of the Regulation which says that the defendant must be domiciled in a Member State to the Regulation. The provision in Article 71.2 (a) therefore makes the application of the more exorbitant jurisdictional rules of special conventions still applicable. However, according to

⁶⁷ Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen* , p. 70 ff

article 26 of the Regulation there is no possibility for the court to decide a case ex officio e.g. if the defendant does not show up or replies to a charge.

Further according to article 71.2 (b) judgements that have been accepted by a court in a Member State on the ground of jurisdiction according to a special convention shall be recognised and executed in the other Member States according to the rules of the Regulation. This provision only applies if the special convention not itself entails rules covering the recognition of judgements. This does that a judgement based on a special convention is of the same standing with a judgement on the grounds of the Regulation. This applies even if the special convention which is the basis for the judgement has not been ratified by the Member State where the recognition or execution has been demanded for. According to the last paragraph of Article 71.2.(b) if the recognition has its basis in a special convention both Member States must be a party to the Convention for recognition to be granted.⁶⁸

Part II

This far we have learnt about the jurisdictional rules in the 1952 Arrest Convention and the changes that the new Arrest Convention will bring about if it enters into force. Further we have looked at the national jurisdictional rules in Sweden, England and the US when it comes to arrest of ships. Also there has been a look at the Brussels Regulation which sets out the jurisdictional rules on an EU level and therefore is very important when discussing jurisdiction within the EU. Hopefully this has given the reader a good basis for a further analysis. In the following there will be a discussion based on the problems that follow the interpretation of the Arrest Convention's jurisdictional rules in comparison with the Regulation and the national law rules in England and Sweden to see where the uncertainties and the loopholes are or might be. The intention is that this part will give examples of the possible ways to escape or create jurisdiction in different countries using the uncertainties or the loopholes created when the Conventions and national law rules are not in accordance before we go on to look at the different outcomes of a lawsuit in different jurisdictions. Accordingly we will for a moment concentrate on the EU and consequently leave the US out of the discussion.

⁶⁸ Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 70 ff

5 Jurisdictional rules within the European Union

5.1 The Council Regulation in relation to the Arrest Convention

It has been concluded in the *travaux préparatoires* to the Brussels Convention and in case law e.g. *The Tatry*⁶⁹ that if there are no provisions about a certain issue in a special convention then the rules of the Convention (Regulation) shall apply.⁷⁰ The special convention was in this case the Arrest Convention and the case was about *lis pendens*, which is not regulated in the Arrest Convention. The Court decided that if there were no provisions concerning a certain issue in a special convention the Brussels Convention shall apply on this area. The effect of this decision is that even though you have a special convention that shall apply before the Regulation the Regulation still applies if the question concerns something that is not regulated in the Convention. Taking this one step further trying to interpret the provisions in the Arrest Convention and the provisions in the Regulation the provisions concerning jurisdiction in the Convention shall prevail over the rules in the Regulation. In reality this does that when it comes to jurisdiction on the merits the rules in the Arrest Convention apply before the Regulation, which was concluded in the case of *The Nordglimt*⁷¹ where the court stated that the two Conventions, talking about the Arrest Convention and the Brussels Convention, are to be read together. Where a special provision is made by the special convention it shall govern and where no special provision is made the general provisions of the Brussels Convention shall govern.⁷² There is, however, one more problem. There are different ways of implementing these international conventions. Sometimes a country just implements the whole convention into national law without changing its provisions and sometimes one rewrites them to fit better with other rules of domestic law. This has been a common way of making implementations in Sweden for example. However, this has consequences when it comes to the Council Regulation and special conventions. As the Council Regulation has the form of an EU regulation it is a higher standing law in comparison with Swedish national law. This does that if you debate with the basis in the implemented convention i.e. Swedish national law, this does not prevail over the Regulation. When national law is identical to the Convention this has not as far reaching consequences but if the Convention has been made

⁶⁹ *The owners of the cargo lately laden on board the ship Tatry v. The owners of the ship Maciej Rataj*, C-406-92, Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 74

⁷⁰ Schlosser Report, Jenard Report

⁷¹ *The Nordglimt* [1988] Q.B. 183 QBD (Adm Ct)

⁷² *The Anna H* [1995] 1 Lloyd's Rep. 11

wider when implemented this part cannot be upheld against the Regulation. This makes it important to look at the Convention and not national law rules when deciding what rules apply, the rules of the Arrest convention or the rules of the Regulation.⁷³

5.1.1 The Tatry

The Tatry⁷⁴ was about a cargo of soya bean oil belonging to various owners. The goods had been found to be contaminated on discharge. The ship owners, knowing they would get a lawsuit against them, launched proceedings in Rotterdam for a declaration that they were not liable for the contamination. Some of the cargo owners defended the proceedings in Rotterdam, but not all of them. Some months afterwards two identical actions were brought against a sister ship in England. Behind one stood some of the defendants in the Rotterdam proceedings and against the other cargo owners that had not replied to the charge in Rotterdam. The ship owners put up a guarantee for the ships release but objected the arrest with regard to article 21 and 22 of the Brussels Convention.

Some of the questions were referred to the ECJ. One of those was whether the proceedings being brought in England through the Arrest Convention prevailed over the proceedings being brought in Rotterdam through the Brussels Convention according to Article 57, or if the proceedings should be stayed according to Article 21 and 22 of the Brussels Convention. The court ruled that Article 21 and 22 governed the case even though the Admiralty Court had taken jurisdiction in accordance with the Arrest Convention.⁷⁵ The effect of this judgement might be that if a future defendant wants to escape a certain jurisdiction because of the Arrest Convention and being liable to one of the claims set out in article 7 or knowing that there are domestic rules in countries where he has ships travelling that could get them arrested, he should try as soon as possible to bring proceedings to get the case settled in a jurisdiction which is favourable to him.

Here another interesting question arises. The reason why the Regulation should prevail would be that *lis pendens* is not regulated in the Arrest Convention and therefore the Regulation

⁷³ Pålsson, *Brysselkonventionen, Luganokonventionen och Bryssel I-Förordningen*, p. 74-75

⁷⁴ The owners of the cargo lately laden on board the ship Tatra v. The owners of the ship Maciej Rataj, C-406/92

⁷⁵ Briggs, *The Brussels Convention tames the Arrest Convention*

steps in. However, in this case the effects are strange as it makes the two Conventions equivalent on this level. The Arrest Convention is the one prevailing the Regulation, however, if this decision is correct the Brussels Convention is on the same level as the Arrest Convention if there are two suits brought at the same time and this makes the relationship between the two Conventions complex. Also the reason why special conventions should prevail was that these conventions were meant to create unification between more states than the ones bound to the Brussels Convention and therefore were regarded as being “above” the regional jurisdiction convention. With this decision it makes it easy for a future defendant to choose jurisdiction himself. However, if the decision had been the opposite, the defendant had had to arrest his own ship in order to choose jurisdiction and to be sure of no other proceedings being brought in another country. In theory this might be possible but maybe not in reality and probably not very well met by the courts. A conclusion that might be drawn from this is that future defendants shall not be able to choose forum for settling a case, but that this is a right that falls on the claimant.

Another question that needs to be considered is where a suit can be brought by someone who wants to establish that he is not liable? In these cases the roles are changed as the plaintiff becomes the defendant and the defendant becomes the plaintiff. This might not be favourable to him as he would have to bring the proceedings in the defendant's country of domicile. However, the advantage is that he can sue in the place of performance which might be his own country of domicile.

Another important effect of special conventions prevailing over the Regulation is that even though a country is not a party to the convention it can be forced to enforce judgements where the jurisdiction is solely based on that special convention.⁷⁶

It is also important to note that there has to be an arrest in order to claim jurisdiction. There have been cases where security has been set and the claimant has been satisfied with that and then the country, in which the security was set, has not had jurisdiction. From the other point of view it is a great tool for the defendant if he can convince the plaintiff to be content with security without arresting the ship as he avoids the proceedings. As a plaintiff the best thing to do is to arrest the ship and then release it if the defendant sets security as then you are sure to

⁷⁶ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 205

have jurisdiction. Also there is no provision saying it is not allowed to arrest a ship even though security has been posted.

5.2 The Arrest Convention in relation to domestic law

There are different ways of implementing international conventions into national law and the way a country chooses to implement can have great effects on the application of the convention. In some countries international treaties have the direct force of law i.e. they are directly incorporated and apply as any national legislation. However, the most common way to implement is to adjust the provisions to national law. Unfortunately this often leads to the result that the provisions are changed to suit better with other national law rules making the implemented conventions very different from country to country. Also when a convention is translated into terms of national law there is a danger that the conventions also gets interpreted on the basis of other national law and not in the light of the convention losing the need of a uniform interpretation. This risk is said to be minor in common law countries as the principal prevails and the provisions of an international origin must be interpreted as to fulfil the States international obligations.⁷⁷

In Sweden the Arrest Convention has been implemented in Lag 1993:103 om kvarstad på fartyg i internationella förhållanden. This act has then been incorporated in Chapter 4 of the SMC. The provisions incorporated are all in line with the Convention even though the wording sometimes differ. Then the question is if they are enforceable against the Regulation even if they differ from the wording in the Convention?

In relation to English law the differences are greater and have been discussed in quite a few cases. The main difference stems from the action *in rem* which has been adopted in the convention as a means of getting jurisdiction on the merits but has not got the same meaning in English law. The difference lies in that in England the *in rem* procedure is to decide whether the High Court has admiralty jurisdiction and the arrest is only an interim relief. In the Convention the purpose is to regulate the cases in which the arrest of a ship is permissible and jurisdiction on the merits is only a secondary effect, in certain cases, of the arrest. The difference lies in that according to the Convention jurisdiction is acquired through arrest but

⁷⁷ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 29-30

according to English law jurisdiction is acquired by service of the writ *in rem* independently of if it is followed by an arrest or not. Further this has effect in relation to the Council Regulation no 44/2001. Article 71 says that any special conventions prevail over the Regulation. However, according to the Arrest Convention there has to be an arrest. It is not enough to serve the writ to get jurisdiction if the defendant is domiciled in a Member State of the European Union. This also applies to countries bound by the Brussels and Lugano Conventions, Article 57.

5.2.1 The Anna H

There has been (see the next page) a few cases concerning the relation between the Brussels Convention and the Arrest Convention and national law. For example in the case of *The Anna H* which was a case about some steel plates that were transported from Wales to Spain and had been exposed to rain when loaded and therefore had rusted. The defendants were domiciled in Germany and the plaintiffs in England. The defendant wanted the case to be settled in Germany and relied upon Article 2 of the Brussels Convention saying that a person should be sued in the courts of his country of domicile. The plaintiffs, however, had applied for arrest in England which they had also been granted and thereby the English courts had jurisdiction on the merits. Before the arrest was made the defendant had set security. The ship was although arrested. The reason for this being that one wanted to achieve jurisdiction in the English courts. The defendants argued that the Arrest Convention was created to give an opportunity to secure a maritime claim and that the Convention was part of the scheme to prevent arrest for all other claims. This was, however, concluded not to be the case as there was nothing else in the Convention saying that the reason for getting an arrest was to get security for a claim. Secondly the defendants argued that after the arrest was made the domestic law pointed out Germany as the country in which to settle the case. According to article 7(1) of the Arrest Convention the courts in the country in which the arrest was made shall have jurisdiction to settle the case if it either has jurisdiction according to the cases enumerated in the Article or if the country has jurisdiction on the merits according to national law. The defendant argued that since the Brussels Convention was incorporated into English law the Brussels Convention was now domestic law in the meaning set out in Article 7 of the Arrest Convention. Domestic law then pointed at Germany being the country in which to settle the case according to domestic law i.e. the Brussels Convention. The court, however,

dismissed this interpretation. Even though England has incorporated the Brussels Convention domestic law should be contrasted with treaty law and hereby meant law relating from international conventions. Further domestic law cannot have been intended to have different meanings in countries having incorporated the conventions or not.⁷⁸ Today the same question might be answered differently as the Regulation now is in force instead of the Brussels Convention. What is the relationship between the Regulation and domestic law? Could the Regulation be regarded as national law? The relationship between regulations and national law is that they are directly applicable in the Member States without implementation i.e. they are regarded as domestic law. Further, the argument about conventions being referred to as international law and thereby different from national law no longer applies as the Convention has lost its importance and the Regulation has taken its place. From this point of view The Anna H might have lost its value as a precedence.

5.2.2 Jurisdiction *in rem* and *in personam*

As has been seen on the previous page there is a problem concerning the arrest *in rem* as it has different meanings depending on if it is according to English law or according to the Arrest Convention. However, the problem is even bigger when it comes to suits *in personam*. With the Regulation there is no possibility to found jurisdiction upon service on a person within the jurisdiction or the presence of property within the United Kingdom belonging to the person or the seizure of his property. The problem lies in the Admiralty Court having jurisdiction both *in personam* and *in rem*, but on different grounds. The domestic jurisdiction referred to in the Arrest Convention is according to English law only jurisdiction *in rem* i.e. against the ship. The jurisdiction *in personam* according to English law is governed by the Regulation. The problem lies in the English procedural law. If a person who is liable *in personam* enters an appearance in an action *in rem* he is liable to have a judgement given against him *in personam*. The two proceedings can then continue alongside each other but in the end the judgement *in personam* might be for the full amount of the claim and even though the value of the ship might be for less. This would then be in conflict with article 3 of the Regulation. However, this rule was set in a case from 1892 and can be said to be overruled in relation to the Arrest Convention. The Arrest Convention and thereby the domestic law rules give jurisdiction to arrest the ship and to give judgement against the ship. It does not give the Court

⁷⁸ The Anna H [1995] 1 Lloyd's Rep. 11, Hartly, *Jurisdiction under competing conventions*

jurisdiction in personam against the owner of the ship.⁷⁹ The problem thus lies within the English domestic law. However, this might not be such a big problem. Even though there of course cannot be a suit in personam the case shall still be decided upon the merits. In civil law countries not having suits in rem or in personam there has to be a person who replies to the charge. In this way it becomes a suit in personam. Of course if the defendant does not reply to the charge the ship can be sold and then there is no process in personam but if the defendant replies then it is always a process against the person behind the ship. This comes from Sweden not having an institute through which you can sue a “thing” but only a (legal) person. Therefore from a civil law perspective there is no problem as the Arrest Convention is not interpreted as only giving jurisdiction in rem but as giving jurisdiction to settle a case on the merits if the domestic law gives jurisdiction. In civil law countries settling a case on the merits entails a process against the person behind the ship. Therefore if English law gives a right to continue a process in personam against a defendant replying to a charge this should be in line with the Convention as it is jurisdiction in accordance with domestic law. This might also find support in the new Arrest Convention as there is no possibility to arrest a ship that has changed its owner. This can be argued to mean that there is some link with the owner and his liability.

The question of how to regard the different kinds of actions, in rem and in personam, in English law has been and probably continues to be a problem in relation to the Regulation. In the case of *The Tatro* the question was raised whether the two actions could be said to be two different actions as the definition of defendant is not clear in relation to in rem cases and there is a clear defendant, of course, in in personam suits. In the case of *The Tatro* a suit had been brought in Rotterdam in personam. After this proceedings were commenced in England in rem. The question that the ECJ had to consider was whether the different suits were between the same parties and consequently should be stayed or if they could be said not to be between the same parties. The argument was that an in personam suit was against a person and an in rem suit was against a “thing”, in this case a ship, and it was not clear whether and in such case who was the defendant. The court came to the conclusion that the two forms of action in England and the Netherlands did not in themselves mean that the causes of action and the parties were not the same. The court did not wish to settle this as it was regarded to be a question for English national law. However, this did not prevent the actions from being

⁷⁹ *The Anna H* [1995] 1 Lloyd's Rep. 11

between the same parties and in the same cause of action.⁸⁰ One could argue that this decision speaks for an interpretation that the two suits are to be regarded as being the same and between the same parties. However, looking at English law, which one is advised to do, the interpretation might not be the same. As has been discussed before the English jurisdictional rules say that when an action in rem is brought and the owner has replied to the charge a lawsuit can be commenced against him in personam. This lawsuit might even lead to him having to pay the whole amount of the claim even though the amount is higher than the value of the ship, which would have been the maximum amount the claimant could have gotten if he had only had the security in the ship for his claim. The most important and deciding factor is that the two suits can be parallel which speaks for them being different suits although the parties and the issues are the same. Also, if the parties and the issues are the same why are not the cases united to one case?

5.3 The Brussels Convention/Regulation in relation to domestic law

As has been said before (see above) the Brussels Convention and the Regulation prevails over domestic law. However, this might cause problems in deciding exactly whether something lies under national law or under the Convention/Regulation. For example when it comes to jurisdiction under national law and whether to stay proceedings according to articles 21 and 22 or not. The aim behind these articles is to prevent two sets of proceedings involving the same parties and concerning the same issues that can get irreconcilable outcomes. Therefore it is regardless whether jurisdiction is based on national law or not. However, it has been said by the English courts that when jurisdiction is initially based on national law it is also up to the court first seised to decline jurisdiction as permitted by that law. Therefore if under national law jurisdiction is not established or would not be exercised there can be no rival proceedings and articles 21 and 22 would never be reached. This might be the case if the question is to decide if there are to be proceedings at all. However, when there is jurisdiction the provisions in the Convention ought to operate or there would be uncertainty again as to where the suit is to be brought. It would seem clear that it is for the Convention to allocate responsibility once there is jurisdiction under national law. The question is therefore when the Convention takes over from national law? In this case it would seem clear from Community interests that the

⁸⁰ Briggs, *The Brussels Convention tames the Arrest Convention*

provisions in the Convention apply before the national rules.⁸¹ If this conclusion stands there should be no possibility for a State to use the doctrine of *forum non convenience*. Naturally one asks oneself how to know which rules shall apply and if the test should be whether it is in line with the aims of the Community? If this is the case the predictability of what rules apply when deciding jurisdiction have been seriously damaged which cannot be good either for plaintiffs or defendants.

Part III

Above we have seen the consequences of the different jurisdictional rules and how different application makes different rules apply. The conclusion to be drawn is that as it is today, although seemingly very straight forward jurisdictional rules both within the Arrest Convention and the Brussels Regulation and in the national law rules when set against each other are not as clear anymore. It has also been shown that these uncertainties are used as a means to acquire or escape certain jurisdictions which leads the thoughts to forum shopping.

In the following there will be an introduction to the concept of forum shopping. This will be followed by an example taken from the list of claims that give rise to maritime liens according to Article 1 of the Arrest Convention namely oil pollution. This example is used to show how different the outcomes can be if you get a case settled in one jurisdiction rather than another. The example shows the differences in application if a case was to be settled in Sweden or England representing the EU or in the US. The reason for these countries being chosen for a comparison is that, as within most international maritime law the US constantly takes its own course not signing the Conventions created by international organisations, which was the case with the Arrest Convention and which as will be seen was also the case with the Oil Pollution Convention. Also, the US is one of the most attractive countries to bring lawsuits in because of the generous damages usually awarded. This makes the US an almost compulsory choice for a comparison.

⁸¹ Jackson, *Fitting English maritime jurisdiction into Europe – or vice versa?*

6 Forum shopping

6.1 Introduction

Forum shopping is something very controversial and it is therefore rarely discussed. A large part of the legal world would rather not talk about it, and pretend it does not exist, than admitting that it does exist and that one might even be using it. The reasons for the different views can be believed to be that forum shopping is not really about justice and fairness. It is more about finding the best laws to serve ones purpose and this purpose usually being to win ones case and to get the best economical outcome possible for ones client. Regarding this, it is quite easy to understand the unwillingness to talk about it or admitting to using it. At least not among the large majority of lawyers who probably like to look at themselves as good lawyers creating objective justice. However, forum shopping exists, either you condemn it or you look at it as a great way of settling cases and taking care of your clients best interest.

6.1.1 Ex. Oil pollution

In 1969 the first International Convention on Civil Liability for Oil Pollution (CLC) was signed. This was the first international convention in the area and the aim was to create uniform rules to ensure that compensation was available to persons who suffered damage caused by oil pollution and also to give governments clear rules on what actions they could take in order to avoid the disaster that followed the accident with the Torrey Canyon in 1967.⁸² In 1971 the Fund Convention was created. It was meant to give a possibility for claimants to get supplementary compensation where full or adequate compensation could not be given as a result of the owner's limitation. The fund is financed by levies on receivers of crude oil that have places of business within contracting states to the Convention. The requirement to be able to claim compensation from the fund was that the damage had arisen under the territory of a contracting state.⁸³ In 1992 a new CLC Convention was created mainly because the limitations under the 1969 Convention were too low to provide a sufficient cover. Especially looking at the development of shipbuilding where the tankers for

⁸² Hill, *Maritime Law*, p. 421

⁸³ Hill, *Maritime Law*, p. 427

transporting oil just became bigger and bigger.⁸⁴ Today Sweden and the UK have ratified both the 1969 Convention and the 1992 Convention whereas the US has not ratified either of them.

The amount of limitation, when this is written, is 420 SDRs⁸⁵ for each ton and the maximum amount is 59,7 million SDR. To be able to limit the owner has to set up a fund to cover the expected damage.⁸⁶ The new amounts of limitation enter into force on the 1 of November 2003. The new maximum amount will then be 89.77 million SDR.⁸⁷

The US took it's own course after the accident with the tanker Exxon Valdez in 1989, which caused the largest ecological disaster in American history. The US decided that the CLC Convention would not provide enough cover against oil pollution as the limits were too low. They chose to create their own law about oil pollution, the Oil Pollution Act of 1990 (OPA 90). This was, however, not very good for the CLC convention as the withdrawal of the US caused a large distrust among countries.⁸⁸

The limitation of liability is set to US\$ 1,200 per gross ton or US\$ 10 million whichever is the greater. For tankers of 3,000 tons or less whichever is the greater of US\$ 1,200 per gross ton and US\$ 2 million.⁸⁹

6.1.1.1 Which is the best for claimants – the 1992 CLC Convention or the OPA 90?

Looking only at the amounts of limitation it is fairly easy to see that the US has a more favourable view of the claimant in an oil pollution situation even when considering the new limitations that will come into force in November 2003. This is, however, not very surprising as the United States has a tradition of being more favourable of the claimant in all aspects of tort law. However, it is not enough only to look at the amounts of limitation when deciding which jurisdiction is the best for a claimant to settle a case in. It is also necessary to look at

⁸⁴ Nesterwicz (Hultman), *Civil liability for Oil Pollution Convention 1969 and 1992 and The Oil Pollution Act of the United States 1990 – the comparison of the definition of oil pollution damage*

⁸⁵ 1 SDR = 1.4 US \$, 2003.07.08, www.imf.org

⁸⁶ Hill, *Maritime Law*, p. 438

⁸⁷ www.imo.org

⁸⁸ Nesterwicz (Hultman), *Civil liability for Oil Pollution Convention 1969 and 1992 and The Oil Pollution Act of the United States 1990 – the comparison of the definition of oil pollution damage*

⁸⁹ Hill, *Maritime Law*, p. 444

what damages can be indemnified. In the 1992 CLC Convention the definition of pollution damage was changed. However, the new definition did not say who was entitled to claim compensation though one can assume that the State, and any other person who actually incurred such expenses, has a right. Further the new definition does not say if claims for pure economic loss can be awarded. During the development of the Convention it had been proposed that economic loss being a direct result of the accident should be included in the definition of pollution damage but the proposal was not accepted. The issue was left to the national courts to be decided by them what is a direct result of the accident and what is not. This might, and most probably will, lead to different outcomes depending on in which country a case is settled and might be a reason for forum shopping. E.g. in Norway the Norwegian Pollution Act 1981 admits claims from workers for lost earnings if the pollution damage caused loss of their jobs or decrease in working hours. In contrast this was not admitted by the Scottish court in the case of Braer for fish product factory workers.⁹⁰ In Sweden pure economic loss is only admitted if the action that led to the accident was a criminal offence. Further only direct economic loss can be admitted and not indirect loss. Consequently Swedish courts would not be likely to admit loss for lost working hours for fishermen or for fish factory workers.⁹¹

The OPA 90 is very easy to break through i.e. to loose the possibility of limitation. Therefore it is also important how the loss is calculated as a break through leads to unlimited liability and the sums can differ a lot depending on how you calculate. There are many different ways of calculating the loss and the results can be very different. Important to note is, however, that it is left in each case to the courts to calculate the value of the damage. In the Zoe Colocotroni the court valued the environmental loss by putting an economic value on the decreased organisms and the cost to re-plant the trees and the organisms. It was, however, claimed that these organisms would not have to be replanted as they would replenish themselves in the clean sea. Some countries value the damages according to the cost to clean up the oil and reinstatement of the environment. The conclusion is that there are many ways to calculate the damage and the cost very much depends on the way of calculation which will have a great impact on the cost for the owner of the polluting vessel. Also the different states have been

⁹⁰ Nesterwicz (Hultman), *Civil liability for Oil Pollution Convention 1969 and 1992 and The Oil Pollution Act of the United States 1990 – the comparison of the definition of oil pollution damage*

⁹¹ Chapter 2 s. 2 The Swedish law of tort (Skadeståndslagen), Hellner, *Skadeståndsrätt*, p. 368

given the possibility to have more stringent rules than the OPA 90 why there is a possibility to have strict liability for a polluter without any possibility to limit the damages.⁹²

Under the OPA 90 there is no maximum limit as under the CLC Convention. This makes the owner liable up to 1200 \$ times the gross tonnage of his vessel. According to the CLC Convention there is a maximum limit which is good for the larger vessels. Although the new limitation limits are a lot higher than before they are still only 2/3 of the US limits when the vessels reach a tonnage over 5000 tons. Under this the limits are equivalent to the US limits.⁹³ Also under the OPA 90 breaking through limitation is fairly easy, or at least easier than under the 1992 Convention which makes these rules more preferable to the victim than the ones set out in the CLC Convention. This is, however, only the case when it comes to larger spills. When it comes to smaller accidents the difference between the two is of no great significance.⁹⁴

6.1.2 The Arrest Convention in relation to oil pollution

Not to be able to be arrested for any other claims than maritime claims must be a great advantage also for ships that are flying the flag of non-contracting states and make their trips a lot safer. However, there is a risk that states that are not parties to the conventions become “stakeouts” for claimants who have other than maritime claims and want to use the possibility to get the claims settled i.e. forum shopping. This might lead to some countries becoming impossible to travel to for certain vessels as there is a great possibility that the ship gets arrested. This might not be a bad thing, but one also has to consider the reasons behind creating uniform rules and one being the possibility to foresee the outcomes of certain actions. For there to be efficient transportation possibilities around the world it is important that the owners of the vessels know what rules apply and that there are no surprising arrests when they enter a port. Especially when it comes to transportation by sea where just a few days of not being able to use a ship or sail is very expensive for the shipowner.

⁹² Nesterwicz (Hultman), *Civil liability for Oil Pollution Convention 1969 and 1992 and The Oil Pollution Act of the United States 1990 – the comparison of the definition of oil pollution damage*

⁹³ Under the OPA 90 1200 US\$ per gross ton. Under the CLC convention 631 SDR = 883 US\$ per ton. 4,510 000 SDR as the maximum limit for a vessel of 5000 tons gives a limit of 902 SDR per ton = 1263 US\$.

1 SDR = 1.4 US \$, 2003.07.08, www.imf.org

⁹⁴ Hill, *Maritime Law*, p. 445

According to Article 1(1)(a) of the 1952 Arrest Convention (oil) pollution is a damage falling in under “or otherwise”.⁹⁵ This makes it possible for a claimant to get an arrest in a nation party to the Convention. However, according to the CLC Convention the owner that is entitled to limit his liability and who sets up a limitation fund has no further liability. This means that as soon as the limitation fund is set up a claimant cannot bring an action against the property of the owner. If an arrest has been made before a limitation fund has been set up the court of the arresting state shall order the release of the arrested ship. According to the Arrest Convention a ship can only be released from arrest if security corresponding the value of the ship is set. However, usually the value of the ship is greater than the limitation fund. Therefore an exception has been made saying that the Arrest Convention shall not affect the application of international conventions for limitation of liability in the state where the arrest is effected. This means that you can get the ship released if you set up a limitation fund even if the amount of security is less than the value of the ship.⁹⁶

6.2 Why are the United States courts so attractive for plaintiffs?

Most people see the US as the most favourable country to bring lawsuits in and especially in tort cases. The reason tends to be the large awards and the possibility for punitive damages that has become one of the characteristics of the US court system. Is that, however, the only reason why plaintiffs tend to use all of their imagination to get a US court to accept their case?

Considering this, the feature that a plaintiff wants to get hold of the most, and that the American court system can offer, is a jury. Juries consisting of normal people and not professional judges or people that are legally trained as in many other countries do that the possibility of getting higher damages is much greater than in many other countries. Also contingency fees make litigation more accessible to poor plaintiffs and the system of not letting the losing party pay the legal costs of the winning party has a great effect on plaintiffs possibilities to bring a lawsuit where the outcome is not that clear. Furthermore the procedural

⁹⁵ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 79

⁹⁶ Berlingieri, *Arrest of ships – A Commentary on the 1952 and 1999 Arrest Convention*, p. 298

rules are more favourable than in many other countries with liberal pleading rules allowing plaintiffs to enter court with vague claims.⁹⁷

6.3 Pro/contra forum shopping

Forum shopping is the reality of international private law today, however, it is not something that lawyers happily talk about as the concept has become, or always has been, looked at with suspicion. Although it is not anything that many lawyers are admitting they involve themselves in it has been argued that it might even be a case of malpractice if they do not investigate the possibility to get a case settled in another, to the plaintiff more favourable, country.

Also the courts in different countries have different views of forum shopping as being good or bad. The UK has had no problem with the concept and some judges have even expressed a liking in the possibility. As Lord Denning expressed it in the *Atlantic Star*⁹⁸:

“If a plaintiff considers that the procedure of our Courts, or the substantive law of England, may hold advantages for him superior to that of any other country, he is entitled to bring his action here – provided always that he can serve the defendant, or arrest his ship, within the jurisdiction of these courts – and provided also that his action is not vexatious or oppressive... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek aid of our Courts if he desires to do so. You may call this “forum shopping” if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.”

However, Lord Denning's opinion was not shared by all the others. In response Lord Reid expressed the following:

“My Lords, with all respect, that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of the island felt an innate superiority over those unfortunate enough to belong to other races... I would draw some distinction between a case

⁹⁷ Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*

⁹⁸ Lynn, *A comment on the New International Convention on Arrest of Ships 1999*

where England is the natural forum for the plaintiff and the case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be “driven from the judgement seat” without very good reason, but in the latter the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay. If both parties are content to proceed here there is no need to object. There have been many recent criticisms of “forum shopping”, and I regard it as undesirable.”

These are just different opinions of what to think about the concept of forum shopping. To be able to make a greater and deeper analysis one has to look at the consequences of the possibility to shop for forum. By permitting forum shopping courts allow the plaintiff to take control of the case. Just the choice of forum can lead to a completely different outcome than had been the case otherwise. It can consequently be regarded as a great advantage to be able to chose forum.⁹⁹ This might lead to the legal system appearing as arbitrary and might lead to eroding the publics confidence in the legal system. At the same time the possibility to chose a different forum can lead to the creating of a greater justice than would have been the case otherwise. This can be seen in cases concerning plane crashes where the plaintiffs have tried to get the case settled in the United States, which is not a party to the Warsaw Convention¹⁰⁰ and consequently not bound by the limitation rules. For the plaintiffs this has meant being able to claim much higher damages than they would have been able to under the law of a State Party to the Warsaw Convention. As it seems as a great part of the legal community agree on the limitation rules being too low and the great impact on private individuals the choice of forum can have in these cases it can be argued that this should be regarded as “good” forum shopping. At least in contrast to a lawsuit stemming out of a breach of contract where the parties are equal in strength and one party is misusing the possibility to sue.

It has also been argued that forum shopping might minimize the administrative costs of litigation. Supporters argue that choosing a forum often leads to choosing one that has great expertise and consequently can offer better substantive rules. However, it has also been argued that instead of leading to efficiency it makes the application of law less predictable which causes inefficiencies when resources are wasted on finding what rule of law will govern their conduct. This can be true in international forum shopping as there are so many

⁹⁹ Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*

¹⁰⁰ Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929

laws and there is no possibility to know every one of them, which leads to more lawyers needing to be engaged which usually will lead to greater costs instead of efficiency. This of course has the greatest implications in international tort cases where there is no chance for the defendant to foresee the choice of forum of unknown future victims. Also, as the choice of forum can have such vast consequences for the outcome of a case there is a risk that parties spend more money on fighting over the choice of forum than on the substantial issues of the case. This should not be good for the parties and it is not good for the community as a whole which would get more out of a thorough examination of the case for future disputes and the possibility of using it as a precedent. Further a plaintiff from a poor country might chose to settle a case in the US to be a able to benefit from the generous rules of damages there. This even if settling the case in his home country would lead to the same result but according to the economic standards in his home country the damages would not be as high. This deprives the home country of the possibility to evolve its own legal rules and of a precedent that might benefit more people for example if it is a suit towards a pharmaceutical company. Also it leads to a favouring of generous US law-rules which might have a bad impact on the view of other jurisdictions as seen as less fair. Even if US courts do apply foreign law the forum shoppers still can get the advantage of US procedural rules which sometimes can be as great an incentive as, or even greater, than the substantial law.¹⁰¹

6.4 The New Arrest Convention's impact on forum shopping

Today a maritime claimant has two methods for conducting forum shopping, proactive and reactive. In the reactive method the claimant stalks the vessel around the world until it calls a port in a jurisdiction that is favourable to the claimant and where he is confident of recovery. Even if it is a good way for the claimant to get recovery it takes a lot of time since a ship can be sailing for a long time without calling a port and also a port with favourable jurisdiction.¹⁰²

For this to work it is necessary for the claimant to know which jurisdiction has the most favourable laws, both procedurally and substantially, for his purpose. If he is wrong he risks

¹⁰¹ Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*

¹⁰² Lynn, *A comment on the New International Convention on Arrest of Ships 1999*

the chance of recovery in another jurisdiction as the case becomes *res judicata* and cannot be tried again in another jurisdiction.¹⁰³

In contrast to the reactive forum shopping method the proactive tries to abolish the possibility of the reactive forum shopping by having a forum selection clause in the contract. However, this method only works with contractual claims and of course cannot have any effect towards claims arising from collision or oil pollution.¹⁰⁴

With the new Convention the reactive forum shopping method might not be as favourable as before. According to the Convention if the ownership has been changed before the arrest the action must be barred as the arrest cannot be effected if the ownership has changed. Under the new Convention this might lead to owners playing “change the company name” to avoid arrest. If this is a good development in general can be debated but at least it gives owners a tool to fight proactive forum shopping and can be said to make the game a bit more equal. When the Convention enters into force, if it ever does, the proactive forum shoppers are left to target the states that are not parties to the Convention and have favourable laws e.g. the US. Looking at the US history of ratifying maritime Conventions there is a great chance of the US becoming even more of a target for forum shoppers in the future than it is today.¹⁰⁵

However, the largest difficulty for proactive forum shoppers lies under Article 7(1). Article 7(1) permits a ship to be arrested in the jurisdiction where it currently is while the case proceeds on the merits in the forum stipulated by the parties. According to Article 7(1) the courts where the arrest has been effected shall have the right to settle the case on the merits unless the parties have validly agreed to settle the case in another jurisdiction or by arbitration. This means that under the Convention it is possible to arrest a ship in one jurisdiction and to get the dispute settled in another and then get the decision recognised by the arresting jurisdiction, Article 7(5). This would mean the beginning of a large-scale comity between different nations and their rulings. However, there is a possibility for the arresting nation not to enforce a decision by a court in another jurisdiction. If the arresting jurisdiction

¹⁰³ Lynn, *A comment on the New International Convention on Arrest of Ships 1999*

¹⁰⁴ Lynn, *A comment on the New International Convention on Arrest of Ships 1999*

¹⁰⁵ Lynn, *A comment on the New International Convention on Arrest of Ships 1999*

believes that the decision is against its public policy it can refuse to recognise the judgement. This shifts a lot of the power back to the arresting jurisdiction and the law of that nation.¹⁰⁶

6.5 The European Union and forum shopping

In Europe, where most countries are civil law countries, forum shopping has a different meaning than in the US. In the US it is not always the substantial law that makes it so appealing to bring a lawsuit there but the procedural rules that are much more favourable to a plaintiff. In civil law countries in general the procedural rules are not as favourable and there is no reason to shop for forum. Also the courts do not have much discretion when deciding whether to take on a case or dismiss it. This means that in Europe when talking about forum shopping it is the substantial law that you shop for and not the procedural rules.

When somebody outside the EU sues in Sweden for example you have to look at the Swedish procedural rules. As has been said before courts in civil law countries usually do not have as much discretion when deciding whether to accept a case or dismiss it. In Sweden for example the court has to apply the rules in the Swedish Code of Civil Procedure chapter 10. In England, being a common law country, the doctrine of forum non conveniens applies leaving a greater discretion to the courts when it comes to deciding if to take on a case or dismiss it. The doctrine of forum non conveniens is however discussed in relation to the Brussels Regulation and also the Arrest Convention.

The Brussels Regulation being constructed as it is opens the possibilities for forum shopping but still regulates it in a way that still makes it possible to foresee the outcome. The main rule being that you can bring actions in the defendants domicile but also the rules of bringing law suits in the place of performance give an opening to forum shopping. That the Regulation itself in this way has given the choice to the defendant means that forum shopping under these circumstances cannot be regarded as something bad. However, sometimes the plaintiffs choice can be regarded as being forum shopping of a negative kind.¹⁰⁷ The question is when and what to do about it? As the rules are constructed there is no way to deny the jurisdiction of a case because the courts find the jurisdictional rules to be stretched into what can be

¹⁰⁶ Lynn, *A comment on the New International Convention on Arrest of Ships 1999*

¹⁰⁷ Hertz, *Jurisdiction in contract and tort under the Brussels Convention*, p. 158

regarded as “bad” forum shopping. This would be to apply the doctrine of forum non convenience which has been clearly eliminated by the Regulation.

Even though forum shopping as such has been restricted under the Brussels Regulation the enforcement of judgements has become a good reason to find the best forum as the verdict will be enforced in every country within the EU no matter what the national law in the country in which the claimant wants to get the verdict enforced says.¹⁰⁸

Part IV

7 Conclusion

As has been seen above international maritime law is something very complex. Even though there is a great unification around the world which leads to the creation of conventions like the Arrest Convention there are other national and international law rules that have an impact on these conventions and sometimes diminish their value. This does that the hard work done within organisations like e.g. the IMO to make shipping transportation around the world easier does not always have the effects that was intended. Sometimes these different effects and the provisions in the conventions can be used by forum shoppers for choosing the best jurisdiction and hereby getting a jurisdiction to settle a case which would not have been possible if the different law rules on different levels had been interrelated. There are different views on whether this is good or not but everybody should be able to agree on that the goal of the creators of these conventions i.e. the unification of international maritime law has not been achieved.

In relation to the above the intention of this essay was to show the different effects that other international conventions and national law rules can have in relation to the Arrest Convention. This has been done with a European perspective looking at the Brussels Convention, which now is a regulation, and the national law rules in Sweden and the UK. What has been shown is that the national law rules and the way of implementing international rules of law have a great impact on the outcomes of different lawsuits. The intent has been to give an example on

¹⁰⁸ Juenger, *Forum Shopping, Domestic and International*

the importance to know about the different law rules that are applicable and the complexity created by different approaches and interpretations of both national and international law. However, to be able to see the consequences of these often uncertain interpretations and to give a clear illustration there was also a need to give a clear example of the different outcomes depending on in which jurisdiction you sue. As the Arrest Convention was the basis for this essay there was a need to use an example relating to this Convention giving a maritime lien and thereby a right to arrest. However, finding an example that was clear and would not need too much space in an essay of this size was hard and the main task was to give an example of the great impact a jurisdictional choice can have on the outcome of a case. The way this was best done was to make a comparison between the United States and Europe, in this case represented by Sweden and the UK. What was shown with the example chosen was that the effects especially when it comes to monetary compensation can be very different depending on in which country a case is settled and this is an incentive to shop for forum and use the uncertainties, or for that matter the sometimes very clear law rules, to choose the best jurisdiction for your case.

The conclusion that has to be drawn is that even though the intention behind the work of various international maritime organisations is to create a greater unification around the world concerning maritime rules of law this is not done with just creating international conventions and sometimes maybe the unification through these conventions is thought to be greater than it actually is in reality. There has only been a look at two countries and their relationship to other conventions and maritime conventions concerning one issue i.e. jurisdiction. Considering the many uncertainties found only when comparing these countries one can just imagine all the uncertainties there must be in all other countries that are parties to the Arrest Convention or for that matter other maritime conventions. Therefore one cannot help thinking that even though the intention of the international work is to create comity around the world sometimes one might be creating a greater confusion instead which one is not aware of. However, the international work for creating unification of maritime law rules is going to continue and one can only hope that in a not too distant future one will have created the unification and comity that is and always has been the intention in international maritime law. In the meantime lawyers have to face reality and work with these uncertainties and the confusion created and do what lawyers always do which is to try and win their cases and earn money on the ignorance of other people.

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