

ARREST OF SHIPS
IN
PRIVATE INTERNATIONAL LAW

**Analysis of English, Scots and International Law on
the Arrest of Ships from a Private International Law
Perspective**

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To my family

*'A book is not an
isolated being: it is a
relationship, an axis of
innumerable
relationships'.*

Jorge Luis Borges, 'A Note on (towards) Bernard
Shaw' in *Labyrinths: Selected Stories and Other
Writings* (New Directions Publishing New York
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Declaration

I declare that this thesis is my own work and it has not been submitted for any other degree or professional qualification.

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The arrest of ships is a truly Private International Law (PIL) institution. Its main rationale is to provide a useful device for international commerce and to compensate for the difficulty of enforcing judgments abroad. The arrest of ships is the typical provisional measure used in maritime claims; but it is as typical for maritime claims as it is atypical as a provisional measure. Arrest of ships is also a typical jurisdictional basis in the maritime sphere; but outside maritime claims it is nowadays completely atypical as a jurisdictional basis, i.e. arrest of non-maritime property to found jurisdiction is regarded as unacceptably exorbitant. Moreover, arrest of ships is a means of security, but its security-related effects are differently understood in comparative law. What is it about the arrest of ships that makes it so distinctive, particularly from a PIL perspective?

This thesis analyses the theme in English and Scots law in the light of the international Conventions in the field. It examines the three main functions of arrest of ships, i.e. its protective function, its security function and its jurisdictional function, within the three classical domains of PIL, i.e. applicable law, jurisdiction, and the recognition and enforcement of foreign judgments. It looks at the role of the *lex fori*; its impact on characterization issues; its subtleties when applied *qua lex causae*; and its so often too far-reaching scope when applied *qua lex fori*. In practice its influence is unhelpful and poses a drawback to the uniformity sought by the international community. Its downside is apparent in English law where the frame in which arrest of ships currently develops is the action *in rem*, and where the impossibility to separate the two has complicated matters in various ways. In Scots law, due to the fact that arrestment of ships pertains to the broader law of diligence, the distinction between the different functions of the arrest of ships is clearer. Furthermore, recent law reform has brought the arrestment of ships in Scotland into line with the latest international trends in the sphere of provisional and protective measures.

Central to this thesis is the jurisdictional function of arrest of ships. *Forum arresti*, the paradigmatic forum selection criterion in English and Scots law, has survived as a specific jurisdictional basis for maritime claims in the process of Europeanization of PIL. This thesis establishes that *forum arresti* in the case of arrest of ships is a cooperative forum. It advances the dynamic objective of PIL, i.e. the juridical continuity of legal relations across national borders. In this context, the conceptual distinction between jurisdiction on the merits and jurisdiction for the sole purpose of interim relief becomes paramount.

Ultimately, the whole analysis shows that the combination of civilian legacy, common law creativity and international attempts for uniformity has profoundly affected the nature of arrest of ships; not only in England and in Scotland, but, through their influence on international Conventions, in the entire shipping world.

Abbreviations

CIDIP	Inter-American Specialized Conference on Private International Law
CMI	Comité Maritime International
DeCITA	Derecho del Comercio Internacional, Temas y Actualidades (Argentina)
HccH	Hague Conference on Private International Law
ILA	International Law Association
IMO	International Maritime Organization
OAS	Organization of American States
RdC	Recueil des Cours, Collected Courses of the Hague Academy of International Law
RTSS	Revista de Transporte y Seguros (Uruguay)
SLC	Scottish Law Commission
SME	The Laws of Scotland, Stair Memorial Encyclopaedia

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CHAPTER ONE

Introduction

1.1. INTRODUCTION

The topic of this thesis belongs to the more general and interesting field of enforcement of maritime claims.¹ In maritime litigation conflict of laws and conflict of jurisdictions are more likely to arise than not. Ships trade worldwide² and they are often owned by one-ship companies;³ they spend their economic life moving between different jurisdictions often far from their country of registry; and their commercial management places peculiar problems for those faced with an unpaid debt incurred in the course of shipping. Since its earliest developments the law has been trying to provide a facilitative framework for all those involved in shipping to do prosperous business. Upon this background, the arrest of ships, inherently connected with jurisdiction and security, has played a key role since ancient times.⁴ It is the speed with which the defendant's main asset could leave the jurisdiction that arrest of ships has been always trying to counteract. Hence, the possibility to arrest a ship in an appropriate jurisdiction is of paramount importance to the international shipping and trading community, and to their legal advisors.

¹ For a treatise on the topic in English law see the authoritative work of D C Jackson, *Enforcement of Maritime Claims* (LLP London 1985; 2nd edn 1996; 3rd edn 2000; 4th edn 2005). Jackson refers to the tripartite nature of maritime claims, i.e. the interim or provisional remedy aspect, the jurisdictional aspect, and the security aspect. Arrest of ships is inextricably intermingled in these three facets of maritime litigation.

² Shipping is probably the most international of the world's industries. More than 90 per cent of global trade is currently carried by sea (see IMO, 'International Shipping-Carrier of World Trade' World Maritime Day 2005 Doc. IMO J/9015 available at www.imo.org/includes/blastData.asp?doc_id=5261 last accessed 15 September 2007) (IMO J/9015.doc).

³ Very often a shipping company sets up a separate subsidiary company to own each ship.

⁴ In the opinion of Jackson arrest became connected to jurisdiction and security through the concept of lien, enforceable under a particular kind of action (action *in rem*), since that kind of action carried with it a provisional remedy (arrest) (D C Jackson (2005) 2).

The historical evolution of maritime law has always had the ideal of harmonization at its very centre. The inherent internationalism of the maritime adventure has fostered the trend towards uniform law at the international sphere and this tendency has been increasing since the early twentieth century. Arrest of ships as a typical admiralty institution is not alien to that process.

In this field international Conventions coexist with national law and regional law, together with the ever growing significance of the *lex mercatoria*. The application of such different sources of law is cumbersome and Private International Law (PIL) comes into play to offer different theoretical and methodological options to the conflict of laws and to the conflict of jurisdictions aiming ultimately at the juridical continuity of legal relations across national borders.

1.1.1. The Selected Field of Research

Arrest of ships is a very powerful interim measure of protection in maritime litigation worldwide. It is so potent not only due to the eventuality of the judicial sale of the ship if the arrest is not released, but because in the commercial shipping industry the mere threat of a ship being paralysed due to its arrest is significant: the arrest could generate immense losses for all those involved in the business.⁵ Thus, a claimant who has the possibility to arrest because of the nature of his claim has strong bargaining power. Therefore, one of the *sine qua non* considerations in maritime litigation is where to arrest a ship of the defendant; once arrested the *res* will be detained until the defendant gives security to the claimant for his claim. On that basis, it has been argued that arrest is not itself the security but it is the best

⁵ In fact, judicial sale may be made prior to judgment on the merits where the security of the arrester is reducing in value through the continuation of arrest; see *The Myrto* [1977] 2 Lloyd's Rep 243 (QBD (Admlty)) 259-260; *The Emre II* [1989] 2 Lloyd's Rep 182 (QBD (Admlty)).

mechanism of obtaining alternative security;⁶ it has been said that the most salient feature of arrest is its being provisional.⁷ Looking at maritime law practice indeed it is.

Failing this initial stage, legal systems usually provide for the judicial sale of the ship. The claimant who has arrested will be in most cases treated as a secured creditor in the distribution of the sale proceeds. This, however, means that arrest implies a certain kind of security by itself in most legal systems, even in the absence of any other alternative security given. This varies significantly from one legal system to another and even within one legal system between the different kinds of arrest of ships available therein. In practice judicial sale is not the most often outcome round arrest. Ship-owners or charterers, or actually their insurers (P & I Clubs), do in most cases give security to the claimant to prevent arrest or to release the ship from arrest.

The arrest of ships is available in most legal systems but is differently approached and exercised in each country. The common features are its provisional character; its security function; its relation with jurisdiction and its inherently protective nature. These features and functions have developed so intermingled, that it is difficult to draw lines and establish clear-cut categories for the sake of legal certainty. Therefore, aware of that, and inspired by the remark of JACKSON in *Enforcement of Maritime Claims* that '*the desirable framework calls for connection with but*

⁶ Admiralty arrests are not so frequent in England. Undertakings in individual suits brought upon causes of action *in rem* are the usual practice since the 1960s (K C McGuffie, P A Fugeman, P V Gray, *Admiralty Practice* (Stevens London 1964) 104 [243]) and this is reflected in the issue of warrants for arrest that, already then, numbered less than twenty per cent of the quantity of writs *in rem* issued (F L Wiswall, *The development of Admiralty jurisdiction and practice since 1800: An English study with American comparisons* (CUP Cambridge 1970) 187). However, it is important to point out that the importance of arrest of ships is not necessarily measurable by the number of arrests effectively granted but by the powerfulness of the availability of such a measure; the arrest of ships has been regarded as '*the most effective provisional remedy*' in maritime litigation (D C Jackson (2005) 3).

⁷ R Herbert and C Fresnedo de Aguirre, 'El Arresto de Buques y el Principio de Jurisdicción más Próxima' [1993] *Revista de Transporte y Seguros* (RTSS) 158.

distinction between the concepts and functions of arrest, jurisdiction and liens',⁸ one dips ones toes into the water.

1.1.2. Problems and Theses

1.1.2.1. The arrest of ships is the typical provisional measure used (or threatened to be used) in maritime claims but it is as typical for maritime claims as it is atypical as a provisional measure. Its oddity does not only relate to its features as an interim measure of protection but affects most of its salient roles. Arrest of ships is also a typical jurisdictional basis in the maritime sphere; but outside maritime claims it is nowadays completely atypical as a jurisdictional basis, i.e. arrest of non-maritime property to found jurisdiction is regarded as unacceptably exorbitant. Finally, arrest of ships is a means of security, but the effects of its security function are left to the *lex fori arresti* whereas the security-related effects in the adjacent field of maritime liens present applicable law problems that do not have a definite answer yet. The resulting situation has been described as chaotic.⁹ What is it about

⁸ D C Jackson (2005) 395. Jackson has explained the more profound problem in English law in the following terms '*...the strands of the process remain confused. The time has surely come for a determined attempt to separate what are quite distinct matters of policy. Failure to do so has played its part in ratification of at least one international Convention (the Convention Relating to the Arrest of Sea Going Ships 1952) without compliance domestically with its provisions, a surprising inability to adapt fully the availability of the most effective provisional remedy (arrest) to arbitration, in uncertainty as to the security aspects of actions available to maritime claimants and priority as between maritime claims*' (D C Jackson (2005) 3). Jackson shows chronologically how English law has missed several opportunities to bring Admiralty jurisdiction in line with the international Arrest Convention (D C Jackson (2005) 5-7). In his opinion, in the significant latest developments of civil procedure in English law '*nothing has changed in relation to the various fundamental and confused aspects of the approach to enforcement of maritime claims in English law*' (*ibid* 7). He argues that the 1999 Arrest Convention (not yet in force) represents a further opportunity for a comprehensive framework change.

⁹ *Bankers Trust International v Todd Shipyards Corp (The Halcyon Isle)* [1980] 2 Lloyd's Rep 325 (PC) 339. The dissenting opinion (Lord Salmon and Lord Scarman) held that PIL had an important role to play in '*the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages*' (339). Note the step forward in the international sphere achieved by the entry into force of the The International Convention on Maritime

the arrest of ships that makes it so distinctive, particularly from a PIL perspective? This thesis seeks to show that it is the combination of a civilian legacy, common law creativity and international attempts for uniformity that has profoundly affected the nature of arrest of ships not only in England and in Scotland, but through their influence on the international Conventions, in the entire shipping world. The modern institution of arrest of ships as recognised today by the international community is the result of the migration of legal ideas, institutions, concepts and structures; the upshot of a chain of amalgamations over the centuries. In traditional English law, it is an institution generated from the efforts of the common lawyers to build upon the practices of a civil law court, the High Court of Admiralty. In traditional Scots law, it is the result of the mixture between original Scots law and Scotland's inheritance from the European systems, particularly that of the Netherlands, and to a lesser extent, France. Internationally, features of the arrest of ships are a compromise between common law and civil law conceptions and, in turn, it is this mixture that makes it unique as a provisional measure.

1.1.2.2. Despite the fact that the legal institution has been the object of substantive harmonization there are characterization¹⁰ problems that derive from, and result in,¹¹ different interpretations of the international Arrest Conventions in the State parties.¹² Bearing in mind that there is no international tribunal capable of

Liens and Mortgages 1993 (Geneva, May 6, 1993) in force since September 5, 2004. States party as at 1 April 2007: Ecuador, Estonia, Monaco, Nigeria, Peru, Russian Federation, Saint Vincent and the Grenadines, Spain, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu (UN Treaty website, <http://untreaty.un.org>, last accessed September 3, 2007).

¹⁰ As to the English understanding of characterisation as a PIL technique see *Macmilland Inc v Bishopsgate Investment Trust (No 3)* [1996] 1 WLR 387 (CA) 407 (Auld LJ) 'characterisation...is governed by the *lex fori*. But characterisation or classification of what?...[T]he proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori*, the true issue or issues thrown up by the claim and defence. This requires a parallel classification of the rule of law'. Cf. *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68, [2001] 1 Lloyd's Rep 597 (CA) (Mance LJ) [26-27].

¹¹ Characterization as a process is two-sided.

¹² For several examples of such characterization problems and the lack of uniformity in the application of the 1952 Arrest Convention in the State parties see F Berlingieri, *Berlingieri on Arrest of Ships* (London LLP 2006).

establishing the most authoritative autonomous interpretation to those provisions, this generates lack of legal certainty. This thesis seeks to show that these problems are mainly created by the disruptive impact of the *lex fori arresti* via the so-called *lex fori* characterization. In practice its influence is unhelpful and poses problems for attaining uniformity in the application of the international Convention currently in force. This impact is apparent in English law where the framework in which arrest of ships currently develops is the action *in rem*; the impossibility of casting aside the two concepts has complicated matters in various ways. In Scots law, due to the fact that arrestment of ships pertains to a broader area of law, that of diligence, the action *in rem* plays a more limited role.

1.1.2.3. Traditionally, English and Scots law have considered the applicable law issues connected with the security function of the arrest of ships as governed by the *lex fori*. Against this background, it is here submitted that the far-reaching concept of 'procedure' in English law as to cover the existence of maritime liens should be seen as a thing of the past. The modern doctrinal approach is consistent in asserting that the characterization of certain aspect of a claim as 'procedural' should be restricted to matters directly related to the conduction of court proceedings. Matters that affect the existence, scope and enforceability of the rights themselves, are inherently substantive, therefore, should be left to the *lex causae*.¹³ Moreover, it is here submitted that it is inconvenient to refer the connected issues of existence and ranking of maritime liens to different laws; it could lead to incoherencies that would not advance the policies underlying neither the *lex causae* nor the *lex fori*. This thesis seeks to show that time is ripe for the re-examination of PIL rules in this sphere, both in English and in Scots law. The ultimate aim of PIL is the juridical continuity of legal relations across national borders, and in that sense there are no arguments in favour of the *lex fori arresti* in this regard.

¹³ D C Jackson (2005) 681-682.

1.1.2.4. Finally, the jurisdictional function of arrest of ships (*forum arresti*) which is paradigmatic in English and Scots law, has consolidated into a forum selection criterion specific to maritime claims in the international sphere. The triumph of the *forum arresti* in the international context has mainly historical and practical foundations rather than theoretical ones. This thesis seeks to establish also from a more abstract consideration that *forum arresti* in the case of arrest of ships is a cooperative forum. In this context, the conceptual distinction between, on the one hand, jurisdiction on the merits and, on the other hand, jurisdiction for the sole purpose of interim relief, becomes paramount, since it is in the general framework of judicial cooperation where the arrest of ships is meant to develop an important role as a provisional and protective measure in the international sphere.

1.1.3. The Selected Scope of Research

The delimitation of the scope of this thesis is very much defined by the international Arrest Conventions regulation of the matter at hand. This lead to major boundaries in the examination *inter alia* of the following matters (i) arrest of ships in execution of a judgment is outside the scope of it;¹⁴ (ii) only privately owned ships will be included, leaving state owned and war ships out of the discussion; (iii) the various issues in relation to arrest of ships in the sphere of maritime arbitration is also left aside and (iv) arrest of cargo will not be dealt with.¹⁵

¹⁴ The rationale of this exclusion may be open to criticism. The justification for leaving arrest in execution aside is that it is completely reserved to national law and international Conventions have not had a say on it so far. The idea of harmonising the law of arrest has since its beginnings in the 1930s in the *Comité Maritime International* (CMI) mores been related to the arrest as a provisional measure (*saisie conservatoire*). Furthermore, it does not present the PIL concerns analysed in this thesis.

¹⁵ Arrest of cargo is part of the law of admiralty arrest/arrestment in English and Scots law and has received special treatment as far as its jurisdictional function in the European jurisdictional scheme. The Brussels and Lugano Conventions and currently Council Regulation (EC) 44/2001 provide for arrest of cargo in article 5.7. in relation to

In terms of the legal systems examined the study of the international Arrest Conventions is to be expected due to the very nature of the topic.¹⁶ In contrast, the selection of English and Scots law is based on several considerations. First of all, the thesis intends to highlight the differences within Great Britain;¹⁷ such differences have been sometimes neglected¹⁸ due to the fact that treaty-making powers rests with the Crown. The United Kingdom is a signatory to the 1952 Arrest Convention

salvage. The reference in the European regime is indeed a consequence of the lack of treatment of arrest of cargo by the 1952 Arrest Convention. Due to that gap, article 57 of the Conventions [article 71 of the Regulation] could not provide for a special jurisdictional basis in those circumstances, hence, article 5.7. was introduced to fill that gap (J J Alvarez Rubio, *Derecho Marítimo y Derecho Internacional Privado, Problemas básicos* (Servicio Central de Publicaciones del Gobierno Vasco Vitoria-Gasteiz 2000) 123). The aim of such inclusion was to adapt the benefits of *forum arresti* to the case of arrest of cargo as it is in respect of the arrest of the ship. From an economic analysis the possibility is essential in the case of total loss of the ship where cargo was secured via salvage operations. From a PIL perspective this provision constitutes an exemption expressed in the European regime itself (as opposed to in a special Convention, like in the case of arrest of ships) to the general detachment between ancillary jurisdiction (for the sole purpose of interim relief) and jurisdiction on the merits. Another interesting point in this area is that, differently from the case of arrest of ships according to its current international regulation, in the case of arrest of cargo in connection with salvage, effectual arrestment is not indispensable and the jurisdictional function is displayed even if arrest was prevented through the provision of a guarantee (art 5.7 (b) Council Regulation (EC) 44/2001); this is indeed commercially sound. The scope of the provision has generated doubts in relation to whom this special jurisdictional basis could be used against; see G Brice, 'Maritime Claims: The European Judgments Convention' [1987] LMCLQ 281, 296-297.

¹⁶ There are other international instruments that deal with arrest of ships in the international sphere. The most important one in the United Kingdom apart from the Arrest Convention is the Collision (Civil Jurisdiction) Convention 1952 (Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952). This Convention has been enacted into English and Scots law through the Administration of Justice Act 1956; now replaced in English law by the Supreme Court Act 1981. The Collision Convention is concerned with jurisdiction based on arrest; it does not rule on arrest as a provisional measure, hence, is relevant only for the study provided in Chapter 6 (Arrest of Ships and Jurisdiction on the Merits) of this thesis.

¹⁷ This selection would have been probably criticised by T B Smith who considered the 'use of the other British [English] system alone of the purpose of comparison' as 'pseudo-comparative methods'; see T B Smith, *British Justice: The Scottish Contribution* (Stevens London 1961) 3, 156, 225.

¹⁸ W Tetley has addressed the theme in 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 *Tulane Law Review* 1895, but he fails to distinguish between English and Scots law. Unfortunately the whole of Tetley's scholarly work on the field, not only in that article but in his several books on maritime litigation, encounter the same omission. The same happens with the work of J J Alvarez Rubio (2000).

which was enacted in the United Kingdom by the Administration of Justice Act 1956. Due to that statutory enactment it has wrongly been assumed by some commentators that the United Kingdom has a unique system of arrest of ships in its territory. In fact the situation is quite the opposite; aware of the very different approach to arrest of ships in Scotland as compared with England the amendments made to Scots law were introduced in a separate self-contained section of the Act.¹⁹ Moreover, it has been argued that the wording used in the provisions applicable to Scotland is much closer to that of the 1952 Arrest Convention than those which apply to England.²⁰

As a very oversimplified outline the differences can be overviewed as follows. First, ship arrestment in Scotland forms part of a general theory of arrestment derived from the Scottish inheritance from the European systems; the right to arrest moveable property or debts belonging to the defender has been part of the Scottish legal system for several hundred years.²¹ In England arrest does not exist outside admiralty jurisdiction and there is no general theory of arrest: arrest in civil and commercial litigation is necessarily ship arrest. Secondly, in Scotland arrestment of a ship is available on the dependence of an action *in personam* and this possibility is not available in England. Thirdly, there is a very peculiar kind of arrestment in Scotland that is not available in England: arrestment *jurisdictionis fundandae causa* or arrestment *ad fundandam jurisdictionem*. The mere presence of the ship (or any other moveable asset of the defender) in Scotland is sufficient under traditional Scots law of procedure to give the Scottish courts general jurisdiction

¹⁹ Administration of Justice Act 1956 Ch 46 Pt V (Admiralty Jurisdiction and Arrestment of Ships in Scotland) arts 47-51/57.

²⁰ I G Inglis, 'Arrest of Ships in Scotland' in C Hill (ed), *The Arrest of Ships Series* (vol 4 LLP London 1987) 83; *Owners of Cargo Lately Laden on Board the MV Erkowit v Owners of the Eschersheim (The Eschersheim, the Jade and the Erkowit)* [1976] 2 Lloyd's Rep 1 (HL) (Lord Diplock).

²¹ I G Inglis (1987) 75.

over the defender.²² General jurisdiction based on arrestment is no longer available within the European Union by virtue of the Civil Jurisdiction and Judgments Act 1982 and the Brussels I Regulation (44/2001). However, such jurisdictional basis is still available in cases involving extra-community parties. It has been argued that the limitations of the 1952 Arrest Convention do not affect this peculiar arrestment *ad fundandam jurisdictionem* since this kind of measure does not establish a right in security over the ship and, more surprisingly, does not even prevent the ship from sailing.

Finally, bearing in mind that the Scottish system was taken into consideration to bridge the differences between English law and continental law in the process leading to the 1952 Arrest Convention and foremost, that the Scottish dual formula of *forum arresti-forum non conveniens* has been adopted in the 1999 Arrest Convention, its analysis should be enlightening to the face of the more general process of Europeanization of PIL.

1.1.4. Literature Review

Surprisingly, arrest of ships has not attracted much academic attention. Being historically and presently an important device in maritime litigation, it has not convoked much discussion in English or Scottish legal literature.²³ Arrest is studied in every shipping law textbook and in all the main admiralty law books, but monographic studies devoted to its analysis are rare. An important opera is a collective work dedicated to ship arrest compounded in seven volumes²⁴ compiling

²² Rule 2 (8) of Schedule 8 to the 1982 Civil Jurisdiction and Judgments Act. The European regime has expressly banned this ground of jurisdiction.

²³ The Scottish Law Commission Report on *Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com Report No 164 (1998)) takes account of such 'scant attention' [1.9].

²⁴ See C J S Hill (ed), *The Arrest of Ships Series* (LLP London 1985-1988) with great practical usefulness, outlining the institution in several jurisdictions such as England and

brief descriptions of the law of arrest of ships in several jurisdictions, where England and Scotland are treated separately. Even though some of these descriptions are practitioner-orientated, the whole work is informative. Internationally, the most well known work on the field is the one of BERLINGIERI²⁵, and is fundamentally concerned with the international Conventions on the topic. TETLEY²⁶ has addressed the topic of arrest of ships with a comparative perspective and his work is clearly of value but he does not distinguish between English and Scots law. From the PIL point of view, the literature is even more scant. General PIL operas usually consider that admiralty causes contain so many specialities that are best left aside.²⁷

1.1.5. Methods, Aims and Presentation of the Research

Inasmuch as the research theme has an international character there is direct incentive to a comparative law approach. The core element of comparative law as a research method is that of functionality. Institutions are comparable if they are

Wales, the Federal Republic of Germany, Japan and The United States (vol 1, 1985); Belgium, The Netherlands, India and Yugoslavia (vol 2, 1986); Malta, Panama, Sweden, United Arab Emirates (vol 3, 1987); People's Republic of China, Nigeria, Oman, Scotland (vol 4, 1987); Bangladesh, Finland, Saudi Arabia, South Africa (vol 5, 1987); Denmark, Greece, Hong Kong, Kuwait, Qatar (vol 6, 1987); Cyprus, Egypt, Pakistan, Poland (vol 7, 1988). On the same line see A D Mc Ardle (ed), *International Ship Arrest: A Practical Guide* (LLP London 1988).

²⁵ F Berlingieri, *Berlingieri on Arrest of Ships* (LLP London 1992; 2nd edn 1996; 3rd edn 2000; 4th edn 2006).

²⁶ W Tetley (1999).

²⁷ For example, A E Anton and P R Beaumont, *Private International Law* (2nd edn Green Edinburgh 1990) 193. Nonetheless, in Spanish law the analysis of arrest of ships from a PIL perspective in J J Alvarez Rubio (2000) is noteworthy; as it is the analysis of Aguirre Ramirez, Herbert and Fresnedo de Aguirre in relation to this topic in Uruguayan law; see R Herbert and C Fresnedo de Aguirre (1993); C Fresnedo de Aguirre, 'Embargo de Buques como Medida Cautelar en el Derecho Internacional Privado Uruguayo' (1997) 14 *Anuario de Derecho Marítimo* 385; F Aguirre Ramirez, 'Embargo y Arresto de Buques en Uruguay' (2005) *Revista de Transporte y Seguros* 275.

functionally equivalent, if they fulfil similar functions in different legal systems.²⁸ That is the case with arrest/arrestment of ships in England and in Scotland.

This study does not focus on domestic law. It is a study of the PIL effects of arrest of ships. The real challenge is not from a comparative perspective, i.e. to contrast the main features in each legal system; but from a PIL perspective, i.e. to examine issues of characterization, applicable law, jurisdiction and recognition and enforcement of foreign judgments in relation to the arrest of ships.

The research results are presented in two parts. The first part analysis aims to contribute to the characterization of arrest of ships as a provisional measure, addressing the issue in different spheres, i.e. in transnational, international and national law. The second part is divided into three chapters, and each chapter presents a specific function of arrest of ships in relation to a specific question germane to PIL.

1.2. THE ARREST OF SHIPS

This study starts from the assumption that the arrest of ships can be said to be a truly PIL institution. Its main rationale is to provide a useful device for international commerce and to compensate for the difficulty of enforcing judgments abroad. Against the foreign defendant, the most common one in maritime litigation, the ship is in most cases the sole asset that eventually the claimant is able to secure for the purposes of enforcing his claim. The international community has taken this view since the 1930s; that is why harmonisation efforts have been put forward in this sphere, and international Conventions have been agreed and are in force in most of the shipping countries. Nonetheless, the success of the 1952 Arrest Convention, despite more than 80 ratifications, is debatable. It is certainly difficult to

²⁸ R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP Oxford 2006) 339.

reconcile the territorial limits of mindsets and the free flow of cross-border transactions. More importantly, policy considerations sometimes outweigh technical ones. However, this research has been conducted in the hope that the mindsets of different legal systems are becoming increasingly harmonised in the procedural mores²⁹ and this may bring in further harmonisation in the field.

The arrest of ships as an institution used in civil and commercial matters does not have an exact equivalent in every legal system; nonetheless most countries provide for the arrest of ships.³⁰ In England it is known as ship arrest and in Scotland as ship arrestment. Neither of those institutions is identical to the French *saisie conservatoire* or the Spanish *embargo preventivo* or the Italian *sequestro preventivo* and certainly differs as well from the ancient English *maritime attachment* and the current North American *preliminary attachment* with regard to ships.

Undoubtedly the differences are not only linguistically relevant but connected to the difference of approach used in the different legal systems for the same or similar purposes. A brief description of the different institutions could

²⁹ J A Jolowicz, 'On the Comparison of Procedures' in J A R Nafziger and S C Symeonides (eds), *Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren* (Transnational Publishers 2002) 721, 740; Kerameus, K 'International Procedural Harmonization and Autonomous Interpretation' in K Siehr and T Einhorn (eds), *International Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (T M C Asser Press The Hague 2004) and 'Procedural Approximation and Legal Pluralism in the European Union' in T Andersson (ed) *Parallel and Conflicting Enforcement of Law* (Nijhoff Leiden 2005).

³⁰ For the latest developments in Europe see: P Wetterstein, 'Arrest of vessels in Finland' (2000) 7 (6) *International Maritime Law* 183; P Perivolaris, 'Arresting ships the Greek way' (2001) 14 *Maritime Advocate* 34; T Eilertsen, 'Arrested development' (Norway) (2003) 23 *Maritime Advocate* 19; E Sinivali and M Greinoman, 'When not to arrest' (Estonia) (2003) 24 *Maritime Advocate* 25; G Vilgerts, 'Out with the old' (Latvia) (2003) 24 *Maritime Advocate* 21; F Askvig, 'Keep it simple' (The Netherlands) (2004) 27 *Maritime Advocate* 15; A von Bohm-Amolly, 'Ship arrest in Portugal' (2005) 29 *Maritime Advocate* 30; L Lewis, 'Arrest in France' (2005) 29 *Maritime Advocate* 26; A Nitsevych, 'Shipping in Ukraine' (2005) 19 (1) *MRI* 19; V Looks, 'New aspects regarding the arrest of foreign sea-going vessels according to German law' (2006) 12 (6) *Journal of International Maritime Law (JIML)* 420; C Van Aerde, 'The Belgian method' (2006) 20 (11) *MRI* 12; H Noble, 'Arrest of ships in Ireland' (2007) 13 (1) *JIML* 56. Most of these short articles are practitioner-orientated but they provide a glimpse on the different approaches to the arrest of ships in comparative law.

contribute to present the general spectrum. The United States preliminary attachment³¹ permits a claimant having an *in personam* claim in admiralty to attach property of the defendant (whether movable or immovable) within the district, when the defendant cannot be found in the district, the attachment thus serving as well as a jurisdictional basis founding jurisdiction where there is otherwise no *in personam* jurisdiction over the defendant.³² Due to its civilian origins, this institution, which comes from the ancient maritime attachment originated in England, resembles the *saisie conservatoire* of civil law systems such as the French. The later – literally translatable as conservatory attachment- gives the claimant ‘physical’ security before judgment. In the case of ships the measure prohibits the ship from leaving port but does not otherwise affect the rights of the owner.³³ In that sense it has similar effects to the recently created English freezing order but differs from the Spanish *embargo preventivo*. The protective *embargo* restrains the defendant from selling the ship and sets up a privilege in the eventual posterior judicial sale of the ship ranking after mortgages but before posterior *embargoes* and unsecured creditors. All in all, what these measures have in common is their provisional nature and protective character, which have been the most salient features of arrest since its very beginnings.³⁴ And they do differ in their ‘security’ function and in their relation with jurisdiction. ‘Arrest of ships’ is the preferred expression by the international community. Internationally, arrest has been defined as ‘any detention or restriction on

³¹ The legal systems of the United States and Canada do have similarities and dissimilarities with English and Scots law (arguably as developments of both). However, due to the limitation in terms of the scope of this PhD thesis, the examination of these other legal systems in the field had to be eliminated *ab initio*. Nonetheless, some references to them are included in Chapter 5 with regard to the law applicable to maritime liens. Notwithstanding the foregoing, the outstanding work of W Tetley in those legal systems on the theme of this thesis is noteworthy.

³² W Tetley (1999) 1934.

³³ Decree No 67-967 of October 27, 1967; R Rodière and E Du Pontavice, *Droit Maritime* (12th edn Dalloz Paris 1997) 178.

³⁴ P Miranda, *História e Prática do Arresto ou Embargo* (Saraiva Sao Paulo 1929 reprint Bookseller Campinas 1999).

removal of a ship by order of a Court to secure a maritime claim' and 'does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument'.³⁵

1.2.1. The Provisional and Protective Character of Arrest of Ships

The provisional and protective character of arrest of ships is related to its temporary condition and to its intrinsic feature as supportive of the case on the merits in a particular way, ensuring that the final award or judgment can be enforced by safeguarding a particular asset of the defendant.³⁶ This is recognised without reservations in most legal systems.³⁷

³⁵ International Convention on Arrest of Ships 1999 art 1(2).

³⁶ See the distinction amongst provisional and protective measures according to its purpose in C A McLachlan, Second Interim Report on 'Provisional and Protective Measures in International Litigation', Report of the Sixty-Seventh Conference, Helsinki (ILA London 1996) 185, 202. The ILA in its Helsinki Resolution identified two objectives as central to provisional and protective measures: a) to seize goods which can meet the demands of an order in the final judgment; and b) to preserve the *status quo* until the merits of the case are settled. Hence, within this broad category of provisional and protective measures a distinction must be made between measures such as preliminary attachment, arrest/arrestment, and freezing injunctions, on the one side, and provisional measures relating directly to the subject-matter of the case on the other side. This second kind of measures, generally tending towards the preservation of the *status quo* until the merits of the case are settled, intrinsically form the heart of the case. In Scots law, arrest of ships in the case of claims under s 47(2) (p) to (s) of the Administration of Justice Act 1956 could come into this second type.

³⁷ For example, in Spain arrest of ships has been acknowledged as having as its characteristics features, being accessory, provisional and supportive to the case on the merits (J J Alvarez Rubio (2000) 92). In the United States it has been understood that 'arrest' in the 1952 Arrest Convention is used in the sense of 'attachment', with the purpose of compelling the appearance of the owner in an action *in personam* and to cause him to furnish security as a condition for release of the ship, pending determination of the merits of the case; thus, in this opinion arrest in the Convention is not synonymous with commencement of an *in rem* proceeding; rather arrest is analogous to the provisional remedy of attachment (in US legal parlance) (J M Kriz 'Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952. Part Two' (1964) 1 Duke Law Journal 70, 80).

The universally recognised requirements of this kind of provisional measures are the need to prove the *fumus boni iuris* and the *periculum in mora*; therefore the main criteria for granting them are reasonableness and proportionality (following that, the lack of such conditions results generally in liability for wrongful arrest); and consequently, courts are usually empowered with the discretion to order the claimant to provide a cross-undertaking in damages. However, in English law, in the case of arrest of ships it is not necessary for the claimant to prove the *fumus boni iuris* or the *periculum in mora*, or to give any undertaking in damages.

As a consequence of the influence of English law the 1952 and 1999 Arrest Conventions, which aim to provide a uniform international legal framework in this sphere, do not require such conditions either. Their irrelevancy under the Conventions and under English law jeopardises its characterization as a provisional measure and undermines uniformity of application, which is the ultimate goal of the Conventions.

The characterization of arrest of ships as a provisional and protective measure presents a problem in the case of arrest of ships to enforce maritime liens. In such cases arrest forms part of the enforcement procedure of a tacit right in security; it is not accessory or supportive to the case on the merits; it is indeed an essential element of the case on the merits. The intricacies of the relation between arrest of ships and action *in rem*, in the particular case of the enforcement of maritime liens, in English and in Scots law, is analysed through out this thesis.

1.2.2. Different Functions of Arrest of Ships

1.2.2.1. The Security Function

The nature and extent of this function is differently understood in the diverse world of legal systems. It has been argued that the security function of arrest is indeed its most relevant one. On this token the argument is that the ultimate

rationale of arrest of ships is to give the creditor the chance to create a right in security over the ship, and in turn that possibility puts pressure on the debtor in order to comply with the eventual judgment; that is actually what makes it so effective.³⁸

Internationally, the security function of arrest as such (independently from maritime liens) does not have a uniform framework. The issue is not clearly framed in English³⁹ or Scots law and this carries the uncertainty of the effect of arrest of ships on third party proprietary interests. To make matters even more obscure the 1952 Arrest Convention has received the following title in its Spanish version: '*Convenio sobre unificación de ciertas reglas relativas al embargo preventivo de buques*', even though arrest and *embargo* are not interchangeable concepts. An *embargo* is a civilian concept meaning in general terms a prohibition to sell. It is an interim measure of protection that by itself guarantees the result of a pending or imminent proceeding. It provides the *embargo*-holder a priority against future *embargoes* and any other future rights (*in rem* or *in personam*) constituted on the ship. Usually it needs to be registered in order to be enforceable. In most legal systems to grant an *embargo*, the ship must have been arrested first; nevertheless, sometimes it is possible to register such encumbrance without the ship's prohibition to sail.⁴⁰ *Embargo* does in fact imply the security function of arrest.

1.2.2.2. The Jurisdictional Function

Arrest and jurisdiction are indissolubly linked but not necessarily in the same way in the different legal systems. In the opinion of some legal historians

³⁸ J J Alvarez Rubio (2000) 102.

³⁹ 'Arrest in English law, when used, is simply an early step ensuring physical retention of an asset in that process. In relation to arrest as such the only relevant issue [in the context of arrest as security] is the extent to which an arrest may be void or stayed as an interference with the bankruptcy and liquidation framework' (D C Jackson (2005) 404).

⁴⁰ For example, the so-called 'ship-register arrest' in Danish law.

arrest of ships derives from the *processus contra contumacem*, a process of arrest of property to compel appearance in court of the defendant, developed in medieval Europe and broadly recognised in England by the sixteenth century.⁴¹ It was included into the *Blacke Booke of the Admiralty*⁴² as the *Ordo Judiciorum*⁴³. The main aim of the procedure was to provide for a solution against the defendant's refusal to appear before the court to contest the suit brought against him. As TETLEY explains, in England, the person and/or the property of the defendant in the jurisdiction of the Admiral could be arrested for such purposes. In the *Ordo Judiciorum* there could be no question of contumacy until the defendant had received the citation. However, by the time of Henry VIII, the arrest of the defendant's property was done concurrently with the citation of the defendant. It has been stressed that the practical reason which justified such alteration of the 'due process' was the speed with which the defendant's main asset, the ship, could leave the jurisdiction,⁴⁴ thus, adding the protective function to the arrest of ships. Furthermore, the possibility of arresting any goods of the defendant in the jurisdiction was a particularly useful remedy to secure the claim where the defendant himself was out of the jurisdiction (as frequently happened and still happens in maritime litigation).

In modern times, the 'compelling' effect is related to arrest of ships as a measure aimed at forcing the debtor to submit to the jurisdiction and to abide by the judgment. This 'compelling' effect is not to be understood as to bring undue pressure on the defendant to settle; however the borderline is always thin.⁴⁵

The strongest link between arrest and jurisdiction is *forum arresti* and the possibility to found jurisdiction on the merits upon arrest. *Forum arresti* was

⁴¹ W Tetley (1999) 1900-1901.

⁴² T Twiss (ed), *Black Book of the Admiralty* (2nd Reprint The Lawbook Exchange Ltd New Jersey 1999).

⁴³ W Tetley (1999) 1900-1901.

⁴⁴ *Ibid.*

⁴⁵ As a practitioner one should attest that provisional and protective measures in general, and the arrest of ships in particular, can be sometimes a lethal tactical weapon that frequently induces an early settlement.

originally a jurisdictional basis known only to a very small number of States - England and Scotland were among them-. Currently, it has been sustained that *forum arresti* constitutes a general trend in international procedural maritime law and that it is justified in terms of convenience, derived from the essentially moveable nature of the ship.⁴⁶ Consequently, it should be accepted together with the Scottish doctrine of *forum conveniens/non conveniens* to advance justice. There are legal systems that criticise severely this jurisdictional basis, such as the French, since French law does not provide for *forum arresti* as a consequence of a *saisie conservatoire* performed in a French port. Nevertheless, the jurisdictional function has survived and it has been adopted by the international Conventions on the field.

1.2.2. Economic Analysis of Arrest of Ships

1.2.2.3. The Protective Function

The protective function of arrest of ships is its most obvious one,⁴⁷ so, it is possible to refer to arrest as a provisional and protective measure, or as an interim measure of protection, even though it is provisional in character and the protective function is only one of its functions.⁴⁸ The arrest of a ship places the *res* under judicial detention pending adjudication of the claim. This character is shared by

⁴⁶ R Herbert and C Fresnedo de Aguirre (1993) 167.

⁴⁷ D C Jackson (2005) 393.

⁴⁸ This is also influenced by European legal literature on the general subject-matter. See for example, L Collins, *Provisional and Protective Measures in International Litigation* (1992) 234 *Recueil des Cours*, Collected Courses of the Hague Academy of International Law (RdC) 19; C Kessedjian, 'Note on Provisional and Protective Measures in Private International Law and Comparative Law' Hague Conference on Private International Law (HccH) Prel. Doc. 10 (1998); G Maher and B J Rodger, 'Provisional and Protective Remedies: The British Experience of the Brussels Convention' (1999) 48 *ICLQ* 306; N Andrews, 'Provisional and Protective Measures: Towards a Uniform Protective Order in Civil Matters' [2001] *Uniform Law Review* 931; J Carrascosa González, 'Medidas provisionales y cautelares en el Reglamento 44/2001' (2005) 3 *DeCITA* 400; A Dickinson, 'English Private International Law Aspects of Provisional and Protective Measures' in M Andenas, H Bukhard and P Oberhammer (eds) *Enforcement Agency Practice in Europe* (BIICL London 2005) 284.

most of the different institutions serving the same functions⁴⁹ in the different legal systems. As stated by JIMENEZ DE ARÉCHAGA in the *Aegean Sea Continental Shelf case*,

'[T]he essential object of provisional measures is to ensure that the enforcement of a future judgment on the merits shall not be frustrated by the actions of one party pendente lite ... [T]he essential justification for the impatience of a tribunal granting relief before it has reached a final decision ... is that the action of one party pendente lite causes or threatens damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour'.⁵⁰

1.2.3. Economic Analysis of Arrest of Ships

Since ancient times ship financing transactions are negotiated on the credit of the ship rather than that of the owner.⁵¹ Ships are high value assets⁵² over which extensive debts can arise.⁵³ The traditional view is that arrest of ships benefit both creditors and ship-owners. BROWNE explained that at the beginning of the sixteenth century if an Englishman was owed money by a foreign merchant, any ship of the latter coming into the river was liable to arrest, the creditor not being obliged to look for his debtor in a foreign country due to the security that the ship itself represented. Moreover, such a security was considered as favouring as well the foreign merchant whom, on such security, was better enabled to gain credit in England upon

⁴⁹ Except for arrestment to found jurisdiction in Scots law, which in fact does not serve all the main functions of arrest of ships but the jurisdictional function only; see Chapter 6 (Arrest of Ships and Jurisdiction on the Merits).

⁵⁰ *Greece v. Turkey* ICJ Reports (1976) 3, 15-16.

⁵¹ In the past by the form of hypothecation of the ship's bottom (*bottomry bond* currently obsolete); see F L Wiswall (1970) 9 referring G H Robinson, *Handbook of Admiralty Law in the United States* (West Publishing Co. St Paul, Minn. 1939) 370.

⁵² At present a large ship can cost over USD 100 million to build (IMO J/9015.doc 4).

⁵³ J A G Lowe, 'Maritime Securities' *The Laws of Scotland, Stair Memorial Encyclopaedia* SME (20) 118 [273].

occasion.⁵⁴ This has not changed that much in the last five centuries. Arrest and the referred related proceedings, particularly in the form of a provisional and protective measure, are of central importance in transactions involving ships.⁵⁵ The harmonisation efforts in the field of arrest of ships were indeed aimed at protecting the ship-owner from abuse as well as improving his position as to the ability to gain credit upon the ship;⁵⁶ interestingly enough, it has been argued that the arrest of ships is the main mechanism of protection and security of ship financing transactions.⁵⁷ Obtaining possession upon default is naturally an essential first requisite in the realisation of asset value through enforcement.⁵⁸ In a slightly different area, concerning express rights in security, based primarily on contract, the Unidroit Convention on International Interests in Mobile Equipment takes account of such importance.

Economic analysis is growing in importance in maritime law⁵⁹ as well as in PIL,⁶⁰ particularly in integrated areas such as Europe. There are fields that are particularly fertile for the application of law and economic theories, and it is here suggested that the international regulation of arrest of ships is particularly so. The economic loss that a ship owner may suffer if his ship is prevented from commercial use is generally severe. Thus, if the ship-owner can provide some form of alternative security other than the ship for the claim, e.g. bail or other security such as a bank guarantee or a letter of undertaking from her insurer (P&I Clubs), the financially

⁵⁴ A Browne, *A compendious view of the civil law and of the law of the admiralty: being the substance of a course of lectures read in the University of Dublin* (vol 2 Halsted and Voorhies New York 1840 reprint The Lawbook Exchange Ltd New Jersey 2000) 76. This corresponds to the traditional view on rights in securities which are deemed to benefit creditor and debtor.

⁵⁵ R Goode, H Kronke, E McKendrick and J Wool, *Transnational Commercial Law* (OUP Oxford 2004) 437.

⁵⁶ J J Alvarez Rubio (2000) 91.

⁵⁷ J J Alvarez Rubio (2000) 23.

⁵⁸ *Ibid.*

⁵⁹ S Kumar and J Hoffmann, 'Globalization: The Maritime Nexus' in *Handbook of Maritime Economics* (LLP London 2002).

⁶⁰ See H Muir Watt, 'Law and Economics: quel apport pour le droit international privé?' in *Etudes offertes a Jacques Ghestin: Le contrat au début du XXIe siècle* (Librairie Générale de Droit et de Jurisprudence Paris 2001) 685.

unsound situation of having a ship taken out of use may be avoided. On the other hand, a ship-owner is at risk of having a ship arrested on insufficient or even incorrect grounds. Therefore, the court may make it a condition for granting arrest that the claimant furnishes counter-security that will be used in case the ship-owner is awarded damages for wrongful arrest. This counter-security is designed to be an effective deterrent against arrest applications from less than serious claimants. Surprisingly, at present, in order to arrest a ship in England or in Scotland it is not necessary to provide any cross-undertaking in damages.

1.3. PRIVATE INTERNATIONAL LAW

Different legal systems have different understanding of the aims and objectives of PIL. Nonetheless, there is universal consensus as to its difficulty.⁶¹ The most extended conception, that of English and Scots law as well as most civilian systems, is that the subject includes the study of conflict of laws, conflict of jurisdictions, and the recognition and enforcement of foreign judgments.⁶² In turn,

⁶¹ Particularly in England '*...the cases decided in the field have been heavily influenced by policy considerations, national pride, and local economic impact of the decisions that must be made. The case law is often inconsistent, with the reasoning underlying many decisions appearing to be an almost ad hoc quality. The unpredictability of the law in this area has from time to time been judicially noted...*' (G Bowtle and K McGuinness, *The Law of Ship Mortgages* (LLP London 2001) 237).

⁶² There are also different names for the subject which despite their appearance do not really reflect those differences of extent in terms of aims and objectives. There is a traditional difference between the common law of the United States of America on the one hand, and civil law systems on the other hand. 'The Conflict of Laws' is the preferred name used in the USA and the title seems to indicate that the subject matter is limited to applicable law problems and choice-of-law methodology; whereas in civilian systems 'Private International Law' usually serves to identify a broader area of law covering not only applicable law but jurisdiction and enforcement of foreign judgments. That difference is more apparent than real and at present legal systems have converged into more or less the same contents of the subject. Both names are very well known. Private International Law (PIL) is the preferred one in this thesis since it indicates the broadest conception. Moreover, it is the label used in the EU. In English law both titles are used and, interestingly enough, none of them is used in Scots law where traditionally the title used for the subject has been 'International Private Law' (IPL). For an explanation of the reasons of such denomination see

English and Scottish PIL systems are formed respectively by three main pillars: national PIL provisions; European PIL rules (mostly Regulations); and international Conventions that are in force in the United Kingdom. In general terms, though Scots domestic law differs substantially from English municipal law, yet there is no such difference as to their principles of PIL. As legislation in the United Kingdom showed an increasing awareness of PIL issues since the 1970s, English and Scots PIL have been transformed from systems largely regulated by common law to ones largely regulated by statute.⁶³

1.3.1. A PIL Objective: Juridical Continuity across National Borders

The dilemma that gives rise to PIL as a legal discipline is created by the confrontation between a world divided into different legal systems (each one with a defined territorial application), and private legal relations that go beyond frontiers. In this context the juridical continuity of legal relations across national borders becomes the centre of concern of PIL.⁶⁴ For this purpose 'legal relation' is every situation capable of being treated as legally relevant by any legal system. In that sense PIL does not differ from any other legal discipline, bearing in mind that all of them have legal relations at the centre of their concerns. However, the difference is one of perspective: the specific aim of PIL is to solve the problem that arises when legal relations are confronted to the discontinuity that the diversity of legal systems throughout the world represents. 'Continuity' and 'discontinuity' are hereby used as relative (as opposed to absolute) terms, to show the confrontation mentioned

A E Anton *Private International Law: A Treatise from the Standpoint of Scots Law* (Sweet and Maxwell Edinburgh 1967).

⁶³ E B Crawford and J M Carruthers, *International Private Law in Scotland* (Green Edinburgh 2006) 2.

⁶⁴ See R Herbert in D Operti Badán et al, *Objeto y Metodo en el Derecho Internacional Privado* (2nd edn Fundacion de Cultura Universitaria (FCU) Montevideo 1990) 93-118 (tr by the author).

above. As HERBERT⁶⁵ explains, the juridical continuity of legal relations is the dynamic objective at the centre of concern of PIL, in a world divided by national borders (discontinuity of legal order).

1.3.2. PIL, Uniform Law and Comparative Law

1.3.2.1. PIL and Methodological Pluralism

At present PIL takes advantage of methodological pluralism⁶⁶ in addressing one of the three main issues referred above: the conflict of laws. There are two main methods used: the 'uniformist' method (or unification of substantive law), and the 'conflictualist' method (or choice-of-law methodology). The first one is used '*...in the few departments of law where this unity is imperative and possible...*'⁶⁷ via international Conventions and Treaties. The traditional view is that whenever such unanimity is not attainable the conflictualist method remains the only solution. The latter creates rules (abstract rules) that indicate merely the legal system which is to supply the substantive provision in the particular case. As explained by OPERTTI, uniform rules and conflict rules have a different objective: the first ones create the substantive provisions for a certain PIL category; by contrast, conflict rules select the applicable law amongst the diversity of legal systems connected to the case. There are national conflict rules, originated from national systems of PIL; and there are international conflict rules, resulting from the efforts of the 'internacionalists' to unify the rules of PIL so as to ensure juridical continuity of legal relations across national borders. This second type of rules is also embodied in international Conventions and Treaties.

⁶⁵ *Ibid* 100.

⁶⁶ J R Talice in D Operti Badán et al, *Objeto y Método en el Derecho Internacional Privado* (2nd edn FCU Montevideo 1990) 29, 53.

⁶⁷ P M North and J J Fawcett, *Cheshire and North Private International Law* (13th edn Butterworths London 1999) 10.

Both methods are currently used within PIL and they do not exclude but complement each other, i.e. eclecticism⁶⁸ is the rule, as it was already in BARTOLUS times.⁶⁹ Legal history shows that there is no need to resort to one method to the exclusion of the other, to achieve a just and satisfactory result. Moreover, this thesis shows, in the particular field of ranking of maritime claims, that the choice-of-law methodology is sometimes inefficient to provide a suitable solution. Hence, methodological pluralism is supreme.⁷⁰ Though, arrest of ships as a PIL category, is very much influenced by the use of the 'uniformist' method, as it is private international maritime law more generally. This is reflected in the international Conventions in the field.

1.3.2.2. Uniform Law and Maritime Law

Even though uniform Conventions such as the 1952 Arrest Convention⁷¹ affected positively the difficulties arising from the diversity of legal systems, it has not suppressed all the problems that PIL aims to answer in that field. It is uncontested that uniform laws do not necessarily mean uniform application of such laws; and the 1952 Arrest Convention is indeed an example of such disparity in application.⁷²

⁶⁸ W A Reppy Jr., 'Eclecticism in Choice of Law: Hybrid or Mishmash?' (1983) 34 Mercer Law Review 645.

⁶⁹ Bartolus de Saxoferrato (1313-1357). In the early conflicts literature the two basic approaches to PIL issues, i.e. unilateralism and multilateralism, were already coexisting methods despite the fact that they yield different conclusions (P H von Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* (Mohr Tübingen 1976) 4-8, 29).

⁷⁰ J R Talice (1990) 29-61.

⁷¹ International Convention Relating to the Arrest of Sea-Going Ships signed in Brussels on May 10th 1952.

⁷² For several examples of different applications of the 1952 Arrest Convention in different countries see F Berlingieri (2006) and J J Alvarez Rubio (2000).

1.3.2.3. PIL Limits in Relation to Uniform Rules

Uniform rules, as any other rule of law, have two elements: the category (the factual situations covered by the norm) and the provision (the legal consequence). The scope of research of PIL as a legal discipline in relation to uniform rules is limited to the first element of this normative structure: the factual situation, where the internationalism of the rule remains. In particular, the PIL concerns⁷³ in this sphere relate to a) the scope of application of uniform Conventions; b) the scope (*alcance extensivo*) of arrest of ships as a legal category [the characterization problem]; c) the problems with interpretation of international Conventions; d) the necessary coordination of legal rules resulting from the coexistence of different (overlapping) legal systems.

1.3.2.4. Comparative Law and PIL

In turn, comparative law represents very important assistance to the whole width of juridical science; for PIL its importance is vital. The study of comparative law is the first step in understanding different legal cultures and indispensable if the aim is to achieve harmonisation, and even more, unification of the law in a particular field. The study of comparative law is indeed of pivotal support to PIL.⁷⁴ Both methods used in the conflict of laws, namely the 'conflictualist' method and

⁷³ For the selection of the issues the opinion of J R Talice insofar as the objectives of PIL has been followed. '*...Debe corresponder a la Parte General del Derecho Internacional Privado...los siguientes problemas a) campo de aplicacion en el espacio b) alcance extensivo de la categoria regulada c) el problema integrativo e interpretativo d) coordinacion normativa frente a la coexistencia de normas*' (J R Talice (1990) 59).

⁷⁴ On this theme see De Boer, TM, 'The Missing Link: Some Thoughts on the Relationship between Private International Law and Comparative Law' in Boele-Woelki [et al] (eds), *Comparability and Evaluation, Essays on Comparative Law, Private International Law and International Commercial Arbitration in Honour of Dimitra Kokkini-Iatridou* (Nijhoff The Hague 1994) 15.

the 'uniformist' one depend on the permanent assistance of comparative law. A PIL scholar must necessarily be a comparatist.⁷⁵

1.3.3. Europeanization of PIL

One of the most important phenomena influencing the current development of PIL is market integration, particularly at the regional level.⁷⁶ Such influence has generated a process that has been called the 'Europeanization' of PIL. This process poses various different issues⁷⁷ and involves in many cases giving up national conflict rules in favour of harmonization and unification. As recognised by JOLOWICZ integration processes between states such as the one undertaken by the European Union are leading to a degree of harmonization of law in a pace never experienced in modern legal history.⁷⁸

Before the Treaty of Amsterdam measures designed to secure the harmonization of conflict rules at EC level had taken the form of Conventions signed and ratified by the Member States on the basis of what is now article 293 of the EC Treaty. Since the entry into force of the Treaty of Amsterdam on 1st May 1999, much progress has been done in the 'Europeanization of PIL' via the harmonisation of conflict rules at European level by means of EC regulations adopted under Title IV (Articles 61-69) of the EC Treaty. The Amsterdam reform of the EC Treaty has given specific competence to Community institutions to legislate

⁷⁵ J Dolinger, *Direito Internacional Privado* (5th edn Renovar Rio de Janeiro 1997) 44.

⁷⁶ This is a reflection of the tendency in international trade. Regional trade has been growing faster than inter-regional trade, i.e. intra-European or intra-MERCOSUR trade has been increasing at a higher rate than trade between these two regional blocks ((2004) 25 UNCTAD Transport Newsletter 15).

⁷⁷ See C van der Plas, 'The Limits of the Judicial Function and the Conflict of Laws' (2006) 53 *Netherlands International Law Review* (3) 439-470.

⁷⁸ J A Jolowicz (2002) 721.

on PIL issues (Article 65 EC). The ultimate objective is the proper functioning of the internal market.

With the Treaty of Amsterdam the judicial cooperation in civil matters, more specifically PIL and procedural law, has been transferred from the Third Pillar to the First Pillar. Whereas the Second and Third Pillars may be qualified as 'inter-governmental', in the First Pillar, the Community Pillar, use is made, firstly, of primary law provisions which have direct effect, and secondly, of secondary law provisions enacted upon the recommendation of the Commission as an independent institution and concerning which the Court of Justice in Luxembourg offers legal protection and legal unity. The movement of PIL from the Third Pillar to the First Pillar shows that the Community is interested in advancing the harmonisation in the field to a great extent.

Coherency and consistency are paramount in this sphere; coherency with basic premises of Community law and consistency with fundamental decisions already adopted by the ECJ. Particularly in the field of jurisdiction, European criteria should conform to fundamental principles of the European legal system such as, in the commercial sphere, the free movement of judgments.

This harmonization would have better chances of succeeding in so far 'decisional harmony' is concerned if the various jurisdictions involved also intend to harmonise their respective procedures.⁷⁹ Already in 1946 GUTTERIDGE stressed that '*...similarity of rule in two or more systems of law, in the substantive sense, may easily be nullified by divergence in procedure*'...⁸⁰ Harmonization of PIL rules could be a pivotal starting point for further private law uniformity.⁸¹

⁷⁹ J A Jolowicz (2002) 725.

⁸⁰ H Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP Cambridge 1949) 35.

⁸¹ There is a wealth of literature on the topic of private law harmonisation in Europe, from the most sceptical positions to the most optimistic, up to some utopia. Measures

'Europeanization' has represented a big change for English, and arguably also for Scots PIL (IPL), and one commentator has called it '*...a systematic dismantling of the common law of conflicts of law' ...*⁸² since in his opinion the European Court of Justice (ECJ)'s decisions on the field have been mainly civil law orientated. Regardless of whether one agrees with such assessment or not it is clear that '*...one enters a new world once an area of private law becomes Europeanized' ...*⁸³This process directly affects the idiosyncratic British maritime jurisdiction and the challenge seems to be to fit maritime jurisdiction into Europe.⁸⁴

1.4. THESIS OUTLINE

This thesis is about relationships. It is not a thesis on the arrest of ships, but a thesis on the relationship between arrest of ships and PIL. It is not a thesis on English and Scots law, but a thesis on the relationship between English law, Scots law and the international Conventions on arrest of ships. It is not a thesis on comparative law, but a thesis where comparative law is used as a device for the sake of a PIL examination. It involves not only the study of maritime law and PIL but several other 'departments of law' such as the Scots law of diligence and the law of rights in security, among others. This thesis is, indeed, the product of an axis of innumerable relationships.

adopted under Title IV of the EC Treaty apply to the UK only if it elects to participate in the adoption of, or to accept, the measure in question.

⁸² T Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813; J Mance, 'The Future of Private International Law' (2005) 2 Journal of Private International Law 185.

⁸³ T Hartley (2005) 813.

⁸⁴ See D C Jackson, 'Fitting Maritime Jurisdiction into Europe or vice versa? [2001] LMCLQ 219. This thesis concludes that fitting the European admiralty scheme into English and Scottish traditions is feasible and desirable (conclusion 8.13 page 305).



This chapter has sought to set the context in which the topic of arrest of ships in PIL in English and Scots law is going to be considered, and to introduce some concepts that are going to be of use throughout this piece of work. In a nutshell, the present study has the following major objectives: First, the characterization of arrest of ships as a provisional and protective measure and consequently the review from a critical viewpoint of the indistinctive conceptualization of ship arrest in English law in modern times as an inherent part of the action *in rem*,⁸⁵ conceptualization that seems to apply to any kind of ship arrest available in England and to prevail over its conceptualization as a provisional and protective measure. Secondly, the systematization of the state of affairs regarding the legal framework applicable to the security function of arrest of ships; its distinction from maritime liens;⁸⁶ and the examination of the conflict of laws issues in this respect in English, Scots and international law. Thirdly, this thesis considers the convenience of the survival of *forum arresti* as a specific jurisdictional ground for maritime claims in the context of the Europeanization of PIL. Fourthly, the role of the *lex fori* is examined throughout this thesis; its impact on characterization issues; its subtleties when applied as the governing (substantive) law of the forum (*qua lex causae*); and its so often too far-reaching scope when used as the law of the forum as such (*qua lex fori*) (in English law through the widest possible extension to the meaning of the term 'procedure'). Finally, jurisdiction for the sole purpose of interim relief (hereinafter ancillary jurisdiction) is distinguished from jurisdiction on the merits of the case in the context of arrest of ships. The underlying rationale of the proximity principle as a pivotal device of judicial cooperation is examined in this context.

⁸⁵ International Convention on Arrest of Ships 1999 art 2(4) see R Goode, H Kronke, E McKendrick and J Wool (2004) 440.

⁸⁶ The English term 'maritime lien' strictly corresponds to a maritime hypothec in traditional Scots law; however due to the internationalism that the English terms has acquired through international Conventions on the field, Scots law has recently recognised by statute the usage of the English term in order to indicate a hypothec over a ship, cargo, or other maritime property; i.e. a non-possessory real right of security in a ship, cargo, or other maritime property (see Administration of Justice Act 1956, Ch 46, s 48 (2), as amended by Schedule 4 to the Bankruptcy and Diligence etc (Scotland) Act 2007).

The whole analysis indicates that at present arrest of ships is a mixed legal institution in its fullest comprehension; undoubtedly an axis of common law and civil law but not only such.⁸⁷

⁸⁷ Note on methodology and terminology: In order to achieve consistency, The Oxford Standard for Citation of Legal Authorities (OSCOLA 2006) has been followed as far as possible. That is the reason why this thesis has departed from normal practice in the citation of cases and preference has been given to the specialist series of the Lloyd's Law Reports. Also following OSCOLA 2006 is that bibliographic references are given in full only in their first mention in each chapter; subsequent mentions are done in the abbreviated form. As far as terminology, traditionally PIL studies are characterised by the use of Latin; this thesis is not immune to that tendency. That is the reason to provide at least the definition of the two Latin expressions more frequently used throughout this study. *Lex fori*: the domestic law of the country where an action is raised. *Lex causae*: the legal system which governs the subject matter of an action (these definitions have been taken from E B Crawford and J M Carruthers (2006) 4).

Part I

*'The Admiralty law of the two countries is derived from the same source, namely, the ancient customs of the commercial nations of Europe, which have grown up into a system with the knowledge and assent of both England and Scotland as members of the commercial community of nations, and which, with certain limits and with certain exceptions, have all the force of an international code.'*⁸⁸

⁸⁸ *Boettcher v Carron Co* 1861 23 D 322, 330.

'The Lex Maritima of Europe and the Mediterranean was more truly international than any other, earlier than any other, and developed a coherence and unity out of necessity'.¹

CHAPTER TWO

Arrest of Ships in the *Lex Maritima*

2.1. INTRODUCTION

The precise historical lineage of arrest of ships is not entirely clear. Despite several scholarly attempts² to trace back this ancient process no definite source has appeared to be the original one. The need to provide security in the case of foreign defendants was already a requisite in the practice of the ancient Athenian maritime procedure as early as in the fourth century. However, arrest of ships is not mentioned there as a device used for such purposes but imprisonment of the defendant if necessary.

After a very brief outline of the legal origins of arrest in general –not limited to the arrest of ships- in civil and commercial litigation this chapter follows a chronological order. First, it analyses the arrest of ships in the ancient *lex maritima*. Then, along with the rise of nationalism, it analyses the arrest of ships as practised in England and Scotland in the nineteenth century. The analysis of the contemporary *lex maritima* since the beginning of the 20th century up till present times is left to Chapter 3.

¹ J Mathiasen, 'Some Problems of Admiralty Jurisdiction in the 17th Century' (1958)

² The American Journal of Legal History (3) 215.

² See eg F L Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (CUP Cambridge 1970) 183.

2.1.1. Arrest in Civil and Commercial Litigation

There are different opinions as to the origins of arrest as a legal institution. According to GIERKE³ arrest has a Germanic foundation. Nevertheless, MUTHER considered that arrest already existed in Roman law⁴ and WACH distinguished the German evolution from the Italian evolution, the first one from the Carolingian times, and the latter from Longobardish law.⁵ In early times arrest was linked to enforcement processes and its compelling effects were against the person and not against the *res*.⁶ At the beginning it was voluntarily agreed between the litigating parties as a way to secure the accomplishment with the eventual judgment⁷, and later it became compulsory in favour of the creditor, first against the person of the debtor, and later on against his property. Arrest preserved only what was enough to cover the debt.⁸

³ O Gierke, *Deutsches Privatrecht* (Duncker u. Humblot Leipzig 1895) (1) 330 ‚Dieses dem römischen Recht unbekannte Rechtsinstitut hat sich aus deutschrechtlicher Wurzel im gemeinen Zivilprozess entwickelt‘. For a historic overview of arrest see P Miranda, *História e Prática do Arresto ou Embargo* (Saraiva Sao Paulo 1929 reprint Bookseller Campinas 1999).

⁴ T Muther, *Sequestration und Arrest im Römischen Recht* (Hirzel Leipzig 1856) 304, 344. It is here submitted that as far as arrest of ships is concerned it is clear that it did exist already in the times of the Roman Empire.

⁵ H von Rudorff, *Zur Rechtsstellung der Gäste im mittelalterlichen städtischen Prozess: vorzugsweise nach norddeutschen Quellen* (Marcus Breslau 1907) (88) 41.

⁶ J W von Planck, *Das deutsche Gerichtsverfahren im Mittelalter: nach dem Sachsenspiegel und den verwandten Rechtsquellen* (Braunschweig 1879 reprint Olms Hildesheim 1973) (2) 367. Planitz considered the arrest against the fugitive debtor as the main type of arrest in the past (H Planitz, *Studien zur Geschichte des deutschen Arrestprozesses, Der Arrest gegen den fugitivus* in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (germanische Abteilung 1913 (34) 49) online at <http://www.bibliothek.uni-regensburg.de/ezeit/?2085091>. Nevertheless this thesis is rejected by P Miranda (1929).

⁷ P Miranda (1929) 25.

⁸ P Miranda (1929) 62.

2.2. ARREST OF SHIPS IN THE ANCIENT *LEX MARITIMA*

2.2.1. The Earliest Times of Maritime Navigation

The ancient *lex maritima* originated from the customs of the early Egyptians, Phoenicians and Greeks, who carried an extensive commerce in the Mediterranean Sea. These rules enjoyed authority far beyond the ports where they were promulgated. Basically, until the rise of modern nations, maritime law did not derive its force from territorial sovereigns but represented what was already conceived to be the customary law of the sea.⁹ Nonetheless, no trace of arrest of ships, or any institution thought to provide for similar functions, can be found in the substantive rules of the earliest times of maritime navigation. The very first rules related to the maritime adventure and its perils such as the *Hammurabi's Code of Laws* (circa 1780 B.C.), the *Sumerian Laws Handbook* (circa 1700 B.C.), and the *Laws of Manu (Manusmriti)* (1500 B.C. to 200 A.D.) do not provide for any such rule or procedure. Neither is arrest of ships accounted for as a common practice in the Hellenic culture. However, it should be noted that the Athenian commercial maritime procedure of the fourth century, the *dikai emporiki*, was rigorous when it came to pre-trial bail for defendants.¹⁰ This rigorosity was a consequence of the heavy participation of foreigners in those commercial cases.¹¹ Special provisions were available for assuring a defendant's appearance at the ensuing trial and measures such as imprisonment could be taken to enforce the judgment of maritime tribunals.¹² That shows that two of the three functions that eventually arrest of ships came to fulfil later in time, the jurisdictional and the security functions, were already

⁹ S S Jados (tr), *The Consulate of the Sea and Related Documents* (University of Alabama Press Alabama 1975) (available online at LIBRO <http://libro.uca.edu/consulate>, last accessed on September 7, 2007).

¹⁰ E E Cohen, *Ancient Athenian Maritime Courts* (Princeton University Press New Jersey 1973) 80.

¹¹ *Ibid.*

¹² *Ibid* 8.

part of commercial and maritime proceedings involving foreigners since at least the fourth century.

Notwithstanding the aforementioned, it is in Rhodian law¹³ as compiled in the *Corpus Iuris Civilis* (Book XIV Title I-II of the Justinian's Digest) of the sixth century where the first evidences of arrest of ships ever appeared. Romans did not have their own maritime law. They incorporated in the *Corpus Iuris Civilis* the famed *Rhodian Sea Law*. According to that law in the early times of the Roman Empire the ship or *res* could be arrested until bail was given and this arrest was not justified under the *tacita pignora* (tacit hypothec) of the Romans.¹⁴ However, the origins of such practice are quite unsettled. No primary written specimen of the Rhodian law has survived, so it is impossible to tell whether this practice was already common in the law of Rhodes. Nonetheless, the majority seem to derive arrest as a process from the *processus contra contumacem* of Roman law. The first evidence of arrest of ships as a procedure would emerge then from the transposition of the law of Rhodes –i.e. the practices of a small-shipping-experienced island- as incorporated in the magnificent compilation of Roman law and associated with the Roman *processus contra contumacem*. This could be seen as the very first merger in the long chain of amalgamations throughout the centuries that have led to what is known today as arrest of ships.

¹³ Some commentators consider Rhodian Laws as the most ancient maritime laws in Europe; see G J Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (vol 2, 7th edn T & T Clark Edinburgh 1870 reprint Butterworths Edinburgh 1990) 547. Bell provides a good concise enumeration and description of authorities received by Scottish judges, ie The Rhodian Laws, Il Consolato del Mare, Rules of Oleron, Rules of Wisby, The Ordonnances of the Hanseatic Towns, Le Guidon de la Mer, Ordonnance de la Marine of Louis XIV, Code de Commerce, the determinations of maritime and mercantile courts such as the ones of Genoa, Friesland and Holland, and the decisions (of greatest authority) of the High Court of Admiralty of England; see *op cit* 547-550.

¹⁴ A Browne, *A Compendious View of the Civil Law and of the Law of Admiralty* (vol 2 Halsted and Voorhies New York 1840 reprint The Lawbook Exchange Ltd New Jersey 2000) 35. When analysing the contents of the law *Rhodia de Jactu* Browne summarises its contents as follows '...They make the exercitor or owner answerable for the contracts of the master and it is said they also make the ship liable for the same. They certainly do inasmuch as the *res* or ship might be arrested by process till bail was given: but I do not find any such case among the *tacita pignora* (tacit pledge) of the Romans though repairs of a ship might like all other repairs constitute a tacit pledge...'.

2.2.2. Arrest of Ships in the Medieval Era

Undoubtedly it was in medieval times where the blossoming of commerce within Europe led to the emergence of the *lex mercatoria*, a cosmopolitan mercantile law based upon customs and applied to cross-border disputes by the market tribunals¹⁵ of the various European trade centres. This law resulted from the effort of the medieval trade community to overcome the fragmentary and obsolete rules of feudal and Roman law which could not respond to the needs of the inter-local and international commerce.¹⁶ Merchants created a superior law, which constituted a solid legal basis for the great expansion of commerce. For almost eight hundred years uniform rules of law, those of the law merchant, were applied throughout Western Europe among traders. The *lex maritima* comprising the rules applied to shipping were an important part of such *lex mercatoria*. However, arrest of ships is not mentioned in many medieval sea laws. The first codes of the Medieval Era such as the *Maritime Ordinances of Trani* (1063 A.D.), the *Navigation Code of the Port of Arles* (1150), the *Barcelona Navigation Act of 1227* or the *Maritime Code of 1258* do not provide for the arrest of ships as an interim measure of protection.

Interestingly enough, the relation between the ship and its creditors as known in present times originated during those times. In *La Tabula de Amalfa* dated from 1095 A.D. the ship was already considered as the guarantee. There were provisions such as '*let the ship and the capital advanced on commission form one mass and one fund, and let the ship be responsible for the capital, and the capital for the ship, notwithstanding, any other ancient or modern obligation howsoever incurred*'¹⁷ or the faculty of the master to '*bind the ship to whomsoever he may please, expressly in*

¹⁵ In England these were so-called *pie poudre* and staple courts (G Baron, 'Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?' (1998) 15 *Arbitration International* (2) 117).

¹⁶ A M Lopez Rodriguez, *Lex Mercatoria and Harmonization of Contract Law in the EU* (DJOF Publishing Copenhagen 2003).

¹⁷ Art 6 see T Twiss (ed), *The Black Book of the Admiralty* (vol 4 Longman London 1871-1876 2nd Reprint The Lawbook Exchange Ltd New Jersey 1998) 9.

accordance with the usage of the Strand of the aforesaid city, notwithstanding, any public or private agreement in the nature of a contract or a quasi-contract entered into between the parties'.¹⁸ The relationship between the ship's equipment and the ship's creditors is found also in the first article of *The Rules of Oleron*¹⁹ (circa 1266), where interestingly enough, Scotland is expressly mentioned,²⁰ and it is established that the master may pledge part of the ship's equipment for necessities.

It is in the Ordinances issued by King James of Spain (1213-1276) for the Island of Majorca where the first provisions regarding to the arrest of ships appeared, but it was not until the end of the fifteenth century, when they were compiled in the *Consolato del Mare* (1494),²¹ that they acquired broader recognition and acceptance. Arrest is therein expressly authorised by provision number 42²² under the title '*Demand of a Guarantee When Seizure of a Vessel is Ordered*'.

¹⁸ Article 7 *Ibid.*

¹⁹ While travelling the eastern Mediterranean on the Crusades with her first husband King Louis VII of France, Eleanor of Aquitaine discovered a complicated and advanced system of admiralty law. She brought back this admiralty law and administered it upon her people on the island of Oleron. Later, while acting as regent for her son King Richard the Lionheart in England she founded the English system of admiralty law on such bases.

²⁰ 'Art I. When several joint owners make a man master of a ship or vessel, and the ship or vessel departing from her own port, arrives at Bordeaux, Rouen, or any other such place, and is there freighted to sail for Scotland, or some other foreign country; the master in such case may not sell or dispose of that ship or vessel, without a special procuration from the owners: but in case he wants money for the victualling, or other necessary provisions of the said vessel, he may for that end, with the advice of his mariners, pawn or pledge part of the tackle or furniture of a ship'.

²¹ The Consulate of the Sea is a compilation of ordinances. The first such codification was published in 1010 under the title of Customs of the City of Amalfitina; a second one was published in 1063 in the city of Trani. In 1509 an edited copy of the later was incorporated into the statutes of the city of Fermo. It is also said that in the Hansa Towns (Baltic, North Sea, Hanseatic League) some of these laws were adopted earlier and published under the auspices of the Hanseatic League, under the title *Waterrecht* in 1407 (the Laws of Wisby). All these compilations contributed significantly to the later formation of the Consulate of the Sea of the fifteenth century (see S S Jados (tr) (1975)).

²² '*In all instances when the Consuls order seizure of a vessel and its cargo as a guarantee...*'. Against the background of these ordinances, it looks as if this 'guarantee seizure' is the modern arrest of ships because 'guarantee' was only mentioned in these ordinances in such context. Ordinance No 30, under the title '*Posting a Bond to Assure the Execution of a Verdict*' establishes '*If the summons demands that the defendant furnish a guarantee in the action brought against him;..., and if he is a foreigner, he must furnish a guarantee bond at once...*' (S S Jados (tr) (1975)).

Therefore it can be submitted without hesitation that even though arrest procedures were already practised in Roman law, arrest of ships had its earliest developments in medieval times, in the context of shipping-credit and related to litigation involving foreigners. That is to say, two main functions were already then performed by arresting a ship. The first one related to the assertion of jurisdiction over a defendant who without such detention would not be submitted to it; and the second one, the security function, related to the ship as an asset guaranteeing the payment of debts. The third function identifiable in present times, the protective function, is indeed a pre-condition for these two to be operative; hence, arguably, the three functions have been part of the law of arrest of ships since its early origins.

2.2.3. Arrest of Ships in Early English Maritime Practice

In England admiralty courts were already functioning in the 11th century. The greatest source to trace back arrest of ships as practiced in England is TWISS' *Black Book of the Admiralty*²³ which although only published in its modern form in 1871, was compiled as the definitive English collection of Admiralty sources dating from the middle Ages. The *Black Book* shows that in the second year of the reign of King John (A.D. 1200) in Ipswich²⁴ there was a 'court sitting regularly from tide to tide to administer the Law Marine in England'.²⁵ This was a practice also in other regions of

²³ Through the compilation of *The Black Book* Twiss succeeded to show that in the practice of shipping law the world rest firmly on the same roots; see J Hare, 'Of Black Books, White Horses and Sacred Cows: The Quest for International Uniformity in Maritime Law' (1999) British Maritime Law Association available online at http://www.bmla.org.uk/documents/of_black_books.htm.

²⁴ See N S B Gras, 'A List of Local Customs Due in the Port of Ipswich' in *The Early English Customs System: A Documentary Study of the Institutional and Economic History of the Customs from the Thirteenth to the Sixteenth Century* (vol 18 CUP Cambridge 1918) 159.

²⁵ Domesday of Ipswich, *Black Book of the Admiralty*, T Twiss (vol 2, 1998) viii '...When and how this practice originated does not appear. It was a legacy of the imperial Rome that

the country where 'courts sat in those boroughs from day to day, or from sea to sea, as the case might be, to administer justice between men of various nations, whom the spirit of commerce or the necessities of navigation happened to bring within their local jurisdiction'.²⁶ Later on, the courts of the Lord High Admiral dealt primarily with cases of piracy and naval discipline but gradually these tribunals extended their jurisdiction to commercial matters.

Arrest of ships is also an ancient institution in England even though it is not possible to determine with certainty when this practice started.²⁷ In the very first reports found in the oldest English admiralty manuscripts there are several references to arrest for the king's service²⁸ but it is difficult to assert when arrest procedures linked with commercial litigation started and what were the legal grounds for such a practice. In any case, at the beginning of the sixteenth century such a practice was common and was intrinsically linked with commercial cases with foreign elements.

As no real right was necessary to found the Admiralty action *in rem* against ships in the medieval or early modern period, rather than it being derived from the *actio realis* of Roman law legal historians point to a procedural origin of arrest of ships in English Admiralty jurisdiction. In their opinion it derives from the *processus contra contumacem*, a process developed all over medieval Europe and firmly

maritime causes should be heard without any delay before the competent judges in each province, and there is good reason for believing that medieval Europe accepted this legacy, and never allowed it to lapse'. The Domesday of Ipswich is the earliest extant record of any borough Court to sit daily to administer the law merchant. Ipswich was an important maritime borough in the time of Edward the Confessor.

²⁶ T Twiss (vol 2, 1998) vii-viii.

²⁷ '...When the right to press private ships for the service of the crown originated is not very clear. A fleet of Edward the Confessor's in the year 1049 consisted partly of "king's ships" partly of "people's ships" ... (T Twiss (vol 1, 1998) 65). In the old rules for the Lord Admiral (*Liber Niger Admiraltatis*) found in *The Black Book of the Admiralty* there are provisions regarding the arrest 'for the king's service or for any other reasonable cause' (T Twiss (vol 1, 1998) 65-67).

²⁸ See the Documents Connected with the Admiralty of John Holland, Duke of Exeter, 1443-46 in T Twiss (vol 1, 1998) 65, 250, 262. In these documents there are several precepts to arrest ships. One of them appears as '*precept to arrest certain aliens and their goods*'.

established in the City of London by the fifteenth century.²⁹ The civilian judges of the High Court of Admiralty practised ship detention during the fourteenth and fifteenth centuries in the framework of the *processus contra contumacem*. Its primary purpose was to neutralise the effects of the defendant's contemptuous resistance to appear before the court. This procedure could be exercised in two ways: against the person or against his property (any property, all the assets of the defendant were at stake, not only the ones related to the claim). The process was a summary one: first, the person and/or the property of the defendant were arrested at the same time that the defendant was cited to appear.³⁰ Secondly, the defendant received up to four citations to appear and if all were defaulted the claimant would formulate his claim in the form of a draft sentence or article upon first decree.³¹ Finally, the admiralty court in its *primum decretum* could award possession³² of the property arrested to the claimant based on the defendant's contumacy.³³ In the original Continental procedure, a *secundum decretum* was needed in an *actio personalis* (different from the *actio realis*, where real rights were at stake) in order to transfer ownership of the arrested property to the claimant after a period of time. In England, the *secundum decretum* rarely appeared in case law, paradoxically, due to the irrelevance of the distinction between *actio realis* and *actio personalis*³⁴ in English law. The arrest did not depend for its validity on the existence of any real right on the ship or the goods derived from a lien or a hypothec; the only requirements were that the ship or goods belonged to the defendant and were within the Court's jurisdiction.³⁵

The development in English law later abandoned these origins completely to reach the opposite pole: where the availability of arrest will depend on the existence

²⁹ W Tetley, 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 Tulane Law Review 1895, 1900-1901.

³⁰ W Tetley (1999) 1901.

³¹ *Ibid.*

³² In the Continental original *processus contra contumacem* possession was granted only in *actio realis* and in *actio personalis* only custody of the property up to the amount of the indebtedness was granted (W Tetley (1999) 1901 fn 19).

³³ A Browne (vol 2, 1840) 352; W Tetley (1999) 1901.

³⁴ W Tetley (1999) 1901 fn 19.

³⁵ W Tetley (1999) 1903.

of a maritime lien (a real right on the ship) and where the relevance of the distinction between action *in rem* and action *in personam* will become not only paramount but –in the opinion of some- the *raison d'être* of arrest of ships as a legal institution. In modern times, however, the situation of English law lies somewhere in the middle of this polarization, not without incongruities and inconsistencies difficult to overcome.

Hence, the English mark of arrest of ships as a measure *in rem* lies elsewhere, not in the distinction between *actio realis* and *actio personalis* of Roman law. It can be said that the distinction *in personam/in rem* even though it originated undoubtedly from the Roman one, evolved as something completely different. It has been suggested that owes its genesis to the long lasting clash between the High Court of Admiralty jurisdiction and that of the common law courts started in the thirteenth and fourteenth centuries.³⁶

The court of admiralty was a civil law court and during those times it was continuously confronted with the common law courts to determine the extent and limits of its jurisdiction. It took many centuries and more *prohibitions*³⁷ to settle this issue, unfortunately with not so good results for the Admiralty court.³⁸ One of the

³⁶ A Mandaraka-Sheppard, *Modern Admiralty Law* (Cavendish London 2001) 5.

³⁷ A prohibition is a writ issued by a [superior] court, directed to the judge and parties of a suit in an [inferior court], commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court (W W C, 'The Function of Writs of Prohibition' (1919) 28 *The Yale Law Journal* 482). In the case of the clash between the court of admiralty and the common law courts the prohibitions were most of the times based on prejudice rather than on reason (A Browne (vol 2, 1840) 85).

³⁸ Already in 1632 the rules were as follows 'If suit should be commenced in the court of admiralty upon contracts made, or other things personal, done beyond the seas, or upon the sea, no prohibition to be awarded. If suit be before the admiral for freight, or mariners wages, or for breach of charter-parties, for voyages to be made beyond the seas; though the charter-party happen to be made within the realm, so as the penalty be not demanded, a prohibition is not to be granted: but if the suit be for the penalty; or if the question be, whether the plaintiff did release or otherwise discharge the same within the realm; this is to be tried in the King's courts at Westminster, and not in his court of admiralty. If suit be in the court of admiralty for building, amending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as

ways used by the common law courts to limit the scope of action of the High Court of Admiralty was to dwell upon the idea that admiralty jurisdiction was limited to causes of action involving the liability of the vessel, as opposed to the personal liability of the owner. At those times the device used in admiralty to compel the defendant to appear in court was to arrest the person of the defendant³⁹ or seize his assets within the jurisdiction (maritime attachment). When the High Court of Admiralty lost its jurisdiction *in personam* (therefore to arrest the person of the defendant was no longer competent) arrest of the ship came to be seen as the exclusive mode in which admiralty process was exercisable in respect of such claims.⁴⁰ The advantage of having the ship as security was so manifest that common law courts were forced to yield and admiralty jurisdiction regained part of its lost jurisdiction in later times. Nevertheless, after those long centuries of struggle it was never again what it once was. From then on, an action *in rem* is one against the ship or *res* where an action *in personam* is against the owner or charterer of the ship, even though the border lines have never been and certainly are still not entirely clear. This traditional *in rem/in personam* distinction –upon which all the admiralty law of England and its ex-colonies has been developing during the last two hundred years– is full of inconsistencies.

for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm' (A Browne (vol 2, 1840) 78-79). For more on the diminishing influence of the civilians in the seventeenth century see B P Levack, *The civil lawyers in England, 1603-1641: a political study* (Clarendon Oxford 1973).

³⁹ The last known maritime attachment exercised as arrest of a person was in 1780 *The Clara* (1855) Swab 1.

⁴⁰ W Tetley (1999) 1903.

2.2.4. Arrestment of Ships in Early Scottish Maritime Practice

The first compilation to include a section on sea laws appears to be BALFOUR's *Practicks*;⁴¹ however this collection was not published until the eighteenth century. As early as in 1590 WILLIAM WELWOOD published the first textbook of maritime law to be published in Great Britain under the title *Sea Laws of Scotland*.⁴² In that book he commented that the first courts to exercise what it was later known as admiralty jurisdiction in Scotland were the Courts of the water bailies of the maritime burghs.⁴³ These were superseded by the Court of Admiralty probably in the early fifteenth century even though the precise date of its establishment it is unknown.⁴⁴

The first Admiral of Scotland appears to have been the second Earl of Orkney in the early fifteenth century and the jurisdiction of the court started to develop during the same time.⁴⁵ Its earliest records are the *Acta Curiae Admirallatus Scotioe*, dated 1557-1562. In 1567 the Court was already established in Edinburgh.⁴⁶

With a clear parallelism with what was happening in England, from 1532, when the Court of Session was instituted, their respective jurisdictions clashed throughout the centuries.⁴⁷ There were various attempts to define the relation

⁴¹ *The Practicks of Sir James Balfour of Pittendreich* (1583, published 1754, reprint Stair Society vol. 21 (1962) and vol. 22 (1963)) see M C Meston, 'Admiralty' Stair Memorial Encyclopaedia (SME) (1) 197 [402].

⁴² W Welwood, *Sea Laws of Scotland* (Robert Waldegrave Edinburgh 1590). An expanded version written in English, not Scots, appeared in 1613 (A D M Forte, 'Insurance' in K G C Reid and R Zimmermann, *A History of Private Law in Scotland* (vol 2 OUP Oxford 2000) 333.

⁴³ A R G McMillan, *Scottish Maritime Practice* (Hodge Edinburgh 1926) xxxiii.

⁴⁴ A R G McMillan (1926) xxxiv.

⁴⁵ *Ibid.*

⁴⁶ The Acts of the Parliaments of Scotland (APS) III 41 (1567) art 50, as cited by M C Meston, SME (1) [403].

⁴⁷ See e.g. M C Meston, SME (1) [404].

between the two courts: the 1609 Act expanded the jurisdiction of the Admiralty Court; and the 1681 Act, which was enacted '*for the advancement and encouragement of trade and navigation*', succeeded in affirming the independency of the jurisdiction of the Court of Admiralty in the first instance and the priority of maritime causes on appeal to the Court of Session. This Act continued to regulate the relations of the two Courts until the abolition of the Court of Admiralty by the Court of Session Act 1830.⁴⁸

The Court of Admiralty was essentially a civil law court where the common law of Scotland was not administered but the general *lex mercatoria*. This had led some authors to affirm that the maritime law of Scotland is not Scottish but British.⁴⁹ It is here submitted though that even when this could be accurate in certain aspects of maritime law, such as the law of maritime liens which is indeed very much related to the law of arrest of ships, it does not apply to the law of arrest of ships itself where both legal systems have developed differently.

The arrestment of the ship played a key role in relation to the jurisdiction of the Court of Admiralty. Its jurisdiction was regarded as particularly applicable to foreigners due to the fact that it was only in admiralty cases that the court was capable of founding jurisdiction against a defender resident abroad through the arrestment of the ship (arrestment *ad fundandam jurisdictionem*⁵⁰) (jurisdictional function).⁵¹ In turn, arrestment of a ship was a summary procedure (and functionally it is possible to say that this was view of its protective function) '*found to be necessary owing to the opportunities which ship-owners possessed for escaping diligence by merely sending their vessels to sea on receipt of notice that proceedings were*

⁴⁸ A R G McMillan (1926) xxxviii.

⁴⁹ A R G McMillan (1926) 4.

⁵⁰ The arrestment *ad fundandam jurisdictionem* was first reported as used by the Court of Admiralty than by the Court of Session; see *Young v Arnold* 1683 M 4833.

⁵¹ A R G McMillan (1926) xxxiv.

contemplated'.⁵² Due to it, it was understood that '*the admiralty jurisdiction arises ratione rei sitae by reason of the res being situated within the maritime territory [of Scotland], and it is founded by the arrestment of the res*'.⁵³ The arrestment was performed without calling the owners, whose names might have been unknown, and the precept was usually directed against the master alone. If the owners failed to enter appearance decree might have proceeded in their absence and the vessel be judicially sold in extinction *pro tanto* of the debt in respect of which she had been arrested (security function). In that case, which was frequent when the amount of the debt exceeded the value of the defender's interest in the ship, MCMILLAN affirms that the proceedings '*were in no sense deemed to be directed against the defender, since the Court was, in fact, ignorant of his identity, and he was not before it but against the ship herself*'.⁵⁴ Not surprisingly, MCMILLAN does not give any further grounds for such an affirmation that disregards the personal liability of the owner beyond the value of the vessel. Probably in the early twentieth century the personification theory, meaning that the action *in rem* was not a pure device for obtaining personal jurisdiction over ship-owners, but a unique proceeding directly against the ship, as firmly established in England by *The Bold Buccleugh* in 1852, was so unchallenged that it was taken for granted.⁵⁵

As well as in England, the method of exercising jurisdiction by the Court of Admiralty in Scotland, had arrestment of the ship at its very centre; considering such procedure as '*the appropriate machinery for proceeding in rem against the ship herself which is the subject of a claim*'.⁵⁶ If the owners entered appearance they had to

⁵² W Smith, *Maritime Practice, Adapted to the Sheriff Courts of Scotland* (T&T Clark Edinburgh 1832) 13 as cited by McMillan (1926) 57.

⁵³ A R G McMillan (1926) 7.

⁵⁴ A R G McMillan (1926) 19.

⁵⁵ Cf. *Morrison v Massa* 1866 5 M 130.

⁵⁶ A R G McMillan (1926) 17. It is apparent that this jurisdiction based on arrestment is of a similar nature of jurisdiction of an English Admiralty action *in rem* as highlighted by McMillan (1926) 8, 'the form of action used in the Scottish Court of Admiralty [i.e. prior to 1830] was in substance an action *in rem* as now used in England'; see *The Duplex* [1912] P 8 (PDAD).

found caution the *judicio sisti* (to attend and appear during the pendency of the suit) and *judicatum solvi* (to pay the sum adjudged against them).⁵⁷ The ship was thereupon released and the action became a personal action against the owner, who was deemed to have voluntarily submitted to the jurisdiction.⁵⁸

On the other side of things, the pursuer was required to find caution for damages for such liability as he might incur under the decree.⁵⁹ This cross-undertaking in damages is another typical feature of interim measures of protection as conceptually encoded universally in present times. Unfortunately it has been abandoned in the current practice of arrest of ships in Scotland, probably in order to be in an equal position as a jurisdiction for the arrestment of ships as compared to England.⁶⁰

The creation of the United Kingdom of Great Britain in 1707 did not affect itself the way that admiralty jurisdiction was at those times exercised in Scotland.⁶¹

⁵⁷ See eg C Farquhar Shand, *The Practice of the Court of Session: On the basis of the late Mr. Darling's Work of 1833* (T&T Clark Edinburgh 1848) 'But in all maritime actions in the Court of Session, [the creditor] is entitled to insist, not only for caution *de judicio sisti*, but *judicatum solvi*' 415.

⁵⁸ A R G McMillan (1926) 8, 20.

⁵⁹ A R G McMillan (1926) 20 referring W Smith (1832); R Boyd, *Judicial Proceedings before the High Court of Admiralty and Supreme Consistorial or Commissary Court of Scotland* (C Elliot Edinburgh 1779).

⁶⁰ In England this is a consequence of characterizing arrest of ships as an enforcing procedure and as such a matter of right, and represents an anomaly as a provisional and protective measure in the sense that a very similar measure in effect –the freezing order–does require such undertaking. In Scotland it is indeed regrettable that in the context of the law reform process that led to the adoption of the Bankruptcy and Diligence etc (Scotland) Act 2007 even though the issue was discussed and the Scottish Law Commission recommended to empower –or retain the power (see Chapter 4) of the courts to require such undertaking, this recommendation has not been followed.

⁶¹ By the nineteenth article of the union Act all admiralty jurisdictions shall be under the Lord Admiral or Commissioners of Admiralty in Great Britain. But the Court of Admiralty in Scotland shall be continued in maritime causes 'till the parliament of Great Britain make regulations as expedient for the whole united kingdom so as in Scotland be always a court of admiralty for determining all maritime causes relating to private right in Scotland' (A Browne (vol 2, 1840) 31).

2.3. ARREST OF SHIPS IN THE NINETEENTH CENTURY IN GREAT BRITAIN

2.3.1. England

The impression one has when analyzing the unsettled dicta of the nineteenth century in England is that the different theories about the essence of arrest of ships have all contributed to a better understanding of the institution: whether it is a way to compel the defendant to appear in court; security-orientated device for accomplishing with the judgment (procedural theory), a way to enforce the liability of the ship as the wrongdoer (personification theory), or the way to establish the jurisdiction of the High Court of Admiralty (hereinafter called 'jurisdictional theory'). The problem, however, is that even when the question addressed by the divergent theories is important, the answers should not be exclusive of one another.

At the beginning of the nineteenth century, when the Admiralty Court had lost its *in personam* jurisdiction and acted only *in rem*, the struggle generated by the futile search of sources to understand, justify and describe the one and only characteristic feature of the action *in rem*, made it unacceptable to conceive the different functions of arrest of ships as equally important. Nonetheless, the arrest of ships has continued to develop as an interim measure of protection that has three functions, the protective, the security and the jurisdictional one. And it is at the crossroads of these three functions derived from three different historical lineages where the core of arrest of ships lies.

2.3.1.1. The Action *in rem*

MAXWELL⁶² in giving the advantages of an Admiralty action *in rem* in his treatise of 1800, said 'the ship itself is responsible in the admiralty, and not the owners';⁶³ BROWNE, in 1802, said that 'no person can be subject to that [Admiralty] jurisdiction [*in rem*] but by his consent'.⁶⁴ In TETLEY'S opinion it was the need of the claimant, under the admiralty procedure of the Tudor/Stuart (1485-1714) period, to identify the arrested *res* in his draft sentence on first decree, and the fact that enforcement was limited to its value, what contributed to the concept that the ship itself, as opposed to its owner, was liable for certain claims, such as seamen's wages and salvage. However, as mentioned earlier in this Chapter, the liability of the ship is much ancient a concept than that, derived from the earliest *lex maritima* of Medieval Europe.

2.3.1.1.1. From Maritime Attachment to Arrest *in rem* (beginning of nineteenth century)

The procedure of maritime attachment is similar in outline to that of the action *in rem*; indeed, because it involves the arrest of the ship, it is often referred to as a proceeding *quasi in rem*. WISWALL distinguishes maritime attachment – assimilating it to foreign attachment-, as a device designed to compel the appearance of a defendant in an action *in personam*, from arrest *in rem*, designed to enforce a maritime lien. He criticizes Sir Francis Jeune in *The Dictator* because he ignored such crucial distinction and congratulates Sir John Jervis in *The Bold Buccleugh* for his skilful acknowledgement of the difference.⁶⁵

⁶² J I Maxwell, *The Spirit of Marine Law* (Bunney and Gold for T. Chapman London 1800).

⁶³ *Ibid* 8.

⁶⁴ A Browne (vol 2, 1840) 100.

⁶⁵ F L Wiswall (1970) 165.

The truth is that the differences among them, at least in England, are not mainly conceptual but historical. The maritime attachment, originally adjunct to the writ *in personam*, fell into disuse in Admiralty by the beginning of the nineteenth century concurrently with the loss of jurisdiction *in personam* experienced by that court. The Admiralty Court's powers were only expanded by the Acts of 1840 and 1861 but by then the maritime attachment was already considered extinct as a legal procedure.⁶⁶ The High Court of Admiralty continued to arrest ships as part of its newly circumvented jurisdiction. From then on, arrest of ships has been conceived in England as part of the action *in rem* nowadays renamed as *in rem* claim.⁶⁷

As WISWALL recognises, the evolution of the action *in rem* in England is an example of the effect of the historical development of the Court of Admiralty upon the substantive law applied by such court.⁶⁸ For centuries, the ability to proceed in the Admiralty Court directly against a ship -regardless of the different theories providing justification for such possibility- has been the distinguishing feature of Admiralty jurisdiction.

2.3.1.1.2. The Jurisdictional Theory (1823)

This theory is constituted by all the decisions and comments that find the earliest antecedent of arrest of ships in the *processus contra contumacem*. Already Lord Stowell in *The Dundee* expressed that arrest of ships was the ancient method of acquiring jurisdiction *in rem*.⁶⁹

⁶⁶ W Tetley (1999) 1905. Tetley is of the opinion that the maritime attachment continued to exist after 1800 on the grounds of Fry LJ's speech in *Northcote v Owners of the Henrich Bjorn (The Henrich Bjorn)* (1885) LR 10 PD 44 (CA).

⁶⁷ Civil Procedure Rules (CPR) 1999.

⁶⁸ F L Wiswall (1970) 155.

⁶⁹ *The Dundee* (1823) 1 Hag. Adm. 109, 124.

2.3.1.1.3. The Personification Theory (1852)

In *The Bold Buccleugh* Sir John Jervis rejected the idea that the action *in rem* was a purely procedural device intended to secure the appearance of the owners and thus to gain personal jurisdiction over them, similar to the manner of a foreign attachment.⁷⁰ Jervis asserted that with attachment the process was directed initially at the person, and was thus in the nature of an action *in personam*, whereas the Admiralty action *in rem* was directed in the first instance at the ship. Hence, the Privy Council firmly established in *The Bold Buccleugh* that the action *in rem* was not a pure device for obtaining personal jurisdiction over ship-owners, but a unique proceeding directly against the ship.⁷¹

2.3.1.1.4. The Procedural Theory (1892)

This theory was first advanced by Sir Francis Jeune in *The Dictator*.⁷² In his opinion arrest *in rem* was essentially intended to obtain security for any judgment that might be given. In evolving the procedural theory Jeune based his reasoning upon 'the early practice of the Admiralty Court'⁷³ and commenced his investigation in the early times above-mentioned when a proceeding to seize the *res* was available

⁷⁰ F L Wiswall (1970) 156; *The Bold Buccleugh* (1852) 7 Moo. PCC 267, 282 (Sir John Jervis).

⁷¹ In the opinion of Wiswall 'the origins of the personification theory may be seen in the early decisions that contracts for ship construction were not maritime and hence not enforceable in Admiralty' correlatively a 'dead' ship [permanently withdrawn from navigation] was then considered non-maritime property and hence not individually liable in tort or upon warranty of seaworthiness' (F L Wiswall (1970) 163). The personification theory has reached its utmost development in the USA where it received complete recognition at the beginning of the twentieth century in [1901] *Tucker v Alexandroff* 183 US 424, 438. In this dictum M J Henry Billings Brown gave the definitive opinion which declares the ship 'born' when she is first launched, and that thereafter 'she acquires a personality of her own...and is individually liable for her obligations'.

⁷² F L Wiswall (1970) 159.

⁷³ *The Dictator* [1892] P 304 (PDAD) 310.

only when the defendant in a proceeding *in personam* was unavailable for personal arrest; failing to appear in response to a citation, the defendant was held in contempt and his *res* defaulted.⁷⁴ In a nutshell, for an action *in rem* against the ship to be available, the procedural theory requires that the person who was the owner at the time when the facts giving rise to the cause of action occurred could have been answerable at common law. There is a person, not an asset, who is liable. Jeune's procedural theory was quickly accepted.⁷⁵

Jeune was not alone. MARDSEN reached also the conclusion that the very early Admiralty action *in rem* was a security-orientated device because: '*Arrest of goods was quite a frequent as arrest of the ship..., [and] the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied*'.⁷⁶

2.3.1.1.5. From the Procedural Theory back to the Jurisdictional Theory (1899)

The procedural theory has one essential corollary, i.e., that in the original action *in rem* it is possible to arrest property of the defendant other than his ship. It was stated in 1885 by L. J. Fry, that '*any property of the defendant within the realm*' might be arrested to enforce a statutory right *in rem*.⁷⁷ This dictum was criticised as gratuitous and unsupported⁷⁸ due to confusion between the very early actions *in*

⁷⁴ F Clerke, *Praxis curiae admiralitatis Angli* (Dublin 1666) Tit. 67-68 (Hall (1809) 115-118). For a translation of Clerke's *Praxis* see J E Hall, *The Practice and Jurisdiction of the Court of Admiralty* (Geo. Dobbin and Murphy, Baltimore, 1809; reprint by The Lawbook Exchange NJ 2005) Part II, 3-118.

⁷⁵ *The Gemma* [1899] P 285 (CA) 292; *The Dupleix* [1912] P 8 (PDAD) 12.

⁷⁶ R G Marsden (ed), *Select Pleas of the Court of Admiralty. The court of the Admiralty of the west (A.D. 1390-1404) and The High Court of Admiralty (A.D. 1527-1545)* (vol 1 B Quaritch London 1894-97) lxxi.

⁷⁷ *The Henrich Bjorn* (1885) LR 10 PD 44 (CA).

⁷⁸ F L Wiswall (1970) 170.

rem with maritime attachment *in personam*. However, this aspect of the procedural theory eventually prompted the arrest in an action *in rem* of collateral property of a ship-owner, particularly sister-ship's arrests.

In the meantime, the Court of Appeal in *The Beldis*⁷⁹ in order to avoid sanctioning collateral arrest, found it necessary to modify the procedural theory which it had previously accepted without question,⁸⁰ asserting that arrest of the *res* was a procedural device to obtain personal jurisdiction, but was not developed until such time as any attempt to assume jurisdiction *in personam* was prohibited by the common law courts.

All in all, the three theories⁸¹ developed during the nineteenth century⁸² in England are to a certain extent correct and all of them contributed to the development of the action *in rem* (and to its core feature: the arrest of ships) by a process of intermingling leading to what it is today the unique institution at the centre of this analysis. However, after the revision of these different theories it is possible to argue that the confusion and complexities that still exist in the enforcement of maritime claims derive from the continued inaccurate reliance on historical admiralty practice. Particularly, in the case of arrest of ships, the lack of distinction between its different functions is due to the lack of acknowledgment that the institution has been permanently changing, arguably adapting itself to the change of times. This backward-looking approach has not advanced its understanding.

⁷⁹ *The Beldis* [1936] P 51(CA) 73-74.

⁸⁰ *The Gemma* [1899] P 285 (CA).

⁸¹ It is noteworthy that both the procedural theory and the personification one seem to have a common point of origin: the jurisdictional side, both have developed partly to distribute competences among national courts. The personification theory to exclude ship building contracts from Admiralty jurisdiction in the USA, and the procedural one to bring the defendant to Admiralty jurisdiction rather than common law courts in England.

⁸² For a modern reassessment of these theories see *Republic of India v India Steamship Co Ltd The Indian Grace (No.2)* [1998] 1 Lloyd's Rep 1 (HL). Ten years ago this decision left more than one 'at sea'; see N Teare, 'The Admiralty Action *in rem* and the House of Lords' [1997] LMCLQ 33.

2.3.2. Scotland

2.3.2.1. Arrestment of Ships in Scotland after the Court of Session Act 1830

By the Court of Session Act 1830 the Court of Admiralty was abolished and its civil jurisdiction transferred to the Court of Session and the Sheriff Courts. From then on, arrestment can be made by the Court of Session or the Sheriff Court in virtue of their dual civil and common law jurisdiction. Same judges, same Courts, but two distinct jurisdictions in their nature and in their law is the situation of administration of civil justice in Scotland since the Court of Session Act 1830. As the two jurisdictions had been cumulative and concurrently exercised since then, the maritime procedure in the early nineteenth century was more closely assimilated to that of a common law action in Scotland than was the case in England.⁸³

The most common form of action in Scotland was a petitory action for the payment of a debt directed against the ship-owner, and all his assets were liable to arrest in security.⁸⁴ Only if he failed to meet his personal obligations or allowed the action to go by default could proceedings *in rem* against the ship become necessary, by which the ship could be sold by order of the Court in a process of sale. As MCMILLAN explains, however, those proceedings *in rem* were ancillary to the main purpose of the action, which was one to enforce payment of a debt, and they were merely a form of diligence and not to be confused with the English action *in rem*. In the former the action was essentially a personal one and distinct from the latter where –in the opinion of most– the liability was primarily that of the ship and was only indirectly that of the owner.⁸⁵ On this distinction *The Bold Buccleugh* was

⁸³A R G McMillan (1926) 19.

⁸⁴A R G McMillan (1926) 21.

⁸⁵*The Burns* [1907] P 137 (CA) 144.

decided, and the two pending actions for damages out of the same collision, the one in Scotland and the other one *in rem* in England, were deemed to be essentially different; hence, the plea of *lis alibi pendens* was not upheld in England.⁸⁶ This has remarkably changed in present times.⁸⁷

At those times the distinctive features of the Scottish maritime procedure as compared with the English action *in rem* were as follows. First of all, in the case of a foreign ship-owner jurisdiction could be founded against him by arrestment *ad fundandam jurisdictionem* of any property or debts belonging to him situated within the jurisdiction. The jurisdictional ground was as simple as that and it disregarded how accidental the presence of this property within the jurisdiction could be.⁸⁸ In the case of existence of a maritime lien in favour of the pursuer, in addition to the warrant of arrestment obtained on the dependence against the defender (which was effectual only to attach his personal interest in the ship) a special warrant of arrestment *in rem* against the ship was also required in order to attach the ship itself. In an action in this form it was necessary to call all parties interested in the ship, and they were to be cited. However, this was neither assimilated to the English action *in rem* because it was still based primarily on the liability of the ship-owner.⁸⁹

⁸⁶ *The Bold Buccleugh* (1851) 7 Moo. P.C.C. 267, 288.

⁸⁷ *Republic of India v India Steamship Co Ltd The Indian Grace (No.2)* [1998] 1 Lloyd's Rep 1 (HL).

⁸⁸ A R G McMillan (1926) 21.

⁸⁹ A R G McMillan (1926) 22-23. Already in the early twentieth century McMillan was worried about the way that this lack of proper action *in rem* affected the extraterritorial recognition of Scottish judgments. He particularly pointed out to the general principle of law that personal decrees in absence in foreign courts are refused recognition while if they were *in rem* is universally conceded to be a real right that will be recognised (ARG McMillan (1926) 44-45).

2.3.2.2. Arrestment *ad fundandam jurisdictionem*

The essential purpose of arrestment was understood to be ‘as the term “arrest” itself implies, to fix the vessel in the place in which she is found’,⁹⁰ operating as ‘an interdict against the debtor himself and paralysing him in the use of the property in his own possession’.⁹¹ It has always been the law of Scotland that jurisdiction exists over a defender not only in respect of his domicile but also in respect of his possession of property there; a jurisdictional ground considered exorbitant by the international community nowadays.

Differently from the action *in rem*, which is exclusively an Admiralty action, arrestment *ad fundandam jurisdictionem* is not limited to admiralty arrestment but is extensible to all moveable property of a defender not otherwise subject to the Scottish jurisdiction. If such property is in Scotland and it is arrested for the express purpose of founding jurisdiction such arrestment is known as arrestment *ad fundandam jurisdictionem* or *jurisdictionis fundandae causa*.⁹² In his *Treatise on the Law of Diligence* in 1898 STEWART offered a profound analysis of this particular ‘diligence’.⁹³ It does not provide for security in the terms that an arrestment of a ship on the dependence does; it has a very defined and narrow purpose: to found the jurisdiction of the Scottish courts. STEWART explained that this method of constituting jurisdiction was borrowed from Dutch law. There was always awareness that this jurisdictional ground was against the settled principle of Roman law that admit the maxim of *actor sequitur forum rei*⁹⁴ but it was justified under the pressing needs of international commerce.

⁹⁰ *Carlberg v Borjesson* 1877 5 R 188, 195.

⁹¹ *Wolthekker v Northern Agricultural Society* 1862 1 M 211, 213.

⁹² G Stewart, *A Treatise on the Law of Diligence* (Green Edinburgh 1898) 246.

⁹³ However it has been alleged that this distinctive kind of arrestment is not proper diligence (G L Gretton, ‘Diligence’ *Stair Memorial Encyclopaedia* (SME) (8) 75 [249]); for a detailed analysis of this peculiar institution of Scots law see Chapter 6 (Arrest of Ships and Jurisdiction on the Merits).

⁹⁴ G Stewart (1898) 246.

It is from the amalgamation of the Scottish jurisdictional base and the Dutch method of 'fixing movable assets' that arrestment *ad fundandam jurisdictionem* emerged. By arresting movable property of the defender the property was rendered fixed in Scotland therefore it was possible through that mechanism to found jurisdiction over the owner of such property in Scotland.⁹⁵ As early as in 1683⁹⁶ the practice was an established one in the Admiralty Court and beyond it and it was accepted that where a foreigner had moveable property in Scotland the creditor could lay a *nexus* on the goods preventing the possessor from handling them over until the owner gave security to submit to the jurisdiction.⁹⁷ Ultimately the effect was that arrestment *ad fundandam jurisdictionem* itself created jurisdiction.⁹⁸ In its earliest times it was considered that the security which could be demanded for releasing the goods was not only *judicio sisti* but *judicatum solvi*, hence, originally arrestment *ad fundandam jurisdictionem* served both functions, grounding jurisdiction and providing security for satisfaction of the eventual decree. However, already in the seventeenth century⁹⁹ this original view was departed from and only the jurisdictional function continued to be the effect of arrestment *ad fundandam jurisdictionem* up to the present time. Nowadays if it is necessary to obtain security

⁹⁵ *Ibid* 247.

⁹⁶ *Young v Arnold* (1683) M 4833 is generally referred to as the leading case. Nevertheless McMillan argues that the case showed that the practice was already common in the Admiralty Court. The importance of *Young v Arnold* in his opinion lies in the fact that it was the first application of the theory not in re mercatoria in the Admiralty Court but in the Court of Session in an ordinary case involving patrimonial rights. In that dictum the Court admits that the acceptance of the theory is foreign in principle to the strict law (McMillan (1922) 89).

⁹⁷ G Stewart (1898) 247. Interestingly enough the effects at those times seemed to be similar to the current effects of the English-crafted freezing injunction; but the purpose of the 'freezing effect' in the early arrestment *ad fundandam jurisdictionem* was to found jurisdiction and to make the goods available as security for the claim (jurisdictional and security function) the later being actually the only purpose of the freezing effect of the English referred injunctions. Nowadays in Scots law both functions are displayed together in the frequent case of arrestment *ad fundandam jurisdictionem* and arrestment on the dependence being used concurrently.

⁹⁸ Further analysis of its current jurisdictional function is provided for in Chapter 6 (Arrest of Ships and Jurisdiction on the Merits).

⁹⁹ *Lindsay v L & N-W Ry Co* 1860 22 D 571, 585 (Lord Press).

in the terms of an interim measure of protection (*judicatum solvi*) an arrestment on the dependence must be served in addition.

This lack of *nexus* with the property meant also in practice –as it was established in 1896¹⁰⁰- that the ship was entitled to sail away without committing any breach of arrestment. Surprisingly, even though this consequence expressed at the end of the nineteenth century run counter to former opinion on the issue, it was rapidly accepted, regarded as sound, and considered not to weaken the efficacy of the ‘diligence’.¹⁰¹ How possible is that arrestment of a ship *ad fundandam jurisdictionem* does not prevent the ship from sailing when the original idea when borrowing the method from Dutch law was to ‘fix’ the property to the jurisdictional territory of Scotland so jurisdiction could be founded on such ground in the case of defenders not domiciled in the country? As it is the case of many legal creations, particularly in the sphere of diligence, due to the fact that is a field crafted by custom and judicial decisions rather than statues, sometimes the remaining figure is inconsistent with its own roots. Undoubtedly, allowing the ship to sail was an unforeseeable feature of arrestment of ships to found jurisdiction when it was first adopted.

The general rule for arrestment *ad fundandam jurisdictionem* was that for jurisdiction to be found the defender needed to be the owner of the property arrested. The exception to that rule applied in the case of arrestment of ships. Differently from English law the justification from such departure from that general principle of law was not based on the personification theory but on the role of the Master as capable of representing and binding the owners and the ship. The dissenting opinion of Lord Curriehill in *Morrison v Masa* in 1866¹⁰² shows that at those times the personification theory as developed earlier in England was not so

¹⁰⁰ *Craig v Brunsgaard, Kjoesterud & Co* (1896) 3 SLT 265 (IH (1Div)).

¹⁰¹ G Stewart (1898) 272.

¹⁰² *Morrison v Massa* 1866 5 M 130.

well known in Scotland and that the possibility of raising an action against the ship as the 'wrongdoer' was far from clear.¹⁰³

2.4. FINAL REMARKS

Arrest of ships never adjusted perfectly to the general framework of arrest in general civil and commercial litigation. Its functions were and still are beyond the effects of arrest as form of diligence, to put it in Scots law terms.

Most of the inconsistencies of the law of arrest of ships as today in England and in Scotland are owing to the lack of attempt to recognise that the institution has been permanently changing since its very origins.¹⁰⁴ The changes have been in the way of transposition and cross-fertilisation. Consequently, lack of historical accuracy was a common drawback found in many dicta in the nineteenth century in England and in Scotland, which created perplexity and inconsistency. And from then on up to the present time Admiralty jurisprudence has been trying to reshape, to describe and to understand arrest of ships. That is why it is so important to determine its scope as a legal category. Due to the achievements in the international sphere this task is easier today. This thesis aims to show that arrest of ships is first

¹⁰³ '*...the argument ...comes very much to this: that the debt was...the debt of the ship... Now I do not know what is meant by a debt being called debt of the ship. It is not a real burden on the ship and the ship itself cannot personally be a debtor. And even if the ship were in the position of being the debtor I do not see how an arrestment of the ship could render her master personally subject to the jurisdiction of this Court on the ground that property belonging to him has been arrested...*' *Morrison v Massa* 1866 5 M 130 (Lord Curriehill).

¹⁰⁴ For instance Wiswall highlighted that '*...Marsden made no attempt to show or to intimate that the early jurisprudence of Admiralty endured without change until the 1890s and his remarks are entirely concerned with the Court's very early practice though they were subsequently cited in support of the historical accuracy of Jeune's scrutiny...*' (F L Wiswall (1970) 162). A constant reference back seems to be the rule when approaching maritime litigation in England and such an attitude has been criticised (see D C Jackson (2005) 7-8). See *The River Rima* (1988) 2 Lloyd's Rep 193 (HL) where the House of Lords construed the 1952 Arrest Convention in the light of English law prior to the Convention (the 1925 Supreme Court of Judicature (Consolidation) Act) (Lord Brandon of Oakbrook).

and foremost a provisional measure that has throughout the centuries developed three main functions: a protective function, a security function, and a jurisdictional function. The following Chapter looks at these different functions in order to examine the scope of the legal category as provided for in the international Conventions dealing with arrest of ships.

3-1. INTRODUCTION

The international trade and commerce is subject to various risks which it is difficult to avoid. One of the main risks is the risk of seizure of the vessel. The seizure of a vessel is a serious event which can have serious consequences for the vessel and its crew. The seizure of a vessel can be the result of a variety of reasons, such as a violation of international law, a violation of national law, or a violation of a contract. The seizure of a vessel can also be the result of a dispute between the vessel and another vessel. The seizure of a vessel can also be the result of a dispute between the vessel and a third party. The seizure of a vessel can also be the result of a dispute between the vessel and a state. The seizure of a vessel can also be the result of a dispute between the vessel and a group of persons. The seizure of a vessel can also be the result of a dispute between the vessel and a company. The seizure of a vessel can also be the result of a dispute between the vessel and an individual. The seizure of a vessel can also be the result of a dispute between the vessel and a state and an individual.

The arrest of ships is not arbitrary in that regard. One of its essential features is that it is based on the availability of international maritime law within the vessel's flag. It has not the least in the use of the "provisional" method in 1976.

The 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea provide a legal framework for the arrest of ships. The 1958 Convention provides for the arrest of ships in the event of a violation of international law. The 1982 Convention provides for the arrest of ships in the event of a violation of national law. The 1982 Convention also provides for the arrest of ships in the event of a violation of a contract. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and another vessel. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and a third party. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and a state. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and a group of persons. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and a company. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and an individual. The 1982 Convention also provides for the arrest of ships in the event of a dispute between the vessel and a state and an individual.

Even though the Convention provides for the arrest of ships, it is not always clear when a vessel can be arrested. The Convention provides for the arrest of ships in the event of a violation of international law, national law, or a contract. However, it is not always clear when a vessel can be arrested in the event of a dispute between the vessel and another vessel, a third party, a state, a group of persons, a company, or an individual. The Convention provides for the arrest of ships in the event of a dispute between the vessel and a state and an individual. The Convention also provides for the arrest of ships in the event of a dispute between the vessel and a state and a group of persons. The Convention also provides for the arrest of ships in the event of a dispute between the vessel and a state and a company. The Convention also provides for the arrest of ships in the event of a dispute between the vessel and a state and an individual.

*'The sea with its winds, its storms and its dangers never changes
and this demands a necessary uniformity of juridical regime'.¹*

CHAPTER THREE

Arrest of Ships in the International Conventions

3.1. INTRODUCTION

As international trade and commerce is more likely to flourish when it is conducted under a system of law which is certain and uniform, one of the dominant legal leitmotifs of the late nineteenth and the twentieth centuries has been the desire to achieve international uniformity. This ideal has always been particularly important to maritime law; an area that is ruled by its international character. The ancient *lex maritima* provided a sound starting point for modern harmonisation; it also fostered the expectation that uniformity in modern maritime law is desirable and achievable.

The arrest of ships is not immune to that ideal.² One of its characteristic features in modern law is the availability of international uniform law within its mores. Indeed, it has led the way in the use of the 'uniformist' method in PIL.

¹ P S Mancini, 'Prelezione al corso di diritto pubblico marittimo insegnato nella R. Università di Torino nell'anno 1852-1853' (speech given on 29 November 1852) in P S Mancini, *Diritto internazionale – Prelezioni, con un saggio sul Machiavelli* (Margheri Naples 1873) 93, 105-106 (tr) P J S Griggs 'Obstacles to Uniformity of Maritime Law, The Nicholas J. Healy Lecture' in (2003) 34 J Mar L & Com 191, 192.

² Even though the rationale underlying the first attempts to harmonise the law in this sphere was not to achieve uniformity for the sake of commercial prosperity generally but to protect ship-owners from the indiscriminate use of arrest of ships as an interim measure of protection; arguably, as an indirect way to protect international trade.

Conflict rules³ are still necessary whenever uniform solutions have not been achieved (either because agreement was not obtained or because preference has been afforded to the *lex fori* to rule on such issues); nonetheless, it is fair to say that this is a sphere shaped by international uniform law.

Uniformity has adopted different paths in this field: the 'transnational' level via the *lex mercatoria* since ancient times; the 'international' level via the traditional mechanism of international Conventions in the twentieth century; and more recently, allegedly, the 'supranational' level with regard to its jurisdictional effects, within Europe, through the special position of the 1952 Arrest Convention in relation to EC Council Regulation 44/2001.

This Chapter studies the international level. It is a matter of fact that uniformity in this sphere is still partial, even after more than fifty years of application of the 1952 Arrest Convention. The analysis conducted allows identifying certain drawbacks to uniformity. In a nutshell, these drawbacks could be overcome if the mixed nature of arrest of ships as an institution, as described in the previous chapter, was borne in mind whenever the Conventions are to be applied. The dogmatic result is the necessity to avoid the use of traditional methods of national law in interpreting Conventional provisions. From a PIL viewpoint and for the sake of an appropriate autonomous interpretation, characterization⁴ imposes itself to clarify the scope⁵ of arrest of ships as a PIL category⁶ in the 1952 and 1999 Arrest Conventions (hereinafter 'the Conventions').

³ To see the relation between the two main methods of PIL in international maritime law C Fresnedo de Aguirre and V Ruiz, 'El Derecho Marítimo y El Derecho Internacional Privado' [2005] 22 Anuario de Derecho Marítimo 189.

⁴ The discoverer of the problem Bartin named it as of 'qualification' nonetheless the term 'characterization' proposed by Falconbridge has been widely adopted as its English equivalent (A E Anton *Private International Law* (Green Edinburgh 1967) 44).

⁵ In Spanish the PIL term for the scope of a PIL category is '*alcance extensivo de la categoría*'.

⁶ J J Alvarez Rubio identify certain characterization problems in this sphere; see J J Alvarez Rubio, 'El embargo preventivo de buques: Regulación Convencional y Problemas de

3.1.1. The International Level

The chase for uniformity at the international level constituted a further link in the long chain of amalgamations that have formed arrest of ships as the modern mixed legal institution that it is today. The interest in international harmonisation in the field arose in the 1930s in the CMI⁷ mores. As it was outlined in Chapter 1 arrest of ships as an institution used in civil and commercial matters did not have an exact equivalent in every legal system at the national level. One main difference between civilian and common law systems needed to be aligned: in civil countries a ship could be arrested as a security for any claim, even for claims that were of a non-maritime nature, and in common law countries, especially in England, ships could only be arrested in the limited cases where the claimant was entitled to a right *in rem*.

The first product of the harmonisation efforts⁸ was the Convention Relating to Arrest of Sea Going Ships adopted in Brussels the 10th of May 1952 entered into force on the 24th of February 1956, where certain degree of harmonization was achieved via the definition of 'maritime claim'; the *ex facie* conceptualization of arrest of ships as an interim measure of protection; and the recognition of *forum*

Calificación' in *Derecho Marítimo y Derecho Internacional Privado: Algunos Problemas Básicos* ((Servicio Central de Publicaciones del Gobierno Vasco Vitoria-Gasteiz 2000) 91.

⁷ Historically the *Comité Maritime International* (hereinafter CMI) was the first private international organization concerned with unification of private international maritime law. In the middle of the twentieth century however the United Nations created the International Maritime Organization (IMO) and then the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL). Nowadays the IMO has become the primary source of harmonising instruments in the field of private international maritime law. The CMI continues to work on its own initiatives and acts as a consultant to IMO UNCTAD and UNCITRAL.

⁸ The International Convention Relating to the Arrest of Sea-Going Ships was signed in Brussels on May 10th 1952 and was preceded by several conferences: Paris (1937), Antwerp (1947) Amsterdam (1948) and Naples (1951).

arresti as an acceptable jurisdictional ground subject to certain conditions. The 1952 Arrest Convention has at present more than 80 ratifications and accessions.⁹

Discussions as to the possible review of the 1952 Arrest Convention were initiated at the CMI Annual Conference in Lisbon in 1985.¹⁰ The International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD) established a 'Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects' (JIGE) in December 1986 to work on a new convention on Maritime Liens and Mortgages and to review the 1952 Arrest Convention. After prolonged considerations, on 12th March 1999 in Geneva the UN/IMO Diplomatic Conference updated the 1952 Arrest Convention by the adoption of the International Convention on Arrest of Ships 1999. The 1999 Arrest Convention aims at achieving further unification in the field by providing a widely acceptable legal instrument promoting international trade and transport. It strives to strike a balance between the interests of cargo-owners and of ship-owners in securing the free movement of ships, and the right of the claimant to obtain security for his claim. The 1999 Arrest Convention represents advancement in various ways analysed in this chapter and throughout this thesis. However, this new Convention has not yet entered into force.¹¹

3.2. ARREST OF SHIPS AND DRAWBACKS TO UNIFORMITY FROM A P.L. PERSPECTIVE

The aim of uniformity is not achieved not only through ratification of certain instruments but also through the application of the same instruments in a uniform manner.

⁹ The status of ratification of the 1952 Arrest Convention is published in the CMI Yearbook (2005-2006) 432-436 accessible through the CMI website www.comitemaritime.org (last accessed on August 9th 2007).

¹⁰ 33rd International Conference of the CMI, 19-25 May 1985.

¹¹ According to art 14 (1) the 1999 Arrest Convention should be ratified by ten countries for it to entry into force. Up to August 9th 2007 this has not happened yet; only 7 countries have ratified or acceded to it: Algeria, Bulgaria, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic (www.unctad.org last accessed on August 9th 2007).

3.1.2. The PIL Perspective

Every PIL rule has, as any other rule of law, two elements: the category (the situations covered by the norm) and the provision (the legal consequence). This bipolar structure is common to all PIL rules: conflict rules, uniform rules and mandatory rules (*'loi de police'*).¹² However, the scope of research of PIL as a legal discipline in relation to uniform rules is limited to the first element of this normative structure: the category, where the internationalism of the rule remains. Hence, the central concern of this Chapter is the characterization of arrest of ships; its legal consequences, i.e. the material solutions, are only analysed in so far as helping to clarify the scope of the category. Other PIL concerns in this sphere relate to a) the scope of application of the Conventions; b) problems of interpretation; and c) the necessary coordination of legal rules resulting from the coexistence of different (overlapping) systems (particularly the specialised arrest Conventions and the more general jurisdictional frame within the EC). The last issue is just touched on in this chapter and further analysis is provided in Chapter 6 (with regard to the 1952 Arrest Convention, *de lege data*) and in Chapter 7 (with regard to the 1999 Arrest Convention, *de lege ferenda*).

3.2. ARREST OF SHIPS AND DRAWBACKS TO UNIFORMITY FROM A PIL PERSPECTIVE

The aim of uniform law is achieved not only through consensus on certain provisions included in international Conventions but uniformity of application in the different State parties to the Conventions is also necessary. In order to achieve such uniformity of application there must be certain criteria to be used by courts and judges for the interpretation of Conventional provisions in accordance with the

¹² J R Talice in D Operti Badán et al, *Objeto y Método en el Derecho Internacional Privado* (2nd edn FCU Montevideo 1990) 29, 59.

purposes of the respective Convention. In that sense the results of the application of the 1952 Arrest Convention have been, and still are, unsuccessful.

The reasons for such lack of uniformity are manifold.¹³ From a PIL perspective the drawbacks to uniformity in the case of arrest of ships relate to the following issues: the scope of application of the Convention; the interpretation of the Convention; and last but not least the 'disruptive' recourse to the *lex fori*. These factors undermine the uniform application of the Convention. It is here suggested that what happens is the consequence of brushing aside the process of characterization. In practical terms that would mean that when, under the 1952 Arrest Convention, an Italian judge is ordering a *sequestro preventivo* of a ship, or a Spanish court is ordering an *embargo preventivo* of a ship, or a Swedish court is ordering a *kvarstad*, or a French court is ordering a *saisie conservatoire* of a ship, or a Scottish court is ordering a ship arrestment, or an English court is ordering a ship arrest, they generally do not take into consideration that they are not ordering any of these measures but they are ordering a '*detention or restriction on removal of a ship to secure a maritime claim*'; and that they should do so according to the provisions and the purposes of the 1952 Arrest Convention. In other words, the scope of the legal category 'arrest of ships' should be examined *in ordinem* against the provisions of the Convention itself; *extra ordinem* characterization is best avoided.

Going through the different authorities in the jurisprudence of the State parties to the 1952 Arrest Convention it appears clearly that in many cases the

¹³ Amongst others, there is no consensus as to the main objective the Convention itself. Most continental Europeans understand the Convention's main aim as to limit the right to arrest since in continental Europe claimants-rights to arrest ships were limited by the Convention. Scots law enters into this category. Under English law, on the other hand, the Convention gives broader rights to arrest than was previously allowed in England. In turn this could lead to a more consistent interpretation with the characterization of arrest of ships; if as such it is a provisional and protective measure the main aim of the Convention should be to assist claimants in the pursue of their claims. The latter interpretation is no more than a wishful thinking.

Convention is seen just as a limitation imposed in terms of the kind of claims that entail the right to arrest the ship; that is the Convention is seen purposively as its article 2. Therefore, *dicta* in the different countries show that in accordance with the limitations and extensions established by the Convention States usually continue to apply their own 'arrest of ships' in terms of scope of the legal category disregarding the fact that the Convention is a uniform scheme by itself.¹⁴ The following factors contribute to that misapplication.

3.2.1. Scope of Application

The first drawback relates to the scope of application of the Conventions. The 1952 Arrest Convention applies to ships flying the flag of State parties and such application excludes national law in so far as the claims for which a ship may be arrested (article 2). From a civil law perspective this is a protective rule -protecting ship-owners- as it limits the right of arrest to certain types of claims included in a closed list in article 1 of the Convention. There are two exceptions to this general rule provided for in article 8 paragraphs 3 and 4. The former provides that State parties may exclude from the benefits of the Convention any person who does not at the time of the arrest have his habitual residence or principal place of business in a State party. This provision is actually entitling the States to make an exclusion that would have the nature of a reservation to the Convention. This has been so amended in the 1999 Arrest Convention.

The second exclusion, that of paragraph 4, is directed towards cases where there are no foreign elements. The provision provides that the Convention does not

¹⁴ An illustration of that is to be found in the Scottish Law Commission 'Report on Diligence on the Dependence and Admiralty Arrestment' (Scot Law Com Report No. 164 (1998)) where it was expressed that the harmonisation introduced through the enactment of the Administration of Justice Act 1956 did not change the nature of arrestment of ships in Scots law; it merely limited its scope or field of competence to a list of particular claims (116).

apply when arrest is performed in the State of registration of the ship by a person who has his habitual residence or principal place of business in that State. That would be a purely domestic case. Article 8 (4) has been subject to criticism. BERLINGIERI is of the opinion that the exclusion from the scope of application of purely national cases is sensible in PIL Conventions adopting the methodology of choice-of-law, i.e. in a 'conflictualist' approach. However, in his opinion, if the 'uniformist' method is adopted and therefore the final aim of the Convention is to achieve uniformity of application of the substantive rules in the State parties, it advances such a goal better by applying the substantive rules of the Convention in relation to everyone.¹⁵ This opinion deserves further consideration. The first argument of BERLINGIERI in so far the difference between conflict-of-laws rules and uniform rules is quite obvious: regarding domestic cases there is no need for a conflicts rule at all. The second argument is not so straightforward. On the one hand international Conventions, such as the Arrest Conventions, provide an alternative to the choice-of-law methodology by providing a uniform solution for PIL cases, that is, for cases where there is at least one relevant foreign element, and in that sense it is the solution of PIL cases that matters –and not the domestic ones. The arrest of ships in the international sphere is a truly PIL institution crafted so as to provide a device for international commerce and to compensate for the difficulty of enforcing judgments abroad. This rationale does not exist in domestic cases. On the other hand, however, it is realistic to ascertain that for the sake of uniformity, keeping double standards, that is, keeping two different schemes of arrest of ships depending on whether the case is domestic or international, places further difficulties for judges and those in charge of applying the law; in a certain way it enhances the possibility of disruptive *lex fori* interference. Moreover, this is not a field where double standards would be justifiable in terms of the need to protect

¹⁵ He explains that this provision may give rise to problems for example where a ship is arrested by two claimants one to whom the Convention applies and one to whom it does not [or it does not completely] because the uniform rules and the national rules may be in conflict with one another (F Berlingieri, *Berlingieri on Arrest of Ships* (4th edn LLP London 2006) 316).

forum policies. Contrarily, a field such as arrest of ships should be a prosperous sphere to advance harmonisation in the procedural mores.¹⁶ All in all, the technique used in article 8 (4) of the 1952 Arrest Convention is regrettable since it encourages State parties to keep double standards.¹⁷ Unfortunately this provision has been reproduced in article 9 (6) of the 1999 Arrest Convention. In the opinion of BERLINGIERI it limits the global character of the new Arrest Convention.¹⁸

A stronger controversy arises, however, in relation to another unfortunate provision of the 1952 Arrest Convention, that of article 8 (2). This provision establishes the application of the Convention to ships flying the flag of a non-State party except for the 'protective' rule of article 2. The *ratio legis* of this provision seems to have been to extend the burdens of the Convention to every sea-going ship but to avail the benefits of it only to ships and claimants closely connected to any of the State parties. The provision is the result of a British proposal in order not to leave ships of non-State parties in a better position in English ports than the ships of State parties. As for English law before the adoption of the Convention the right of arrest was limited to claims enforcing a maritime lien, if the Convention could not

¹⁶ J A Jolowicz, 'On the Comparison of Procedures' in J A R Nafziger and S C Symeonides (eds), *Law and Justice in a Multistate World, Essays in Honor of Arthur T von Mehren* (Transnational Publishers New York 2002) 721, 740.

¹⁷ Sweden for example has a dual system when it comes to arrest of ships. It has ratified the 1952 Arrest Convention and it keeps its domestic legislation regarding the *kvarstad* institute. *Kvarstad* is a Swedish term and may be defined as an ordinary attachment. Under rule 8 (4) above-mentioned the rules relating to the *kvarstad* procedure found in ch 15th of the Swedish Code of Judicial Procedure may still be used to arrest ships (see O Egerström, 'Securing Maritime Claims: The ship arrest regimes in Sweden and England' (2004/2005) Master thesis, Faculty of Law, University of Lund, www.juridicum.su.se/transport/Forskning/Uppsatser/oscaregerstrom%20uppsats%20050901.pdf last accessed on August 10th 2007). Other examples are Germany and France. In the German *Handelsgesetzbuch* (Commercial Code) the national provisions on arrest still apply on the ground that they are not in conflict with those of the Convention because they require conditions for an arrest that are stricter than those set out in the Convention. This interpretation is criticized by Berlingieri (F Berlingieri (2006) 16). In France the national regime applicable to French ships in the cases set out in art 8 (4) and to ships flying the flag of a non-State party to the Convention where the arrester elects to apply it, is Decree No 67-967 of 27 October 1967.

¹⁸ F Berlingieri (2006) 319.

be applied to ships of non-State parties that would imply that those ships in English ports would be 'safer' than the rest. The application of the 1952 Arrest Convention to ships flying the flag of non-State parties is noteworthy.¹⁹ This dichotomy has been amended in the 1999 Arrest Convention where paragraphs 1 and 2 of article 8 have been replaced by a provision according to which the Convention shall apply to any ship, whether or not flying a flag of a State party; and this is without any limitations insofar as the availability of 'protective rules' whatsoever. States may, however, reserve the right to exclude the application of the Convention to ships not flying the flag of a state party to the Convention via a formal reservation. This modification is to be welcomed. The wider the scope of application of the Convention the more uniformity that is going to be achieved in the field, and the less chances of double standards interfering with a proper *in ordinem* characterization of the legal category.

3.2.2. Interpretation

The second disadvantage²⁰ is that the Arrest Convention 1952 has been implemented differently in the States parties to the Convention.²¹ In some countries it has been given force of law directly as a consequence of its ratification.²² However, in most of the countries some sort of implementing legislation was necessary.²³

¹⁹ Belgium, Denmark, Croatia, Finland, France, Germany, Haiti, Norway, Poland, Slovenia, Spain, Sweden, Nigeria and the United Kingdom (F Berlingieri (2006) 310-311).

²⁰ It is obvious that this is not a downside particular to the 1952 Arrest Convention but to international Conventions more generally; however it is material to this thesis in the sense that it does affect directly the characterization problem.

²¹ It is worth mentioning in this context that the International Maritime Law Institute (IMLI) in Malta provides an excellent source for governments in the understanding and implementing international Conventions in this field.

²² That is the case of Belgium, Croatia, France, Germany, Greece, Haiti, Italy, The Netherlands, Poland, Portugal, Slovenia, Ireland and Spain (F Berlingieri (2006) 15-23).

²³ Other states where the provisions of the Convention have been incorporated into national law include Denmark, Finland, Nigeria, Norway and Sweden (F Berlingieri (2006) 24). This was the case in the United Kingdom. The Administration of Justice Act 1956 was enacted with the purpose of giving effect to the 1952 Arrest Convention in English and Scots law. In England it has been superseded by the Supreme Court Act 1981. In Scotland, even

These different methods of implementation have affected the uniform interpretation of the Convention. As recognised by BERLINGIERI, '*when the provisions of a Convention are enacted into national law the danger arises that they are interpreted on the basis of national rules rather than on the basis of the Convention from which they originate, no account being taken of the need for their uniform interpretation*'.²⁴ In PIL terms the risk is that when countries fulfil their international obligations by enacting a piece of national legislation to comply with the Convention, the *extra ordinem* characterization imposes itself against the best interest of unification. The text of the Conventions consists of concepts formed out of negotiations between states delegates based on several systems of law; not only the *saisie conservatoire* of French law or the ship arrest of English law but many more. It is paramount then to avoid the use of traditional methods of national law in interpreting international uniform Conventions; the restrictive bases that they use make them unsuitable for interpreting international uniform law.

These different interpretations are apparent in the case of the 1952 Arrest Convention²⁵, even after more than fifty years since its entry into force. From the different titles that the 1952 Arrest Convention does have in the different languages that it has been drafted or translated into these differences showed. Arrest has been defined by the Convention as '*any detention or restriction on removal of a ship by order of a Court to secure a maritime claim*'²⁶. However, the English term 'arrest' and the French term '*saisie conservatoire*', both official languages of the Convention, have been translated, for example, in Spanish, as '*embargo preventivo*'²⁷ which has

though the 1956 Act remains in force, it has had several amendments and further modifications are being introduced by the Bankruptcy and Diligence, etc (Scotland) Act 2007.

²⁴ F Berlingieri (2006) 14.

²⁵ Berlingieri's work is the clearest evidence of the many inconsistencies that still exist in the law of arrest of ships when applied in the States parties to the Convention. See F Berlingieri (2006).

²⁶ International Convention on Arrest of Ships 1999 art 1 (2).

²⁷ In Spain jurists have to distinguish between the nature of '*embargo preventivo*' in the general frame of protective measures from the particular nature of '*embargo preventivo*' in

particular implications in terms of the requirements and functions of ship arrest that not necessarily coincide with the autonomous concept of the Convention.²⁸

A contrary argument to the one just submitted could be that there is in fact no autonomous concept of arrest of ships in the Convention despite its definition in article 1 (2) since the aim of the Convention was just to limit the scope of arrest as practised by national courts before the Convention entered into force. On that line it could be argued that art 1 (2) is a mere delimitation of the scope of the Convention and not a definition of arrest. This line of argument is not followed in this thesis; it is here submitted that art 1 (2) is indeed a substantive definition. The issue is discussed later in this chapter.²⁹

3.2.3. Recourse to the *lex fori*

The *lex fori* has been regarded as universal and exclusive in its application in the sense that *ab initio* every question has to be decided by reference to the *lex fori* and this dogma applies to every national court.³⁰ In that sense the *lex fori* always interferes with the *lex causae*, unavoidably. This happens whether the *lex causae* is international uniform law or national law selected by a choice-of-law rule. This is

the maritime law mores; see J J Alvarez Rubio (2000) 102 '*Debe tenerse presente la singularidad que representa la adopción de tal medida de embargo preventivo en el campo del Derecho marítimo, frente al Derecho común: conforme a éste último, el régimen del embargo preventivo es concebido como el anticipo ordinario previo a una medida de ejecución, mientras que el embargo preventivo de buques sólo desempeña tal papel de manera excepcional*'.

²⁸ The *embargo preventivo* in Spanish general law restrains the defendant from selling the ship and sets up a privilege in the eventual posterior sale of the ship ranking after mortgages but before posterior embargoes and unsecured creditors.

²⁹ See numeral 4, The Autonomous Concept of Arrest of Ships in the Conventions.

³⁰ A court should as a matter of course look to the law of the forum as the source of the rules of decision; see B Currie, *Selected Essays on the Conflict of Laws* (Duke University Press Durham, NC 1963) 183; O Kahn-Freund, 'General Problems of Private International Law' 143 RdC 139 (1974) 167; G C Petrochilos, *Procedural Law in International Arbitration* (OUP Oxford 2004) 6.

something to be assumed rather than discussed.³¹ Moreover, methodological pluralism has been used in PIL since its beginnings.³² What is unfortunate is not recourse to the *lex fori* within an international uniform Convention. In that sense it could be argued that total uniformity is a utopia and that the 'uniformist' and the 'conflictualist' methods do complement each other in PIL. This is apparent in maritime law where, even though there is a considerable degree of unification, conflict rules still have a very important role to play.³³ However, this back-up role of conflict rules should not be used in a way that undermines the harmonisation purpose of the Convention. It is obvious that recourse to the *lex fori* makes it even more difficult to free the concepts advanced by the Convention from their meanings in the respective internal laws of the State parties; if the courts have to take recourse to their own laws to solve the issues that are left to it by the Convention, necessarily, the process of interpretation is affected and the goal of an autonomous interpretation is undermined.

This is the case with the general recourse to the *lex fori* in article 6 (2) of the 1952 Arrest Convention for all matters of procedure which the arrest may entail.³⁴ In

³¹ The author does not want to fall in the trap that many PIL scholars do, devoting enormous energy to square the circle. See F K Juenger *The Problem with Private International Law* (Centro di Studi e Ricerche di Diritto Comparato e Straniero Roma 1999).

³² J R Talice (1990) 57.

³³ On the particular theme see C Fresnedo de Aguirre and V Ruiz Abou-Nigm (2005).

³⁴ The principle that procedural aspects of interim measures of protection are to be governed by the *lex fori* is widely accepted in PIL. Operti has advanced the idea that in the case of provisional and protective measures the *lex fori* is indeed the most appropriate conflict-of-law rule (D Operti Badán *Exhortos y Embargo de Bienes Extranjeros. Medios de Cooperacion Judicial Internacional* (Amalio Fernández Montevideo 1976). Aguirre Ramirez, however, has a different [arguably not so slightly] opinion in the sense that in his opinion it should be the *lex fori* of the court that has jurisdiction to hear the case on the merits (F Aguirre Ramirez 'Embargo y Arresto de Buques en Uruguay' (2005) *Revista de Transporte y Seguros* 275, 286). Regardless of the convenience of the choice-of-law rule and the good example that this is of the 'back-up role' of PIL in harmonisation processes what is here submitted is that for the sake of harmonisation processes recourse to the *lex fori* should be left as a last resort for issues where forum policies are germane or where the lack of consensus in terms of legal principles jeopardises the possibility of achieving a substantive solution. Following that, what is to be avoided is recourse to the *lex fori* in areas where consensus was achievable but was not achieved.

this sphere two relatively recent Swedish cases are illustrative. The first one is *The Nestor*³⁵. The tug *Nestor* was towing a barge which was subsequently anchored in such manner that it damaged a fibre optic cable owned by a telecom company. The telecom company applied for the ship to be arrested as it was moored in Sweden. The Court found that the claim for damages for the damaged cable was a maritime claim under the 1952 Arrest Convention as implemented in chapter 4 of the Swedish Maritime Code. However, the Court also referred to the domestic rules of *kvarstad* as provided for in chapter 15 of the Swedish Code of Judicial Procedure (CJP). In applying the requirements criteria used for *kvarstad* the Court found that *periculum in mora* was to be proved by the claimant and the fact that the ship was ready to leave the jurisdiction could not be taken as a presumption of such risk. Due to the fact that there was not another peril showing that the defendants might not abide by the judgment, the arrest of the ship was refused. The second case is *The Mindaugas*³⁶. It involved a claim for collision damages. The ship had struck a moored ship in the harbour of Tallinn. While she was in Gävle, Sweden, arrest was applied for at the Stockholm District Court. The Court concluded that *fumus boni iuris* has been shown for the claim and that the claim attracted a maritime lien. However, as in the prior case, the Court applied chapter 15 CJP very strictly and not finding *periculum in mora* to be proven this arrest was also refused. This sort of reasoning is widely held to be wrong even in Sweden.³⁷ Doubtless, it is in plain contravention of the 1952 Arrest Convention. Unfortunately there are several examples of this kind of misapplications in all of the State parties to the Convention.

³⁵ T 1863-02 unreported (Swedish Maritime Court).

³⁶ T 11513-02 unreported (Stockholm DC).

³⁷ In *The Mindaugas* the court has ignored the regulation in ch 3 s 40 of the Swedish Maritime Code providing that when a claim is secured by a maritime lien the Court may grant arrest even though *periculum in mora* has not been shown. Legislation to the same effect is found in all Scandinavian countries, Denmark: *Retplejeloven* §627, Finland: *SjöL* 4:3, Norway: *Tvangsfullbyrdelsesloven* §14-2. See O Egerström (2004/2005) 31.

3.3. CHARACTERIZATION AND AUTONOMOUS INTERPRETATION OF INTERNATIONAL UNIFORM LAW: THE DEVICES

Characterization is one of the fundamental pillars of PIL³⁸ and yet the most difficult and unsettled issue.³⁹ It is often discussed in the sphere of choice-of-law rules; however, theoretically, the process is common to all methods in PIL.⁴⁰ The process of characterization seeks to allocate a certain legal issue into a PIL category.⁴¹ This process goes unnoticed if the legal relation is easily 'classifiable' and the PIL category has a scope of application clearly established. Whenever these two circumstances do not coincide the problem of characterization arises. In the field of arrest of ships as provided for in the international uniform Conventions analysed in this chapter, the problem arises due to the lack of clear delimitation of the scope of 'arrest of ships'.

In turn, 'autonomous interpretation' stands for a synthesis of methods; the traditional grammatical, systematic and historical method of interpretation must be

³⁸ Q Alfonsin, *Teoría del Derecho Privado Internacional* (Editorial Martín Bianchi Altuna Montevideo 1955) 386 fn 1.

³⁹ T de B Maekelt, *Teoría General del Derecho Internacional Privado* (Academia de Ciencias Políticas y Sociales Caracas 2005) 285. As revealed by Lipstein there seems to be at least certain consensus on two basic problems: what is to be characterised is a legal relation confronted with a certain system or systems of law and the aim of the process of characterization is to reveal the function and purpose of those norms as far as that legal relation is concerned (K Lipstein, 'Characterization' (1999) 3 *International Encyclopaedia of Comparative Law* (ch 5) 8).

⁴⁰ For a discussion on the importance of characterization in relation to uniform law see Q Alfonsin (1955) 385-407.

⁴¹ As for the importance of characterization and the need to undertake such process in a broad internationalist spirit in accordance with the principles of PIL and its overall aim to identify the most appropriate law to govern a particular issue see *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68, [2001] 1 *Lloyd's Rep* 597 (CA) (Mance LJ) [26-27].

supplemented by a comparative approach.⁴² For the purposes of international uniform law the process of characterization goes sometimes unnoticed within the process of autonomous interpretation;⁴³ theoretically, though, in the construal process, this autonomous interpretation is preceded by characterization.⁴⁴

In the case of arrest of ships the conflict arises due to the fact that different legal systems attach different meanings to the term 'arrest of ships'. This is the problem identified by FREUND as the 'hidden homonym' or 'latent conflict'⁴⁵. Taking the Conventions as the system of law against which characterization is to be performed, and bearing in mind that there is an autonomous definition of arrest of ships in the Conventions, this conflict should be easily resolved. But it is not. It is a

⁴² F Diedrich, 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation' (1996) 8 Pace International Law Rev 303, 311. An excellent source of information for the comparative approach that is necessary to achieve an 'autonomous interpretation' in this regard is F Berlingieri (2006).

⁴³ The standard principles of interpretation of international uniform Conventions are nowadays clearly established. A leading example is Article 7 (1) of the 1980 United Nations Convention on Contracts for the International Sale of Goods. More recently the Cape Town Convention on International Interest in Mobile Equipment art 5 expressly recognises those standards by stating that in the interpretation of the Convention regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote predictability in its application. Furthermore, questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law. Finally references to the applicable law are to the national rules of the law applicable by virtue of the rules of private international law of the forum State (rejection of *renvoi*). As explained by Goode in the Official Commentary [1] is an instruction to national courts to avoid national concepts in interpreting the texts (R Goode 'Official Commentary to the Cape Town Convention on International Interest in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment' (Unidroit Rome 2002) 63.

⁴⁴ This opinion is not unanimous. Alfonsin understood that characterization and interpretation were the two phases of a one and only process. In his opinion the difference is one of perspective: from the point of view of the rule of law it is interpretation; from the point of view of the legal relation is characterization (Q Alfonsin, *Teoria del Derecho Internacional Privado* (2nd edn Idea Montevideo 1982) 389.

⁴⁵ E B Crawford and J M Carruthers, *International Private Law in Scotland* (Green Edinburgh 2006) 52.

misconception⁴⁶ to assume that because there is an autonomous definition within an international uniform law Convention, the characterization problem is totally avoided⁴⁷. Nonetheless, it is feasible that a greater degree of harmonisation could arise from the consensus that States parties achieved at the law-making stage. However, it is still necessary to characterize at the moment of application of such uniform rules.

In a nutshell, an 'autonomous definition' does not guarantee avoidance of 'lex fori' (*extra ordinem*) characterization at the stage of application of the Conventions. In turn this enhances the difficulty of freeing the concepts advanced by the Conventions from its interpretation according to the different national laws of the States parties. Therefore, uniformity of application would be advanced if courts bear in mind that in a PIL case characterization is always part of the decision-making process.⁴⁸

⁴⁶ For example Goldschmidt believed that the problem of characterisation did not arise in the case of uniform law (W Goldschmidt, *Derecho Internacional Privado* (Depalma Buenos Aires 1992) 86).

⁴⁷ Characterisation has been recognised as relevant in the sphere of an international uniform Convention in the recent Cape Town Convention on International Interests in Mobile Equipment concluded in 2001 and in force since the first of April 2004 www.unidroit.org/english/Conventions/mobile-equipment R Goode (2002) 60.

⁴⁸ For an argument to the contrary, aiming at minimizing the effect of characterization in modern English PIL see A Briggs, 'Conflict of Laws and Commercial Remedies' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP Oxford 2003) 274 '...And the elimination of the line which separates right from remedy would have the advantage of negating the exercise in characterization which the existence of such a line requires to be undertaken...' 277-278; D C Jackson (2005) '...classification is a first step away from reality...' 717.

3.4. CHARACTERIZATION *IN ORDINEM* OF ARREST OF SHIPS: THE RESULTS

Arrest of ships under the Conventions is the detention of a ship under the authority of a court as a provisional and protective measure. Hence, the extent of the PIL category includes arrest as a protective measure to secure payment of a maritime claim; arrest as a preventive measure to enforce maritime liens; and arrest as a provisional measure 'to secure the *res*'. Bearing in mind that these three different types of measure have different functions it is indeed its provisional character and not its functions that provides the scope of arrest of ships as a PIL category insofar as characterization of the rule of law against the international Arrest Conventions.

3.4.1. Arrest of Ships as a Provisional and Protective Measure

In international commercial litigation the provisional character and the protective function⁴⁹ of these kinds of measures more generally -not limited to ship

⁴⁹ In international commercial litigation the distinctive features of provisional and protective measures are to be supportive of the case on the merits and consequentially reasonable and proportional. Bearing in mind that measures are to be granted '*...without however adversely affecting the other guarantees of a fair trial*' (Resolution No 1 adopted by the 20th Conference of European Ministers of Justice Budapest 11-12 June 1996) proportionality is vital. The same criterion is applied in English law considering proportionality a part of the overriding objective that interim remedies purport to obtain (H Brooke (ed) *Civil Procedure* (Sweet and Maxwell London 2004) 547). At present there are certain global standards of what constitutes a provisional and protective measure and there is as well enough basis for consensus in what is necessary for the claimant in terms of requirements for the court to order any such measures. The most authoritative achievements in this regard internationally are the 'Resolution on Provisional and Protective Measures in International Litigation' prepared by the International Law Association (ILA) at its Helsinki Conference in 1996 and the 'Principles of Transnational Civil Procedure ALI/Unidroit' as adopted in 2004 ((2004) 4 *Unif L Rev* 758-809). For a comprehensive study of provisional and protective measures see L Collins, *Provisional and Protective Measures in International Litigation* (1992) 234 RdC 19; see

arrest- are usually examined together. In the long chain of amalgamations that led to arrest of ships as the modern mixed legal institution that it is today law-makers have departed, with or without reason, from the universally recognised criteria for granting provisional and protective measures. These measures are generally discretionary, and to assess the convenience of granting them there is usually the need to prove the *fumus boni iuris*, the *periculum in mora* and to provide for an undertaking in damages.

Just for the sake of a better analysis the provisional character is cast aside from the protective side of it in order to clarify some conceptual misunderstandings.

3.4.1.1. Provisional Measure

The particularities of the 'provisional' feature of arrest of ships are as follows.

3.4.1.1.1. No need to prove *periculum in mora*

There are important differences of perspective in common law systems as opposed to civil law ones in this regard. Under many civilian legal systems arrest as any other interim measure of protection against any asset of the debtor is conditional on the danger of the claimant being unable to enforce his claim after he has obtained an enforceable judgment because the debtor is financially insolvent (*periculum in mora*). The *periculum in mora* literally means 'risk in waiting' and therefore, urgency is an element to be proved by the claimant.

However this is not a requirement for the arrest of ships under the Conventions. It has been argued that this is because the risk in waiting is in fact

also C Kessedjian, 'Note on Provisional and Protective Measures in Private International Law and Comparative Law' Prel. Doc. No.10 HccH October 1998.

inherent to the moveable character of the ship.⁵⁰ The issue has been discussed thoroughly in Italy and in Spain. In the latter the need to prove the *periculum in mora* has been provided for in relation to protective measures in general in the new Spanish Code of Civil Procedure⁵¹ in force since January 2001. Despite that, the law that established (following the ratification by Spain of the 1952 Arrest Convention) that the right of arrest exists as respects maritime claims on the basis of a mere allegation of a claim⁵² has remained in force as a *lex specialis*.⁵³ In the eight session of the Joint UNCTAD/IMO Intergovernmental Group of Experts (hereinafter JIGE) held the 9-10 October 1995 one delegation suggested that new language should be added to the definition of arrest to ensure that arrest can be ordered in cases where there was a risk for the alleged claim not to be satisfied.⁵⁴ But it was then decided to revert to the definition of arrest contained in article 1 (2) of the 1952 Arrest Convention where such a risk is not a requirement.

3.4.1.1.2. No need to prove *fumus boni iuris*

On the same token the allegation of a claim suffices to justify an arrest, consequently, proof of the *fumus boni iuris* is not required under the Conventions.⁵⁵

This is a consequence of characterising arrest as a procedure to enforce maritime liens; but inconsistent with arrest as an interim measure of protection. In Italy, for example, the general rule is that pursuant to obtain an order of arrest it is sufficient to provide a *prima facie* evidence of the claim which is described as *fumus boni iuris*. Italian courts have applied this rule also in respect of arrest of ships

⁵⁰ F Aguirre Ramirez (2005) 280.

⁵¹ Ley de Enjuiciamiento Civil 1/2000 art 728.

⁵² Ley 2/1967.

⁵³ F Berlingieri (2006) 22.

⁵⁴ The *travaux préparatoires* of the 1999 Arrest Convention (F Berlingieri (2006) 526).

⁵⁵ F Berlingieri, 'The 1952 Arrest Convention Revisited' [2005] LMCLQ 327, 330-331.

governed by the 1952 Arrest Convention.⁵⁶ The 'fume of a good right' relates both to the likelihood of success of the claim and to the amount of the claim.⁵⁷ In similar terms the claim is assessed in Poland and in Portugal for the purposes of ordering an arrest under the 1952 Arrest Convention.⁵⁸ In France and in Spain the burden of proof resting on the claimant is less onerous in the cases of arrest of ships under the 1952 Arrest Convention than under internal procedural rules.⁵⁹ This feature, even though a departure from the general principles of interim measures of protection has been regarded as commercially sound.⁶⁰

3.4.1.1.3. Cross-undertaking in damages?

As above-mentioned article 6 (1) of the 1952 Arrest Convention establishes that '*...all questions whether in any case the claimant is liable in damages for the arrest of a ship or for the cost of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the State party in whose jurisdiction the arrest was made or applied for...*'. In this regard the differences were not solved but circumvented by '*...abandoning any attempt to provide uniform rules in that respect and merely inserting a private international law rule...*'⁶¹ Indeed, advancement in this matter has been achieved in the 1999 Arrest Convention, where arrest may be subject to provision of security by the claimant for wrongful arrest or excessive security (article 6). This shows that the remission to the *lex fori* in the 1952 Arrest Convention was not justified by 'forum connections' but was indeed a point where further consensus was necessary. In the 1999 Arrest Convention this discretion is made available to courts and judges by the uniform Convention and does not depend on the *lex fori* as it is the case under the previous Convention.

⁵⁶ *Martingale Trading Group v. Azovske Morske Paroplavstvo (The Mekhanik Yuzvocich)* [2005] Dir Mar 200 (Court of Appeal of Rome).

⁵⁷ F Berlingieri (2006) 99.

⁵⁸ *Ibid* 100.

⁵⁹ *Ibid* 101.

⁶⁰ F Aguirre Ramirez (2005) 278.

⁶¹ F Berlingieri (2000) 9.

3.4.1.1.4. Proportionality

The 1952 Arrest Convention prohibits more than one arrest or bail or other security in respect of the same maritime claim by the same claimant in any one or more of the contracting States unless the claimant shows 'good cause'.⁶² It does not appear however that an absolute prohibition of multiple arrests is established by the Convention, following the reference to 'good cause for maintaining the arrest' at the end of article 3 (1).⁶³ In the 1999 Arrest Convention article 5 (2) clarifies that another ship may be arrested for the same claim only if the security provided by the first arrest is inadequate or defective.

The particularities of arrest of ships as a provisional measure comparing it to provisional measures as provided for in national legal systems, particularly civil law systems, and to the latest international trends in this regard, derive from the characterization of arrest of ships in English law as the procedure to enforce maritime liens; and in that sense, available as a matter of right. Hence, there is no discretion to assess *periculum in mora*, *fumus boni iuris* and to order a cross-undertaking in damages under the 1952 Arrest Convention. The 1999 Arrest Convention allows that latter possibility to courts and judges, bringing arrest of ships in line with the latest trends of international commercial litigation.

Particularly in relation to the lack of proof of the *periculum in mora*, an autonomous interpretation should take into account the historical method of interpretation and in that sense it is the endemic absence of safety that particularly

⁶² The Arrest Convention 1999 provides for re-arrest or multiple arrests if the amount of security provided is inadequate (up to the value of the ship originally arrested) the defendant is unlikely to be able to fulfil obligations or the ship arrested or security provided was released with the consent of the claimant on reasonable grounds or the claimant could not by reasonable steps prevent the release art 5 (1) (2).

⁶³ Scot Law Com Report No. 164, 135.

affect the shipping endeavour that explains such peculiarity. In Lord Jeffrey's words '*in maritime causes the parties are always supposed to be in meditatione fugae; they have their sails spread, and are, as it were, on the wing, and ever ready to depart*'.⁶⁴ For that reason, it is here submitted that in the case of arrest of ships it is not necessary to prove *periculum in mora* because it is always presumed.⁶⁵

3.4.1.2. Protective Measure

As outlined in Chapter 1, the protective function of arrest of ships is its most obvious one, so, it is possible to refer to arrest as a provisional and protective measure, even though it is provisional in character and the protective function is only one of its functions.

The particularities of the protective function of arrest of ships are as follows.

3.4.1.2.1. The ship-claim connection

For the right of arrest to arise it does not suffice that the ship is the property of the defendant to the action; it must also be identifiable as the ship in connection with the claim arose.⁶⁶ Only that ship or a sister ship of that ship are liable to arrest under the Conventions in respect of that claim. Consequently, claims that are not against a particular ship cannot be protected by arrest.⁶⁷

⁶⁴ *Gray v Sutherland* 1847 10 D 154,156.

⁶⁵ In German law there is a statutory provision that provides for such presumption when the defendant does not have any other assets see S Nieschulz, *Der Arrest in Seeschiffe: Eine rechtsvergleichende Untersuchung des deutschen, niederländischen und englischen Rechts* (Lit Hamburg 1997) 18 (Arrestgrund des § 917 I ZPO bei one ship companies).

⁶⁶ *Owners of Cargo Lately Laden on Board the MV Erkowit v Owners of the Eschersheim (The Eschersheim, the Jade and the Erkowit)* [1976] 2 Lloyd's Rep 1 (HL) (Lord Diplock).

⁶⁷ '*claims against a ship-owner that relate to the maintenance and operation of his ships but which are not related to a particular ship cannot be secured by means of the arrest of one of the ships owned by him If for example the owner purchases stores or spare parts for his fleet and uses them for his ships when the need arises*' F Berlingieri (2006) 127. The same would happen if he leases containers for use by an entire fleet since the claim of the supplier for the payment of such

3.4.1.2.2. Arrest of a ship in respect of a person other than the owner

Arrest of ships would not present any particularities in this regard if it was available when the owner of the ship is liable at the moment of arrest; this would be in line with general principles of law in respect of personal obligations. However, even though this is the general rule also in the case of arrest of ships⁶⁸, there are some exceptions. Article 3 (4) of the 1952 Arrest Convention grants the claimant who has a maritime claim against the demise charterer the right to arrest the ship in respect of which the claim arose. Such right is unrestricted and exists irrespective of the claim being secured by a maritime lien or not. The last sentence of paragraph 4 extends the right of arrest to any case in which a person other than the registered owner is liable in respect of a maritime claim relating to the ship (including, for instance, the time charterer or the voyage charterer).⁶⁹ Provision 3 (4) appears to derive from the fact that in certain legal systems,⁷⁰ particularly the Netherlands [as it stood then],⁷¹ maritime claims must in certain cases be brought against the *armateur gerant* (manager) or the demise charterer. Article 3(4), however, does not cover the

contracts has not arisen in respect of a particular ship therefore does not give right of arrest in terms of the Convention.

⁶⁸ The limits have been clarified in the same article of the 1999 Arrest Convention. The latter provides that arrest is permissible of any ship in respect of which a maritime claim is asserted if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected.

⁶⁹ This could be the case in relation to the maritime claims listed in art 1(1)(b)(loss of life or personal injury) art 1(1)(e)(agreements relating to the carriage of goods) art 1(1)(f)(loss of or damage to goods) ie in most of the cases it will be related to a maritime claim against 'the carrier' when such carrier is neither the owner nor the demise charterer. It has been revealed by Berlingieri that this provision was added on request of Norway and the Netherlands but he argues that the provision goes beyond what was required to bring it in line with Dutch and Norwegian law (F Berlingieri (2006) 139). Indeed in those legal systems arrest is permissible if the owner is not personally liable only in the cases where a maritime lien exists.

⁷⁰ For instance in Uruguay certain maritime claims are to be brought against the *armador* a concept that is probably equivalent to the *armateur gerant* of Dutch law. In Uruguay most of maritime claims are indeed enforceable against *armadores y propietarios* (manager and owner) of a certain ship This is certainly the case of cargo claims.

⁷¹ At present under the new Transport Law included in Book 8 of the Civil Code art 360 in force since 1 April 1991 the owner of a ship is personally liable in respect of claims against the demise charterer (F Berlingieri (2006) 140).

case where arrest is permissible in respect of claims secured by a maritime lien. The concept seems to unravel if article 3 (4) is read together with article 9.⁷² Probably the intention was to provide for arrest to follow the ship in the case of maritime liens; but article 3(4) goes far beyond those cases. This provision has given rise to interpretation problems.⁷³ Arrest of a ship in respect of a person other than the owner is permitted under the 1952 Arrest Convention, regardless of the existence of a maritime lien, in France (demise charterer); Germany (*Ausruster*);⁷⁴ Greece (any kind of charterer); Italy (demise charterer and time charterer); and the Netherlands (demise charterer).⁷⁵

The situation has been clarified in the 1999 Arrest Convention. Article 3 (1) (b) establishes that 'arrest is permissible of any ship in respect of which a maritime claim is asserted if the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected. Article 3 (3) adds: '*Nonetheless, the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship*'. Paragraph 3 refers generally to the arrest of a ship which is not owned by the person liable for the claim and is formulated as an exception to the provisions of paragraphs 1 and 2; the exception, therefore, applies not only in respect of claims against the demise charterer but also in respect of claims secured by a maritime lien,

⁷² Even though art 3 says art 10 but this is a recognised mistake (F Berlingieri (2006) 131).

⁷³ F Berlingieri (2006) 144.

⁷⁴ The *Ausruster* pursuant to para 510 of the HGB is the operator. This concept would include the demise charterer but not the time charterer (F Berlingieri (2006) 145).

⁷⁵ At present art 8 (360) of the Dutch Civil Code of 1991 provides that if a ship is demise chartered the owner is jointly liable with the demise charterer in respect of all contractual obligations of the demise charterer relating to the operation of the ship (F Berlingieri (2006) 147).

a mortgage, hypothec or other charge, and claims relating to the ownership or possession of the ship.⁷⁶

This provision is intended to reinforce the 'protective' character of arrest. And it has been welcomed by expert commentators.⁷⁷ As such arrest can only be effective as a 'security' measure if it can ensure the availability of judicial sale; i.e. if after a decision on the merits is taken, it could be used as an asset to obtain payment from. However, from a PIL perspective this provision is at least difficult and needs further analysis. BERLINGIERI points out to possible conflict of laws in this regard. He explains that in the case of mortgages and *hypothèques* the consequence of article 3 (3) is not to change the generally recognised rule that those charges are to be governed by the law of the place where the ship is registered. He assumes that every court will have the same conflict-of-law rule in this regard, and if that is the case, courts will permit the enforcement of the claim if the security is valid under the law of the State where the ship is registered.⁷⁸

Doubtless this provision was intended to suppress the vexatious (and allegedly oppressive) effect of arrest in the cases where the eventual judgment would not be enforceable against the ship. Again here the different functions of arrest as described in Chapter 1 are inextricably intermingled. And jurisdiction on the merits is not distinguished from jurisdiction for the purposes of interim relief. This lack of distinction could have been excusable in 1952 when that distinction was not so widely acknowledged.⁷⁹ This was not the case in 1999.⁸⁰ If a choice-of-law rule was to be included to determine whether arrest of a third-party ship was permissible, the remission should have been to the law of the court competent to

⁷⁶ F Berlingieri (2006) 150.

⁷⁷ See especially D C Jackson, *Enforcement of Maritime Claims* (4th edn LLP London 2005) 396-397. 'So a gap of the 1952 Arrest Convention is filled' ... 'The uncertainty of substantive rights in an arrested ship is removed' [in the 1999 Arrest Convention].

⁷⁸ F Berlingieri (2006) 151.

⁷⁹ However, even then art 7 shows that the distinction was taken into consideration. Following it article 7(1) refers to jurisdiction on the merits whereas article 7(2) and (3) clearly refers to ancillary jurisdiction.

⁸⁰ C Kessedjian (1998).

hear the merits; even though *forum arresti* is recognised as the rule in the 1999 Arrest Conventions this does not mean that in every case the court of the place where the arrest was applied for is going to be the one effectively hearing the merits. The competence of the *forum arresti* is not exclusive and several circumstances can lead to a different court being the one to decide on the merits. In those cases, that is, when arrest is granted by a court exercising ancillary jurisdiction, just for the purpose of granting interim relief, it should not be left to the law of that court (the one where arrest is applied for) to decide whether a certain ship is liable to arrest in relation to that claim or not; this would go against a good overall management of the case.⁸¹

At the time of the adoption of such rule it was suggested that such issue was a question of national law which is not expected to have a significant impact in common law countries.⁸² However, Scots law, where the property of a third party is not generally affected to satisfy the debts of another, has been modified in respect of arrestment of ships against demise charterers to allow judicial sale of the ship in the cases provided for in the 1999 Arrest Convention.⁸³

3.5. CONCLUSIONS

Arrest of ships anticipated the emergence of the *lex mercatoria* in the past and the chase for uniformity in the field at the international level also anticipated the

⁸¹ In the case of ships the PIL rule that allows for the *lex situs* to establish which assets can be affected by a certain encumbrance (*embargabilidad o inembargabilidad de los bienes* (D Operti Badán (1976) 324) does not apply. In the case of arrest of ships the territoriality principle only serves the function of permitting to found jurisdiction on the merits regardless of further connections with the claim, but it does not 'connect' the forum with the claim in any other sense, therefore, it is here submitted that taking it as a connecting factor for the purposes of applicable law is at least dubious.

⁸² N Gaskell and R Shaw, 'Arrest Convention 1999' [1999] LMCLQ 1,10.

⁸³ See Administration of Justice Act 1956, Ch 46, s 47 E, as introduced by Sch 4 to the Bankruptcy and Diligence (Scotland) Act 2007.

revival of the new law merchant in present times.⁸⁴ As a mixture of ancient doctrines and new developments, national, international, supranational and a-national it belongs to the *lex maritima* of all times.

Under the 1952 and 1999 Arrest Conventions, the arrest of ships is the detention of a ship under the authority of a court as a provisional and protective measure. This characterization provides a broad framework for the development of arrest of ships as a legal institution in the international sphere. The protective and security function of arrest are most of the times intermingled up to such a point where it is very difficult to distinguish one from the other. It is possible to cast them aside just for the purposes of its analysis. From the definition of arrest in the Conventions as the detention of a ship 'to secure a maritime claim' it follows that the security function is the core of the protective measure as such. Hence, the extent of the PIL category includes arrest as a protective measure 'to secure payment of a maritime claim'; arrest as a preventive measure to enforce maritime liens; and arrest as a provisional measure 'to secure the *res*'.

In turn, the distinctive features of arrest of ships as a provisional and protective measure are what make it so special, so, helping to identify arrest of ships as a PIL category. Theoretically, these features have the potential to reduce the risk of *extra ordinem* characterization; on that line it could be argued that because of the peculiarities of arrest of ships in the international sphere its distinctiveness is noteworthy as meeting the needs of maritime commerce. Courts would, therefore, find it easy to distinguish between the international category and the measure as provided for in the national law of the forum. However, this has not happened; on the contrary, these features have lessened the aim of uniform application. The *ex*

⁸⁴ The new *lex mercatoria* re-emerged in the early sixties by then the first International Convention on Arrest of Ships was already in force after seek for uniformity in the field started in the 1930s (V Ruiz Abou-Nigm 'The *Lex Mercatoria* and Its Current Relevance in International Commercial Arbitration' 2 *DeCITA* (2004) 101).

facie conceptualization of arrest of ships as an interim measure of protection has not been as effective as it could have since it was not provided for with consistency in the Conventions and the lack of a conceptual framework in which to develop (due to the fact that neither as provisional nor as protective it followed the international trends) has represented a drawback to uniformity and has left arrest of ships far behind the most accepted international standards with regard to provisional and protective measures.

These drawbacks could be overcome if the transnational origin of arrest of ships as an institution and the fact that in this field States have attempted to find compromises that resulted in the creation of a 'mixed legal institution' were borne in mind whenever the Convention is to be applied. The general *ratio Conventionis* of international uniform law, i.e. the creation of international uniform statutory rules between State parties that support stability and predictability in international legal relations, is not fostered by 'homewards' methods of interpretation.⁸⁵ Therefore, an 'autonomous interpretation' is necessary; and achievable, because it has to be acknowledged, as JUENGER did, that civilian as well as common law judges are able to suppress their homing instincts to adopt desirable solutions found abroad.⁸⁶ The problems with autonomous interpretation are lessened when there is an international tribunal to seek uniformity in interpretation. In the international sphere there is no such tribunal. In the regional area there is the European Court of Justice. Its powers in so far as to the interpretation of the 1952 Arrest Convention as a specialised Convention given force in the European Communities by the *lex specialis* provision of EC Regulation 44/2001 (article 71) is limited to those provisions related to jurisdiction and do not go further beyond that.

⁸⁵ F Diedrich (1996) 310.

⁸⁶ F K Juenger (1999) 202.

CHAPTER FOUR

Arrest of Ships in England and in Scotland

4.1. INTRODUCTION

England and Scotland have always had different legal systems, even when they shared a common Parliament.² As it is well-known nowadays Scots law³ is a mixed legal system with strong civilian routes⁴ and influence from the common law of England.⁵ In turn, English law is common law based even though it is not free from the influence of the civilian traditions of Scotland and the rest of the European

¹ G J Bell *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (vol 2, 7th edn T. & T. Clark Edinburgh 1870 reprint Butterworths Edinburgh 1990) 546.

² By the Act of Union 1707 when the United Kingdom of Great Britain was formed express provision was made for the preservation of Scots law and Scottish courts. Nonetheless Britain as a unit shares the House of Lords, the highest court of appeal for private law matters for both England and Scotland.

³ See K G C Reid, 'While One Hundred Remain: T B Smith and the Progress of Scots Law' in E Reid and D L Carey Miller (eds) *A Mixed Legal System in Transition: T.B. Smith and the Progress of Scots Law* (EUP Edinburgh 2005); R Evan-Jones, 'Mixed Legal Systems, Scotland and the Unification of Private Law in Europe' in J M Smits (ed) *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia Antwerp 2001).

⁴ See P B H Birks, 'More Logic and Less Experience: The Difference between Scots and English Law' in D L Carey Miller and R Zimmermann (eds) *The Civilian Tradition and Scots Law* (Dunker und Humblot Berlin 1997) 167.

⁵ See H L MacQueen, *Common Law and Feudal Society in Medieval Scotland* (EUP Edinburgh 1993).

countries.⁶ This is particularly true in the field of PIL;⁷ and it is material in the case of arrest of ships.

In the past, the earliest admiralty courts in England and in Scotland recognised and applied the law merchant, particularly the *lex maritima* - a general maritime law common to all maritime nations-;⁸ the same in England and in Scotland. Nonetheless, even then, uniformity of principle did not necessarily imply uniformity of practice;⁹ it is undeniable though that there has been direct and indirect cross-fertilization.

The deeper differences in the field were harmonised in the United Kingdom by the 1952 Arrest Convention as enacted by the Administration of Justice Act 1956¹⁰ (now in England consolidated in the Supreme Court Act 1981). This enactment introduced the compromise achieved in the international sphere into English and Scots law. On the one hand, it narrowed the wide powers of arrestment of a ship on

⁶ In the opinion of R Evan-Jones, England has benefited extraordinarily from its openness to the Civilian tradition with which it has had to operate so closely in the context of Britain (R Evan-Jones (2001) 48. Furthermore, in his opinion '*Although it is true that English law is essentially a product of indigenous development, Roman law was certainly though for example at the University of Oxford from the earliest of times*' 42. See also R Evan-Jones, 'Roman Law in Scotland and England and the Development of one Law for Britain' (1999) 115 *Law Quarterly Review* 605. See also R Zimmermann, 'Roman Law and European Legal Unity' in AS Hartkamp et al (eds) *Towards a European Civil Code* (2nd edn Kluwer Law International Nijmegen 1998) 21; W M Gordon, 'A Comparison of the Influence of Roman Law in England and Scotland' in D Carey Miller and R Zimmermann (eds) *The Civilian Tradition and Scots Law op cit* 135.

⁷ T Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *ICLQ* 813.

⁸ *Currie v McKnight* [1897] AC 97 (HL).

⁹ *Sheaf Steamship Co Ltd v Compania Tramediterranea* (1930) 36 *Lloyd's Law Rep* 197 (IH (2 Div)). Although the Scottish and English Admiralty Courts administered the same maritime law the procedure which each Court adopted as a condition of exercising its jurisdiction was not necessarily the same (A R G McMillan, *Scottish Maritime Practice* (Hodge Edinburgh 1926)).

¹⁰ See *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co (The Sandrina)* [1985] 1 *Lloyd's Rep* 181 (HL). There it was held that it was desirable that the Administration of Justice Act 1956, as passed to enable the United Kingdom to ratify and comply with the 1952 Arrest Convention, was interpreted consistently as such provisions for both jurisdictions can be identified as having a common derivation from the Convention.

the dependence previously available in Scotland where arrestment was competent even for non-maritime claims; on the other hand, it widened the powers of arrest previously available in England under which the power of arrest arose only in respect of admiralty claims based upon a maritime lien, or a statutory right to arrest *in rem*, by allowing the arrest of 'sister ships' in certain circumstances. The degree of harmonisation was affected by the very different approach to the arrestment of ships in Scotland as compared with England prior to the Convention. In view of such divergences the amendments made to Scots law were introduced in a separate self-contained section of the Act.¹¹

This Chapter aims to signal the current remaining differences between English and Scots law¹² in the law of arrest of ships and to assess their consistency, respectively, with the international Conventions. Ultimately, the question that arises is whether it is more convenient to approach the arrest of ships as pertaining to a broader category (interim relief/diligence/provisional and protective measures) –as it is done in Scotland-; or if it is preferable, for the sake of adjustment to the particular needs of maritime commerce, to treat it as a category of its own –as it is done in English law-.¹³

¹¹ Administration of Justice Act 1956, Chapter 46, Part V (Admiralty Jurisdiction and Arrestment of Ships in Scotland) (47-51/57).

¹² Due to the fact that the power to ratify international Conventions rest with the Crown, most of the international literature on the subject matter tends to erroneously assume that the United Kingdom has at present a single system of arrest of ships.

¹³ It has to be borne in mind that this is a thesis on the arrest of ships from a PIL standpoint. Hence, the issues looked at in this chapter are not wholly comprehensive of the topic 'arrest of ships' in English and Scots law, but, only in as much as relevant for the discussion on its characterization. The specific PIL problems, i.e. applicable law, jurisdiction, and recognition and enforcement of foreign judgments, are going to be analysed in the following three chapters.

4.2. ADMIRALTY JURISDICTION IN ENGLAND AND SCOTLAND

As essential background to this discussion, it is necessary to present an overview of the admiralty jurisdiction in each legal system to set the scene. In this context, the particular features of the action *in rem* are material, as the framework where the arrest of ships has developed in England; and so are the main features of diligence on the dependence, as the framework where the arrestment of ships as a provisional measure has developed in Scots law.

First of all, arrest and arrestment correspond to the same legal institution;¹⁴ therefore, they share the same origins. However, in Scotland, arrestment is a particular kind of diligence. That means that the institution can be easily referred to the general framework wherein it developed. On the contrary, arrest of ships in England developed as an institution of its own kind used in Admiralty, and it does not pertain to a more general category.

4.2.1. Overview

4.2.1.1. England

The Admiralty Court in England is part of the Queen's Bench Division of the High Court. Admiralty actions can be either *in rem* or *in personam*. It is possible for an action to be both *in rem* and *in personam*. Since the beginning of the nineteenth century, arrest of ships is available in English law in the frame of *in rem* claims only. Admiralty actions in English law (in fact, Admiralty actions *in rem*) are subject to the Civil Procedure Rules (hereinafter CPR) Part 61 (Admiralty Claims) and the

¹⁴ 'The effect of an Admiralty arrestment, as the term 'arrest' itself implies, is to fix the vessel in the place in which she is found...' *Carlberg v Borjesson* 1877 5 R 188, 195.

associated Practice Direction.¹⁵ In turn, *in personam* Admiralty claims are dealt with in accordance with CPR Part 58 (Commercial Claims).¹⁶ The subject matters over which the Admiralty Court has jurisdiction are established in section 20 of the Supreme Court Act (SCA) 1981 and all claims therein included are closely connected to the maritime activity.¹⁷ The right to proceed against a ship *in rem* is governed by sections 20-24 of the SCA 1981. According to its section 20 (7), Admiralty Jurisdiction is exercisable in relation to all ships for all claims enumerated in section 20 (2). To be able to issue an *in rem* claim form in the Admiralty Jurisdiction and to effect service thereof in the prescribed ways, the ship must be within the territorial jurisdiction of the High Court.

4.2.1.2. Scotland

Most Admiralty actions in Scotland can be initiated either in the sheriff court or in the Court of Session in Edinburgh.¹⁸ As well as in England, admiralty actions can be either *in rem* or *in personam*. It is possible for an action to be both *in rem* and *in personam*. However, differently from English law, arrestment of a ship is available in

¹⁵ The Civil Procedure (Amendment No 5) Rules 2001 (SI 2001 No. 4015) entered into force on 25 March 2002.

¹⁶ Practice Direction 61 12(2).

¹⁷ a) Under s 20(1)(a) of the Supreme Court Act 1981 claims are largely coincident with the list of maritime claims as provided for in the 1952 Arrest Convention; b) under s20(1)(b) of the same Act any application to the High Court under the Merchant Shipping Act 1995; any action to enforce a claim for damage, loss of life or personal injury arising out of several circumstances enunciated therein; and any action by ship-owners or other persons under the Merchant Shipping Act 1995 for the limitation of the amount of their liability in connection with a ship or other property; c) under s 20(1)(c) of the Act any other Admiralty jurisdiction which it had immediately before the entry into force of the Act d) under s 20(1)(d) of the Act any jurisdiction connected with ships or aircraft which is vested in the High Court apart from that section and is for the time being by rules of court made or coming into force after the commencement of the Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.

¹⁸ The sheriff courts have exclusive jurisdiction in Admiralty causes below certain amount of money in value, and otherwise, concurrent jurisdiction with the Court of Session except in relation to salvage, where there are very particular provisions, the discussion of it is out with the scope of this analysis; see M C Meston, 'Admiralty' SME (1) [407].

the two types of Admiralty actions, that is, actions *in rem*, where the claim is pursued against the *res* as such as constituting a fund out of which the eventual judgment could be enforced against through the eventual sale of the ship; and actions *in personam* against the owner (or demise charterer¹⁹) of the ship, where a ship is arrested to secure the claim. Arrestment of ships in Scots law is subject to the Rules of the Court of Session 1994, as amended, Chapter 16 (Service, intimation and diligence) paragraph 16.13 (Arrestment of ships and arrestment *in rem* of cargo on board ship). Nowadays, in Scotland, as well as in England, the arrestment of ships is only available in maritime claims. In Scots law those claims are the ones listed in section 47 of the Administration of Justice Act 1956. For arrestment to be competent the ship must be within Scotland, in port or in a recognised anchorage; section 47 (6) of the Act provides that arrestment of a ship on passage is forbidden.

4.2.2. The Action *in Rem*

An *in rem* claim is a claim against the *res*.²⁰ In Admiralty, the distinctive feature of the action *in rem* has always been the ability of the maritime claimant to proceed directly against the ship; if the person interested in defending the claim

¹⁹ See Sheriff Courts (Scotland) Act 1907, Ch 51, s 6 (c) (Competence of Arresting a Ship to Found Jurisdiction in Sheriff Court) as amended by the Schedule 4 to the Bankruptcy and Diligence etc. (Scotland) Act 2007. The amendment allows this kind of arrestment against the demise charterer of the ship as well as the owner; see also Administration of Justice Act 1956, Ch 46, s 47 H as introduced by Schedule 4 to the Bankruptcy and Diligence etc. (Scotland) Act 2007.

²⁰ The *in rem/in personam* distinction derives ultimately from Roman law; see B Nicholas, *An Introduction to Roman Law* (Clarendon Press Oxford 1975) 99-104. Nonetheless, the strict Roman dichotomy becomes difficult to maintain in modern legal systems where the law is construed in terms of rights and duties. An action *in personam* may operate to protect a right *in rem* (as it is in fact the case in Scots law in some admiralty actions) hence the Roman dichotomy is blurred. It is also blurred in English law in the sister-ship 'allowance' which is only permitted for those claims under paragraphs (e) to (r) that also include those claims which give rise to maritime liens but do not include claims related to mortgages or ownership of a particular ship. Thus, as examined in Chapter 2, in admiralty actions, the modern dichotomy of *in rem/in personam* claims finds its modern routes elsewhere but in the Roman distinction.

appears in the proceedings, or acknowledges service of the *in rem* claim form, an action *in personam* materializes on top against the defendants.²¹ Therefore, the practical importance of the distinction between actions *in rem* and actions *in personam* is their effect on third parties.²²

The procedural advantages of the action *in rem* have arrest as its very core; by commencing the *in rem* claim and arresting the ship three distinct functions are merged: namely, it has the consequence of preventing the ship from leaving the jurisdiction; of establishing jurisdiction on the merits, even if there is no substantive link between the claim and the jurisdiction other than the presence of the arrested ship in the jurisdiction; and of securing the position of maritime claimants as preferred creditors over unsecured ones in the eventual sale of the ship. These features of the action *in rem* apply equally in English and Scots law.

In English law it is necessary to distinguish actions which are inherently *in rem* from actions that are procedurally *in rem* but substantially *in personam*, and, which sometimes are referred as *quasi in rem* claims.²³ In the Scottish Admiralty scheme this fallacy of the law does not exist, therefore, an action *in rem* is 'truly *in rem*'²⁴ and is only competent to enforce a maritime lien;²⁵ all other forms of admiralty actions are *in personam*.

²¹ *The Gemma* [1899] P 285 (CA); *The August 8* [1983] 1 Lloyd's Rep 351(PC Singapore).

²² B Nicholas (1975) 102. In Chapter 2 a brief account of the development of the action *in rem* in England and in Scotland in the nineteenth century was given. Since the decision of Sir Francis Jeune in *The Dictator* [1892] P 304 (PDAD) 310 it has kept 'evolving'. For an account of the relevant English dicta in the twentieth century see N Teare, 'The Admiralty Action *in rem* and the House of Lords' [1997] LMCLQ 34.

²³ N Meeson, *Admiralty Jurisdiction and Practice* (3rd edn LLP London 2003) 17.

²⁴ *The Indian Grace (No2)* [1998] 1 Lloyd's Rep (HL) 1. In the opinion of Jackson the decision helped significantly to replace fiction by reality. An action *in rem* is an action against a defendant with particular benefits for the claimant rather than an action against the ship as the 'wrongdoer' (D C Jackson (2005) 2-3).

²⁵ Administration of Justice (Scotland) Act 1933 s 17(iii) consolidated in the Court of Session Act 1988 s 6(iii). This requires the Court of Session to provide by act of sederunt 'for enabling the enforcement of a maritime lien over a ship by an action *in rem* directed against

4.2.3. Provisional Measures, Diligence on the Dependence, Interim Relief

Most legal systems provide for measures granted before a court has reached a decision on the merits to secure compliance with the eventual decision, primarily in relation to pecuniary claims. In Scots law, admiralty arrestment²⁶ as a provisional measure is part of the law of such kind of measures more generally,²⁷ that of diligence on the dependence. Diligence²⁸ is the Scots law term used to indicate the legal measures to secure or enforce compliance with court decrees, primarily decrees for payment.²⁹ Diligence can be used on the dependence of an action, i.e. when the court has not yet reached a decision on the merits, to provisionally secure the pursuer's claim. In the past, these measures used on the dependence used to be

the ship and all persons interested therein without naming then and concluding for the sale of the ship and the application of the proceeds in extinction *pro tanto* of the lien and for enabling arrestment of the ship on the dependence of such an action, and for the regulation of the procedure in any such action' (Scot Law Com Report No. 164 (1998) 125).

²⁶ Due to the many specialities of arrest of ships as compared with ordinary arrestment in Scots law, Professor Gretton considers that it should be perhaps considered as a separate diligence though he recognises that most texts deal with it as a special kind of arrestment (G L Gretton, 'Diligence' *The Laws of Scotland, Stair Memorial Encyclopaedia* SME (8) 113 [322]).

²⁷ For a general discussion on diligence in Scots law see J G Stewart, *Treatise on the Law of Diligence* (Green Edinburgh 1898); G Maher and D J Cusine, *The Law and Practice of Diligence* (Butterworths Edinburgh 1990); G L Gretton, 'Diligence' SME (8) [101-399].

²⁸ As Gretton mentions in the SME (8) [102], how a word meaning carefulness or assiduity came to mean execution for debt is unclear. He mentions W Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence* (2nd edn Bell & Bradfute Edinburgh 1822)), and his derivation from the French usage *diligentia*, and ascertains that modern French law does not use the word in this sense any more. In Uruguayan law where French influence has been notorious, provisional and protective measures are dealt with under the name of, respectively (in Spanish), *diligencias preparatorias* and *medidas cautelares* (art 306-310 and 311-317 of the General Code of Civil Procedure). However, diligence in the sense of Scots law is covered by the second (*medidas cautelares*) rather than by the former (*diligencias preparatorias*) that are preparatory measures such as the taking of evidence.

²⁹ The exception to that general rule is arrestment of ships *in rem* to secure non-pecuniary claims under s 47(3) of the Administration of Justice Act 1956.

called 'diligence for intermediate security'³⁰, particularly, 'arrestment in security'³¹, and operated '*in a way that seems to be unknown in England*'.³² As it is easily observed from the concept of diligence, the line between 'to secure' and 'to enforce' seems to be drawn at the moment when the court reaches a decision on the merits; before that, the action is depending and therefore, measures are provisional, i.e. subject to recall on security being given for the debt. Once there is a decree, diligence is taken in execution to enforce it, and the object arrested cannot be relieved but by payment.³³ Arrestment of ships to enforce maritime liens lies somewhere in the middle of the two, its function is to enforce rather than to secure, but it is granted before a decision on the merits by the courts.

The law of diligence more generally, and admiralty arrestment in particular, have been the object of recent law reform in Scotland. The Bankruptcy and Diligence (Scotland) Act 2007 draws from the 1998 Scottish Law Commission Report on Diligence on the Dependence and Admiralty Arrestments (Scot Law Com No 164). The objective of the reform is to modernise the law of diligence and to bring it into line with international commitments already undertaken. The new Act is in general consistent with the latest international development in the sphere of diligence.³⁴ As far as diligence on the dependence is concerned, the underlying policy is to prevent an unscrupulous creditor from using provisional and protective measures to put undue pressure on the debtor when the creditor does not in fact need any security for the claim.³⁵ In so far as the arrestment of ships, Schedule 4 to the Act, introduced

³⁰ G J Bell (vol 1, 1870) 7.

³¹ G J Bell (vol 2, 1870) 64-68. However, Gretton criticises that usage as confusing, since arrestment in security is strictly in respect of a debt which is contingent or future (G L Gretton, SME (8) [257]).

³² G J Bell (vol 1, 1870) 7.

³³ *Ibid.*

³⁴ For instance, proportionality as the main criterion for granting permission to use interim measures of protection, recognised in the recently adopted ALI/Unidroit Principles of Transnational Civil Procedure, is reflected in the Scottish reform.

³⁵ Policy Memorandum 104.

by section 213, modifies various enactments relating to admiralty actions and the arrestment of ships.

The functions of diligence more generally, and the functions of the arrestment of ships as a peculiar kind of diligence, coincide up to a certain extent. As STEWART³⁶ explained, diligence has three main functions: i) forcing the debtor to appear in court to answer an action at the creditor's instance (the 'compelling' effect), ii) finding security to satisfy the eventual judgment (the security function), iii) enforcing a judgment already pronounced (diligence in execution).

The benefit of being part of a more general framework is that there are certain legal effects that belong to the general category, for example, the *nexus* (attachment) that arrestment lays over the property arrested, thus, the real right in security that arrestment implies;³⁷ which in turn gives a preference to the creditor over acts of the debtor and of the competing creditor.³⁸ On the contrary, it is arguable that arrest of ships as developed in England, as part of its Admiralty scheme, has developed so as to meet the particular needs of maritime commerce. In English law arrest of ships and interim relief are treated distinctly. The judicial discretion to grant interim relief is provided for in Part 25 of the Civil Procedure Rules. These provisions apply, for instance, to the granting of freezing orders;³⁹ whereas arrest of maritime property is excluded from that framework. And indeed it does not have any other framework but the action *in rem* itself.

³⁶ J G Stewart (1898)1. As Gretton explains in the SME (8) [101], the first of these three functions refers to arrestment to found jurisdiction, and also to the now obsolete *fugae* warrant; (*meditatio fugae warrant*, a device of ancient Scots law to stop the debtor to escape from the country; under this warrant the debtor could be imprisoned unless he relieved himself by finding bail to remain in the country; see G J Bell (vol 1, 1870) 7.

³⁷ SME (8) [286].

³⁸ Scot Law Com No. 164 (1998) 186.

³⁹ The relation between arrest of ships and freezing orders involving a ship is somehow unsettled in English law. In the preliminary work pursuant to the 1999 Arrest Convention, the United Kingdom delegation expressed that a discussion was under way in England on whether it would be desirable for the Mareva injunction (as it was then called) to be covered by the definition of 'arrest'. See the *travaux préparatoires* of the 1999 Arrest Convention, Ninth Session 2-6 December 1996, as included in F Berlingieri (2006) 527.

4.3. DIFFERENT TYPES OF ARREST OF SHIPS

There are three types of arrest of ships as a provisional⁴⁰ measure in Britain: arrest/ arrestment *in rem* to enforce a maritime lien, arrest/ arrestment (*quasi in rem*) under a statutory right to proceed *in rem*, and arrestment on the dependence of admiralty actions *in personam* (only in Scots law). The third one is granted within the general law of diligence in Scotland therefore, nowadays, at judicial discretion. The first one, both in England and in Scotland, is part of the specific admiralty scheme above-mentioned, the action *in rem*. The second type, arrest/ arrestment (*quasi in rem*), is differently treated in English and Scots law. In English law, statutory rights entitle the claimant to issue an *in rem* claim form regardless of whether the result is pecuniary or not. In Scots law, the entitlement depends on whether the conclusion of the purported action on the merits is pecuniary or not; if it is pecuniary, arrestment on the dependence of an *action in personam* is competent, if it is non-pecuniary, the pursuer is entitled to arrest *in rem*, even though the action would still be *in personam*.

4.3.1. England

4.3.1.1. Generalities

Arrests of ships in England take place only in the framework of an action *in rem*, available in a limited list of admiralty causes and maritime claims. There are two main types of arrest. The one executed to enforce a maritime lien, and the other type (arrest available under statutory rights). Technically, the difference between arrest when it enforces a maritime lien and when it does not lies in its effects with

⁴⁰ Arrest/arrestment in execution is out with the scope of this thesis since it has been expressly excluded from the international framework (art 1(2) 1952 and 1999 Arrest Conventions). Noteworthy, arrestment of a ship in execution is competent in Scots law and nowadays also in English law; for the latter see M Tsimplis and N Gaskell, 'Admiralty claims and the new CPR Part 61' [2002] LMCLQ 520, 527.

regard to third parties. Nonetheless, in this sense, the difference is not connected to the effect of the arrest as such, but, with the nature of the right that the arrest is purporting to enforce; i.e. the difference is between rights *in rem* (or 'truly *in rem*') and rights to proceed *in rem* (just a procedural device). In terms of functions, the jurisdictional function operates the same way in both types, since it is not arrest that displays this function but the action *in rem* when initiated. The interaction of the other two functions varies and is going to be analysed in turn.

For the arrest of the ship in connection with which the claim arose, and provided the claim does not attract a maritime lien, and is not one of a proprietary character, such as those under sub-paragraphs a, b and c of section 20 (2), the person who would be liable for such claim *in personam* when the cause of action arose (either the owner, the charterer, or the person in possession or in control of that ship) should be either the beneficial owner of that ship in all shares, or the demise charterer at the time of the issue of the *in rem* claim form.

For the arrest of a sister ship, the person who would be liable for such claim *in personam* when the cause of action arose should be the beneficial owner of that ship in all shares of that other ship at the time of the issue of the *in rem* claim form. A sister ship is only permitted for those claims under paragraphs (e) to (r), which also include those claims which give rise to maritime liens, but not for claims related to mortgages or ownership of a particular ship. When a sister ship is arrested for a claim attracting a maritime lien, the lien is lost and therefore its priority in satisfaction of the claim will rank in the same category as that of the other statutory rights *in rem*.⁴¹

⁴¹ *The Leoborg* (No 4) [1964] 1 Lloyd's Rep 380 (PDAD).

4.3.1.2. Arrest *in rem* to enforce a maritime lien

A maritime lien is a security which gives the security-holder a right *in rem* on the ship, and takes priority over mortgages. This right arises by operation of law, without registration or other formalities. It is indeed a right in security. This kind of security must be enforced by an *in rem* claim, in which arrest is an essential component. In this context, arrest is an early step ensuring physical retention of the *res*; it is a pre-emptive measure linked with a real right in security on the object. It displays the protective function of arrest as referred in Chapter 1, i.e. counteracts the speed with which the *res* could leave the jurisdiction; but, it does not have a security function as such; the priority afforded lies in the nature of the cause of action. In English law maritime liens arise out of collision, salvage, crew's wages, master's disbursements and bonds of *bottomry* and *respondentia*.

4.3.1.3. Arrest *in rem* to enforce statutory rights *in rem*

Apart from the claims that attract a maritime lien under English law, there are statutory rights *in rem*, the function of which is to confer on a claimant having a certain type of maritime claim,⁴² the right to arrest the ship as security for that claim. With regard to those claims it is the arrest as such that constitutes the 'security'. As explained by TETLEY, the statutory right of action *in rem* differs from a maritime lien in at least three major ways, all of them related to the security function. First, the right arises only from the time of the issue of the *in rem* claim form, where the maritime lien arises when the services are provided to, or the damage is done by the

⁴² In order to comply with the obligations deriving from the ratification of the 1952 Arrest Convention, the United Kingdom amended the jurisdictional rules of the Admiralty Court in the Administration of Justice Act 1956. This statute has been superseded in England by the Supreme Court Act 1981. The list of maritime claims appearing therein largely coincides with those maritime claims listed in art 1 of the 1952 Arrest Convention.

ship concerned. Secondly, for a statutory right *in rem* to follow the ship into whomever's hands it passes, an *in rem* claim form needs to be issued before the ship is sold.⁴³ Once the *in rem* claim form is issued, the claimant acquires a status of a preferred creditor and the claim will follow the ship even in the hands of an innocent purchaser. The potential purchaser though, could protect himself against such encumbrance by looking at the court's register of *in rem* proceedings. This is a further difference from ships 'affected' by maritime liens, because liens are invisible (non-registrable). Thirdly, the holder of a statutory right *in rem* has a much lower priority than the maritime lien-holder in the distribution of the proceeds of the judicial sale, ranking after, rather than before, the ship's mortgagee.⁴⁴

4.3.1.4. No arrest as a protective measure in an action *in personam*

Differently from civil law jurisdictions, and from Scots law, there are no possibilities in England to arrest a ship as an interim measure of protection in an action *in personam*.⁴⁵ As explained in Chapter 2, this was not always the case. In the early days of the Admiralty Jurisdiction in England it used to be possible to arrest a ship in the framework of an action *in personam*. The measure was known as a maritime attachment, and allegedly it fell into disuse in Admiralty by the beginning of the nineteenth century concurrently with the loss of jurisdiction *in personam* experienced by that court.⁴⁶

⁴³ s 21(4)(b)(i) of the Supreme Court Act 1981.

⁴⁴ W Tetley, 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 Tulane Law Review 1895.

⁴⁵ Since the creation of the *Mareva* injunctions, those freezing orders are the ones available *in personam* in the maritime sphere, as well as in civil and commercial cases in general.

⁴⁶ W Tetley (1999) 1905. Tetley is of the opinion that the maritime attachment continued to exist after 1800 on the grounds of Fry's speech in *The Northcote v Owners of the Henrich Bjorn* (*The Henrich Bjorn*) (1885) LR 10 PD 44 (CA).

4.3.2. Scotland

4.3.2.1. Generalities

There are four types of provisional arrestment of ships to be considered in Scots law. Only the first and the third are within the general category of provisional and protective measures. They will be described and analysed in turn.

- (1) Arrestment *in rem* in an admiralty action *in rem* to enforce a maritime lien
- (2) Arrestment *in rem* in an admiralty action *in personam* to enforce a statutory right *in rem*⁴⁷
- (3) Arrestment on the dependence in an admiralty action *in personam*
- (4) Arrestment to found jurisdiction

4.3.2.2. Arrestment *in rem*

There may be an arrestment *in rem* of a ship in Scots law,

a) In an Admiralty action *in rem* to enforce a maritime lien over that ship. In this respects there are no differences between Scots law and English law. The claim needs to be arising out of a collision, salvage, or for crew's wages or master's disbursements, bottomry or respondentia, i.e. one of the claims included in the list provided for in section 47 (2) (a) (c) (h) (n) or (o) of the 1956 Act.

b) In an Admiralty action *in personam* involving a non-pecuniary claim related to ownership and possession, or mortgage or hypothecation of a ship. The claim needs to be one of the claims included in the list provided for in section 47 (2) (p) to (s) of the 1956 Act.

⁴⁷ Non-pecuniary claim to that ship, being the claim specified in paragraphs (p) to (s) of s 47(2) of the 1956 Act.

4.3.2.2.1. Arrestment *in rem* enforcing maritime liens

As well as in English law, in Scots law a maritime lien gives the creditor a security without possession from the moment when the circumstances occur out of which the lien arises. The effect of an arrestment *in rem* to enforce a maritime lien is therefore, not to create a nexus or security over the *res* (which already exists) but, to fix the *res* in the place where it is when the arrestment *in rem* is executed.⁴⁸ That is to say that the protective function of arrest of ships is the central one in this case. In addition, in an action *in rem* an arrestment *in rem* founds jurisdiction;⁴⁹ i.e. it displays also the jurisdictional function.

With regard to the protective function, already in the late nineteenth century Lord Shand in *Carlberg v Borjesson*⁵⁰ used the expression 'real diligence' in this sense; arrest of ships has the effect of fixing the object in a particular place, preventing the defender from disposing of it.⁵¹

As in English law, an arrestment *in rem* to enforce a maritime lien is not only competent, but also an essential incident of an admiralty action *in rem*.⁵² Warrant of arrestment *in rem* should be executed before service of the summons.⁵³

⁴⁸ Scot Law Com Report No. 164 (1998) 124.

⁴⁹ A E Anton, *Private International Law A Treatise from the Standpoint of Scots Law* (Sweet and Maxwell Edinburgh 1967) 115. Civil Jurisdiction and Judgments Act 1982 Sch 5 [7] Sch 9[6].

⁵⁰ 1877 5 R 188, 195.

⁵¹ In Lord Shand words '*Its effects, as the term 'arrest' itself implies, is to fix the vessel in the place in which she is found, and, if there is any danger of her being removed from that place, the power to dismantle may be exercised*'. As Gretton explains, 'real diligence' is an open-ended concept since it has been used in different senses in English and Scots law, and even within the latter, with more than one meaning; hence is not helpful to distinguish one type of arrestment from the others (G L Gretton SME (8) [118] / [322]).

⁵² Consequentially, the expenses of an arrestment *in rem* are recoverable as part of the expenses of process because they are essential to the obtaining of decree *in rem*; see *Hatton v*

4.3.2.2.2. Arrestment *in rem*⁵⁴ to secure non-pecuniary claims

By virtue of section 47(3) (b) of the Administration of Justice Act 1956, the claims listed in section 47(2) (p) to (s) when the result is non-pecuniary, (when the result is pecuniary the arrestment is on the dependence), encumber a right to arrest *in rem* in an action *in personam*. These claims are (p) any dispute as to the ownership or right to possession of any ship or as to the ownership of any share in a ship; (q) any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship; (r) the mortgage or hypothecation of any ship or any share in a ship; (s) any forfeiture or condemnation of any ship, or of goods which are being, or have been, carried, or have been attempted to be carried, in any ship, or for the restoration of a ship or any such goods after seizure.

As it was highlighted by the Scottish Law Commission in the Report on Diligence on the Dependence and Admiralty Arrestments,⁵⁵ this kind of arrestment is distinctive in terms of nature and functions. It is a unique example in Scots law of an arrestment which secures non-pecuniary claims, and in that sense sits uneasily with settled principles of the Scots law of diligence.⁵⁶ It is the only example in Scots law of an arrestment which is neither an arrestment on the dependence of an action nor an arrestment *in rem* enforcing a maritime lien. Although it is an arrestment *in rem*, it is competent only in admiralty actions *in personam* or combined actions, but not in actions which are purely *in rem*.

A/S Durban Hansen 1919 S C 154 (IH (1 Div)) as cited by the Scot Law Com Discussion Paper No. 84 (1989) 212.

⁵³ Implementing a proposal (Proposition 30 (2) [3.48] of the SLC Discussion Paper No 84 the current Rules of Court make it possible to convert an admiralty action *in personam* into an action *in rem* after signeting RCS r. 13.8 and note 46.3.1 *Mill v Fides* 1982 SLT 147 (OH) under RCS 1965.

⁵⁴ Under s 47 (39)(b) of the Administration of Justice Act 1956.

⁵⁵ Scot Law Com No. 164 (1998).

⁵⁶ In his *Commentaries* Bell established that arrestment 'is an incompetent diligence for enforcing obligations which are not of a pecuniary nature' G J Bell, *Commentaries on the law of Scotland and on the principles of mercantile jurisprudence* (vol 2, 7th edn T. & T. Clark Edinburgh 1870 reprint Butterworths Edinburgh 1990) 68.

Furthermore, it functions differently. It does not display the functions of arrest of ships as described in Chapter 1. It does not have a jurisdictional function, therefore, arrestment of a ship to found jurisdiction is competent in addition to that ship being arrested *in rem* to secure a non-pecuniary claim.⁵⁷ Moreover, this kind of arrestment is not followed by a process of sale, that is, the protective function does not operate to safeguard the defendant's assets to eventually create a fund against which to enforce the judgment, but to safeguard the *res* itself. Following that, and contrary to the situation of arrestment on the dependence and arrestment *in rem* to enforce a maritime lien, this kind of arrestment does not appear to have any effect on the ranking of creditors, or in competition with *bona fide* purchasers or mortgagees, or generally on the substantive rights of parties, other than right to interim possession; i.e. it does not display neither a security function at all.

In terms of juridical nature, however, it is a provisional and protective measure in the terms described in Chapter 1. As was discussed therein, a distinction must be made between measures such as preliminary attachment, arrest/arrestment or freezing injunction, on the one side, where the protective function operates to ensure that the final award or judgment can be enforced by safeguarding the defendant's assets or property;⁵⁸ and, on the other side, provisional measures relating directly to the subject-matter of the case. This second kind of measure has as its main function the preservation of the *res*, i.e. the preservation of the *status quo* until the merits of the case are settled (*pendente lite nihil innovandum*). In that sense, arrestment *in rem* to enforce non-pecuniary claims is an order regulating interim possession pending decree in a petitory action determining the right of parties. It is for this reason that it may be used whether or not the ship belongs to the defender,

⁵⁷ *PTKF Kontinent v VMPTO Progress* 1994 SLT 235 (OH).

⁵⁸ CA McLachlan, 'Second Interim Report on Provisional and Protective Measures in International Litigation', Report of the Sixty-Seventh Conference, Helsinki (ILA London 1996) 185, 202.

and even if it belongs already to the pursuer.⁵⁹ Furthermore, it has been argued that being an ancillary interim remedy in an action the court granting it should have jurisdiction in the principal action.⁶⁰ For this reason, the possibility of arresting a ship in these circumstances while exercising ancillary jurisdiction supporting foreign proceedings or arbitration seems to be excluded.

4.3.2.3. Arrestment on the dependence

Arrestment on the dependence in general law. The arrestment on the dependence as it stands today in Scots law was already a very familiar and well-known form of diligence at the beginning of the twentieth century.⁶¹ Its object is to arrest, i.e., to keep fixed, some asset of the debtor, the defender in the action, so it may be made good to satisfy the decree which the pursuer is seeking (protective function). Except from ships, arrestment could never be in the hands of the debtor himself but must be in the hands of a third party.

Arrestment of a ship on the dependence. Arrestment of a ship is rather different. It is a diligence against the ship itself and is eventually made good by a process of sale. There may be arrestment of a ship on the dependence of an Admiralty action *in personam* involving (i) claims included in section 47 (2) (p) to (s) of the Administration of Justice Act 1956 when the result is pecuniary; (ii) claims included in section 47 (2) (b) loss of life or personal injury, (d) use or hire of a ship, (e) carriage of goods (agreement), (f) carriage of goods (loss or damage), (g) general

⁵⁹ Inglis explains, for instance, that '*under s 47(2) (p) an owner may wish to obtain possession of a ship which he has chartered to the defender He would be entitled to arrest his own ship in security for the claim to obtain possession because for example of a breach of the defender of a material obligation in the charter*' I G Inglis, 'Arrest of Ships in Scotland' in C Hill (ed) *The Arrest of Ships Series* (vol 4 LLP London 1987) 87.

⁶⁰ Scot Law Com No. 164 (1998) 131.

⁶¹ *The Clan Line Steamers Limited v The Earl of Douglas Steamship Company* 1913 SC 967 (IH (1 Div)). It is probably the diligence most practitioners turn to in the first place (E Baijal, 'The Bankruptcy and Diligence etc (Scotland) Act 2007: The New Jewel in the Creditor's Crown' (2007) 9 Scots Law Times (Legislative Comment) 55, 57.

average, (i) towage, (j) pilotage, (k) supplies, (l) construction, repair or equipment of a ship, (m) liability for dock charges or dues.

Only one ship (the ship concerned or a sister ship) per action may be arrested on the dependence under section 47 (1) of the 1956 Act.⁶² Contrary to the admiralty arrestment *in rem*, arrestment on the dependence is competent but not an essential incident of an admiralty action *in personam*. And unlike arrestment *in rem* and arrest of ships in English law, arrestment of ships on the dependence in Scots law does not found jurisdiction; it does not have a jurisdictional function. If jurisdiction is to be found upon arrestment an arrestment to found jurisdiction needs to be served in addition to the arrestment on the dependence.

4.3.2.4. Arrestment to found jurisdiction

In addition to the three kinds of arrestment of ships mentioned above, a ship can be arrested under Scots traditional law to found jurisdiction (the so-called arrestment *ad fundandam jurisdictionem*). This peculiar means of establishing jurisdiction is not technically a provisional and protective measure. Arrestment to found jurisdiction does not prevent the ship from sailing (no protective function) and does not establish a *nexus*⁶³ with the property arrested (no security function); the effects of this kind of arrestment in the case of ships as well as in the case of any other kind of moveable property of the defender, are solely *fundandae causa* (jurisdictional function) and are examined in Chapter 6.

⁶² *Interatlantic (Namibia) (Ptr) Okeasni Ribolov Ltd (The Afala)* [1995] 2 Lloyd's Rep. 286 (OH).

⁶³ J G Stewart (1898) 269; *North v Stewart* (1890) 17 R 60 (HL); Maxwell *The Practice of the Court of Session* (Scottish Courts Administration Edinburgh 1980) 387; *Fraser-Johnston Engineering Co v Jeffs* ((1920) 2 Lloyd's Rep 33 (IH (1 Div))); A R G McMillan (1926) 10; D Maxwell, *The Practice of the Court of Session* (Scottish Courts Administration Edinburgh 1980) 387; *Mill v Fides* 1982 SLT 147 (OH).

4.4. THE DIFFERENT TYPES OF ARREST OF SHIPS IN ENGLISH AND IN SCOTS LAW IN THE LIGHT OF THE AUTONOMOUS CHARACTERIZATION OF ARREST OF SHIPS IN THE INTERNATIONAL CONVENTIONS

Article 1(2) of the 1952 and 1999 Arrest Conventions contain an autonomous definition of arrest of ships as formed by various parts: (i) what is arrest (the detention of a ship; the detention or restriction on removal of a ship); (ii) how is it effected (judicial process; order of a court); (iii) what is its purpose (to secure a maritime claim); (iv) what is not arrest (the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument). In the following paragraphs the consistency of English and Scots law with such autonomous definition is scrutinised.

i. Arrest Means Physical Detention of a Ship

Except for arrestment to found jurisdiction in Scots law all the other types of arrestment mentioned above prevent the ship from sailing; and in that sense fit within the Convention's category. The same happens with arrest of ships in English law. The phrase 'restriction on removal'⁶⁴ added in the 1999 Arrest Convention does not present any difference as far as English or Scots law.⁶⁵

⁶⁴ The selection of the term 'removal' in the English version has been criticised. In the French version the more appropriate term 'depart' was used. In the Diplomatic Conference the CMI suggested that the term 'removal' should be replaced by 'departure' but that suggestion was not taken into consideration. In the Spanish text is '*restricción a la salida de un buque*' (F Berlingieri (2006) 93).

⁶⁵ It was inserted to clarify the situation of any encumbrance over a ship that does not imply physical detention. For instance, the so-called 'ship-register arrest' in Danish law, whereby the warrant of arrest is not executed on the ship but is only endorsed in the ship's register. Functionally it operates like an *embargo* preventing the owner from selling or mortgaging the ship and thus securing the future enforcement on the ship of the claim of the arrester (security function only).

ii. Arrest is a Judicial Remedy

In this sphere alignment with the Convention's provisions is not so straightforward. Article 1(2) of both international Conventions refers to the detention of a ship by judicial process and articles 4 and 2, respectively, provide that a ship 'may only be arrested [or released from arrest] under the authority of a court [or of the appropriate judicial authority] of the State party in which the arrest is made [effected]'. Under Scots law not so long ago⁶⁶ warrant for diligence on the dependence was granted as a matter of right without judicial consideration; the 'judicial authority' intervention was limited to an order of the clerk of courts. In any case doubts in this regard in Scots law are now dissipated because currently judicial intervention is mandatory.⁶⁷ In English law, though, it remains an order of the Admiralty Marshall without much of a 'judicial process' in between.

iii. Arrest is a Provisional Measure; it is Not Seizure in Execution

As examined above arrest/arrestment of ships can be used both in English and in Scots law before a court has reached a decision on the merits of a maritime claim; arrestment in execution is also available, arguably in both systems, but it has been cast aside from the characterization of arrest of ships in the International Conventions. This point is made clearly in Article 1 (2) of the Conventions. Seemingly, the notional concept is centred on two premises. Arrest is a provisional measure requested before the claim is subject to a decision on its merits by a court. To be provisional in nature means that it can be recalled at the instance of the defendant and alternative security may replace that of the ship herself. Contrarily, seizure in execution is permanent, and a manner of enforcing a judgment and

⁶⁶ Before the incorporation of the European Convention on Human Rights into Scots law. See *Karl Construction Ltd v Palisade Properties Plc* 2002 SC 270 (OH).

⁶⁷ See Bankruptcy and Diligence etc. (Scotland) Act 2007, Pt 6 (Diligence on the Dependence).

satisfying the claim out of the proceeds of sale. In this event a ship is not different from the other assets of the debtor, and due to its exclusion from the definition of arrest of ships under the Convention, is liable to seizure irrespective of the nature of the claim, whether maritime or not.⁶⁸

iv. Arrest is a Measure intended to 'Secure a Maritime Claim'

Characterization in this respect is difficult. The problem lies in the extent of the security function of arrest of ships. In the international Arrest Conventions the security function is part of the autonomous definition of arrest of ships; whereas in English law, several *dicta* have disregarded such function.⁶⁹

In accordance with an *in ordinem* characterization of arrest of ships any detention of a ship effected without the purpose of securing a maritime claim would be beyond the scope of the Conventions. This purposive interpretation could entail a problem of consistency if understood too narrowly, for example in the case of claims secured by a maritime lien. In this regard the common law and civil law have not managed to amalgamate so easily. The result is that some of the provisions of the Conventions reflect the one and some the other. In other words, under the Conventions the following questions produce inconsistent answers: Does the scope of arrest of ships as a legal category in the Conventions covers only measures intended to secure a maritime claim or arrests performed to provide functionally any other of the effects stated in the Conventions fit within the category regardless of its lack of security function? Is the protective function of arrest of ships separable from its security function? That is, 'to secure a maritime claim' is necessarily to safeguard a certain asset against which the final award or judgment can be enforced

⁶⁸ F Berlingieri (2006) 88.

⁶⁹ *The Prinsengracht* [1993] 1 Lloyd's Rep 41; *The Anna H* [1995] 1 Lloyd's Rep 11. In fact, in the later it became clear as to English case law, the multiplicity of functions that the arrest of a ship entails as a single procedural act.

(the ship), or is it possible to understand the protective function more broadly in terms of the compelling effect of arrest of ships regardless of its security aspect? According to the Conventions in this context it is possible to arrest 'to secure a maritime claim' even when the claim (according to its *lex causae*) is already secured by a maritime lien, hypothec, mortgage or charge of the same nature. How should this be interpreted in terms of the extent of the legal category? Is it possible to arrest a ship even when alternative security has already been given? Apparently due to the inclusion of the security function in the very definition of arrest of ships, all the substantive rules (the legal consequences) of arrest of ships under the Conventions should be interpreted in accordance with this central function. To do it otherwise would be against the Conventions. However, an interpretation of the Conventions as whole points to a broad interpretation of the protective function of arrest of ships.

In *The Prinsengracht*⁷⁰ it was held that the claimant is entitled to arrest a ship even after bail has been provided when the owner has declined to agree expressly to submit to the jurisdiction of the court. On the same line in *The Anna H*⁷¹ the Court of Appeal in England argued that the purpose of the arrest of ships indicated in its definition in the 1952 Arrest Convention does not mean that where there is alternative security, an arrest to establish jurisdiction is not within that Convention. It was argued that despite the definition of arrest as a measure 'to secure a maritime claim' the commercial motive of the arrester was irrelevant. This argument is in plain contradiction to an *in ordinem* characterization of arrest of ships as a PIL category in the Convention. The only explanation for that departure from the autonomous interpretation of arrest of ships as in the Convention could be that, because in English law the protective function of arrest of ships is as important as its jurisdictional one, the *lex fori* characterization distorted the application of the Convention in such a way.

⁷⁰ [1993] 1 Lloyd's Rep 41 (QBD (Admlty)) (Sheen J).

⁷¹ [1995] 1 Lloyd's Rep 11 (CA).

4.4.1. Arrest of Ships as a Provisional and Protective Measure

4.4.1.1. The Provisional Character of Arrest of Ships

The 'provisional' character of arrest of ships is related to its temporary condition and to its accessory nature to the case on the merits. Due to these features provisional measures are generally discretionary, and can always be recalled under the provision of alternative security. The universally recognised criteria to assess the convenience of granting such interim remedies are the need to prove the *fumus boni iuris*, the *periculum in mora* and to provide for an undertaking in damages. However, as explained in Chapter 3, in the long chain of amalgamations that led to arrest of ships as the modern mixed legal institution that it is today, law-makers have departed from the universally recognised criteria above-mentioned. Doubtless, the influence of English law is responsible for such departure.

4.4.1.1.1. Arrest/arrestment *in rem* to enforce a maritime lien

This 'departure' is currently immaterial in the case of arrest/arrestment *in rem* to enforce a maritime lien. Both in English and Scots law such arrest is currently a legal right rather than a discretionary remedy.⁷² Paradoxically, in English law it has been argued that due to the strength in nature and effect of arrest of ships it might better be discretionary rather than a legal entitlement.⁷³ On the contrary, in Scotland it has been held that judicial discretion is inappropriate where the purpose of the

⁷² In English law it used to be conditional upon the claimant making full and frank disclosure of material facts at the time it applies for the arrest *Owners of the Vasso v Owners of Cargo Lately Laden on Board the Vasso (The Andria, The Vasso)* [1984] 1 Lloyd's Rep 235 (CA).

⁷³ M Tsimplis and N Gaskell (2002) 525. Furthermore, these authors argue that this may be particularly true if the 1999 Arrest Convention is enacted, as it increases the scope of arrest.

measure is to enforce a security.⁷⁴ On the one hand, the foregoing paradox illustrates the difference between English and Scots law in this regard, since the comment of English law referred to arrest of ships in general and indistinctively as in England actions *in rem* do not necessarily imply a substantive right *in rem* but a right to proceed *in rem*; whereas in Scots law actions *in rem* are 'truly *in rem*'. In that sense, if the court were to refuse the arrestment *in rem*, it would deprive the claimant of the benefit of his maritime lien.⁷⁵ On the other hand, this view does not take into consideration that even though the court is enforcing a real right it is so doing 'in advance'; that is probably what was meant when referring to its strength in nature and effect. And the court is doing so before even considering the case on its merits, hence, there should be an '*essential justification for the impatience of a tribunal granting relief before it has reached a final decision*'.⁷⁶ None of the benefits of a maritime lien as a real right justifies the 'anticipation' of the remedy; the only justification is that it is an essential part of the action *in rem*, a special admiralty scheme the development of which does not have other but historical explanation as showed in Chapter 2.

Following that, the suggestion made in English law referred to above deserves further consideration. In this sphere the revision undertaken with regard to admiralty arrestments pursuant to the law reform in Scots law has raised several questions (and answers) that have not been answered as far as English law is concerned. It has been suggested that eventually⁷⁷ similar questions will have to be answered and that there is little support for any change away from arrest as an entitlement.⁷⁸ In the light of the latest trends in international litigation in the field of interim measures of protection this opinion is challengeable at least in the cases where the cause of action is not secured by a maritime lien. The theme should be

⁷⁴ Scot Law Com No. 164 (1998) 127.

⁷⁵ *Ibid.*

⁷⁶ E Jimenez de Arechaga in the *Aegean Sea Continental Shelf case (Greece v. Turkey)* ICJ Reports (1976) 3 15-16.

⁷⁷ '*Should it ever be decided to reform the English law of arrest, e.g. by enacting the Arrest Convention 1999 similar questions will have to be answered*' M Tsimplis and N Gaskell (2002) 526.

⁷⁸ M Tsimplis and N Gaskell (2002) 526.

looked at from the perspective of the European Convention on Human Rights and it should be linked with the issue of cross-undertaking in damages and liability for wrongful arrest.⁷⁹

4.4.1.1.2. Arrest/ arrestment *in rem* or in the dependence when there is no maritime lien at stake

4.4.1.1.2.1. Legal Right or Discretionary Remedy?

4.4.1.1.2.1.1. England

In English law this feature of being a legal right rather than a discretionary remedy applies not only to arrest to enforce a maritime lien but to arrest of ships in general. Arrest is described as an inherent part of the action *in rem*,⁸⁰ a characterization that seems to prevail over its provisional and protective nature. At present, the general understanding is that as there is an entitlement to arrest in compliance with procedure requirements there is no room for any discretion to impose any condition.⁸¹

This was not always so. Before the 1986 Rules of the Supreme Court arrest was considered to be a discretionary remedy and the court had the power to refuse the application to arrest.⁸² Furthermore, in the case of *ex parte* proceedings there was

⁷⁹ See *infra*.

⁸⁰ 1999 Arrest Convention art 2(4) R Goode, H Kronke, E McKendrick and J Wool *Transnational Commercial Law* (OUP Oxford 2004) 440.

⁸¹ D C Jackson (2005) 405. However, when Part 61 of the CPR and its associated PD entered into force in 2002, there was some scope for doubt as to whether there was any intention to return to the position prior to 1986 (M Tsimplis and N Gaskell (2002) 525). The widely held position is that there was no such intention and arrest remains a legal entitlement rather than a discretionary remedy under current English law. Surprisingly, the issue has not been examined in the light of the ECHR in English law, as it has been Scots law.

⁸² M Tsimplis and N Gaskell (2002) 523; [1984] *The Vasso* 1 Lloyd's Rep. 235; *The Vanessa Ann* [1985] 1 Lloyd's Rep 549 (QBD (Admlty)).

the requirement of full and frank disclosure by the claimant.⁸³ Arrest shifted from a discretionary remedy to a legal right due the changes introduced in the Rules of the Supreme Court in 1986.⁸⁴ This change of character enhanced the power of arrest as a 'weapon' in the hands of a claimant; doubtless due not only to the protective and the security function of arrest but to its jurisdictional one. From then on the entitlement to arrest has been further reaffirmed by subsequent legislation.⁸⁵ The only sphere where discretion still exists is with regard to ancillary jurisdiction in support of foreign proceedings or arbitration. In such circumstances the Court has discretion as provided for in Section 26 of the Civil Jurisdiction and Judgments Act 1982.⁸⁶

There are many differences between a court exercising jurisdiction on the merits from a court exercising ancillary jurisdiction; some of them will be examined in Chapter 7. Nonetheless, the different treatment of arrest as an interim measure of protection in both situations could be suggesting that indeed this claimant-orientated policy of treating arrest of ships as a legal entitlement is aimed to protect England as one of the world leaders of maritime litigation.

4.4.1.1.2.1.2. Scotland

In Scotland, except for the arrestment *in rem* to enforce a maritime lien, admiralty arrestment is part of the general framework of diligences in security (protective measures), and may be used on the dependence of an action (as a provisional measure). Until recently authority to use diligence on the dependence

⁸³ *Ibid.*

⁸⁴ *The Varna* [1993] 2 Lloyd's Rep 253 (CA).

⁸⁵ In 1999 Practice Direction 49F [6.1] as enacted by CPR 1998 (SI 1998 No. 3132).

⁸⁶ *Greenmar Navigation v Owners of Ships Bazias 3 and Bazias 4 and Sally Line (The Bazias 3 and The Bazias 4)* [1993] QB 673 (CA); *The Havhelt* (1993) 1 Lloyd's Rep 523 where the defendant argued that the claimant's claim would be time barred under the Hague Rules as construed by Norwegian Law (S Baughen *Shipping Law* (3rd edn Cavendish London 2004) 399).

was given more or less automatically.⁸⁷ This state of affairs was considered by the Scottish Law Commission discussion paper *Diligence on the Dependence and Admiralty Arrestments 1989* (SLC DP 84) and the Report mentioned above, where judicial discretion was recommended for the grant of warrant for arrestment of a ship on the dependence of an action *in personam*, or warrant for arrestment *in rem* securing decree of specific implement in an admiralty action *in personam* in relation to a non-pecuniary claim. It was also recommended there a different treatment for an arrestment *in rem* in an admiralty action *in rem* to enforce a maritime lien since in those cases the arrest is the only method of making good the lien; it was considered that judicial discretion would be out of place in those cases and accordingly warrant for arrestment *in rem* should continue to be available to the maritime lien-holder as of right.⁸⁸

Furthermore, the Scottish Law Commission analysed the situation in the light of the Protocol 1 (right to property, education and free elections) of the European Convention on Human Rights (ECHR).⁸⁹ Two decisions of the Scottish courts, the cases of *Karl Construction Ltd v Palisade Properties Plc*⁹⁰ and *Advocate General for Scotland v Taylor*⁹¹ affirmed that the way in which diligence on the dependence was then available in Scots law infringed Article 1 of Protocol 1 ECHR because of a disproportionate interference with the debtor's property rights.

According to *Karl* four conditions needed to be satisfied before diligence on the dependence could be compatible with Article 1 of Protocol 1 ECHR: the creditor

⁸⁷ G Maher, 'Diligence on the dependence: principles for reform' [1998] *Juridical Review* 188. Nonetheless, well before the statutory law reform in this sphere, to permit the arrestment of a ship on the dependence the summons needed to show a 'colourable case' i.e. 'some intelligible and discernible cause of action' (G Maher and D J Cusine, *The Law and Practice of Diligence* (Butterworths Edinburgh 1990) 96; *West Cumberland Farmers Ltd v Ellon Hinengo Ltd* 1988 SLT 294 (OH); *Clipper Shipping Co Ltd v San Vicente Partners* 1989 SLT 204 (OH)).

⁸⁸ Scot Law Com Report No. 164 (1998) [1.10].

⁸⁹ The European Convention on Human Rights and Fundamental Freedoms signed in Rome on the 4th of November 1950.

⁹⁰ 2002 Session Cases 270.

⁹¹ 2003 Scots Law Times 1340.

needed to show a prima facie case (*fumus boni iuris*) and a specific need for diligence on the dependence (*periculum in mora*); there should be a hearing before a judge (due process); and the creditor must be liable to pay damages for losses of the debtor should the action fail.

Taylor is the latest and authoritative case but has a more limited analysis of the issues. In contradiction to *Karl*, the court held in *Taylor* that a hearing was not necessary, and all that was needed was for the decision on the application for permission to use diligence to be made by a judge. The creditor needed to show only a prima facie case and there was no need to show *periculum in mora*. However it raised the issue of proportionality; the use of such diligence would require being proportionate to the claim being made. *Taylor* clearly establishes just as low a minimum as required for ECHR compatibility. As such it was subject to academic criticism.⁹²

Since the decisions in *Karl* and *Taylor* and because of the differences between them practice in the courts did not developed in a consistent way. This led to uncertainty and unfairness. The Bankruptcy and Diligence (Scotland) Act 2007 enacted to modernize the law of diligence more generally in Scots law, tackles the issue by applying a specific test in order to get permission to use diligence on the dependence.⁹³ According to it the creditor must have a prima facie case (*fumus boni iuris*) and satisfy the court that there is a specific need to use diligence (*periculum in mora*). The court will need to be satisfied that it is reasonable in all the circumstances that permission is given and in making the decision consider whether the debtor is insolvent or verging on insolvency, or likely by removal or disposal of his assets to defeat or prejudice enforcement of any decree (*periculum in mora*). It is intended that there will be a hearing in every case, except where the court is satisfied that there is

⁹² G Maher, 'Diligence on the dependence: reform needed' (2004) 27 Scots Law Times (news) 167.

⁹³ For an account of the milestones of the reform process see G Maher (2004).

an urgent need to act before intimation of the claim document⁹⁴ (the need for the so-called surprise effect of *ex parte* warrants). In order to strike the balance between the rights of the debtor and the creditor the court may limit the sum secured, the limit being set by reference to a formula.⁹⁵

This judicial discretion applies to arrestment of ships with the only exception of the enforcement of maritime liens; that is, even arrestment *in rem* to secure non-pecuniary claims should be affected by the new legislation on diligence on the dependence.⁹⁶

Accordingly, Scots law has put itself in line with the recognised international standards in the field, except for one thing: if proportionality is to be achieved the court should have discretion to ask for a cross-undertaking in damages since the creditor must be liable to pay damages for losses of the debtor should the action fail. Further discussion of this issue is offered *infra* when dealing with cross-undertakings.

4.4.1.1.2.2. *Fumus boni iuris*

The *fumus boni iuris* is the requirement to show the appearance of a good right, that is the applicant should be able to show a large probability that he has a good right which deserves protection. As explained in Chapter 3 proof of *fumus boni iuris* is not required under the Arrest Conventions.

⁹⁴ See Debtors (Scotland) Act 1987, s 15, Pt 1 A (Diligence on the Dependence) ss 15 E (Grant of Warrant without a Hearing) as introduced by Bankruptcy and Diligence etc. (Scotland) Act 2007, Pt 6, s 169.

⁹⁵ See Debtors (Scotland) Act 1987, s 15, Pt 1 A (Diligence on the Dependence) ss 15 H (Sum Attached by Arrestment on Dependence) as introduced by Bankruptcy and Diligence etc. (Scotland) Act 2007, Pt 6, s 169.

⁹⁶ Scot Law Com No. 164 (1998) 131.

4.4.1.1.2.2.1. England

Consequently with the right to arrest as aforementioned judicial discretion to assess *fumus boni iuris* is beyond the powers of English courts when it comes to arrest of ships, except for the case when exercising ancillary jurisdiction in support of foreign proceedings or arbitration. However and even though showing *fumus boni iuris* is not a condition at the moment of arrest, the lack of foundation to ask for such a measure may amount to gross negligence in the eventuality of the defendant claiming damages for wrongful arrest.

4.4.1.1.2.2.2. Scotland

In Scots law the competency of arrestment of a ship on the dependence depends upon there being a colourable case set out in the pleadings.⁹⁷ The recent law reform makes the situation far clearer by establishing that to arrest on the dependence the creditor has the onus of proving that he has a prima facie case on the merits of the action.⁹⁸ The reform applies to an arrestment on the dependence of an admiralty action⁹⁹ in so far as not inconsistent with the provisions of Part V of the Administration of Justice Act 1956. It follows that even though *fumus boni iuris* is not a requirement under the 1952 Arrest Convention it will be clearly so under Scots law once the reform is fully in force. Arguably, this collides with the Convention since despite article 6 (2) leaves procedural issues to the *lex fori arresti* the extension of 'procedure' should not go that far. It is broadly understood that the mere allegation of a claim should be sufficient to arrest the ship in terms of the Conventions.

⁹⁷ G Maher/ D J Cusine (1990) 88.

⁹⁸ See Debtors (Scotland) Act 1987, s 15, Pt 1 A (Diligence on the Dependence) ss 15 E (Grant of Warrant without a Hearing) and F (Hearing on Application) as introduced by Bankruptcy and Diligence etc. (Scotland) Act 2007, Pt 6, s 169.

⁹⁹ See Debtors (Scotland) Act 1987, s 15, Pt 1 A (Diligence on the Dependence) ss 15 N (Application of this Part to Admiralty Actions) as introduced by Bankruptcy and Diligence etc. (Scotland) Act 2007, Pt 6, s 169.

4.4.1.1.2.3. Periculum in mora

The *periculum in mora* is literally the 'risk in waiting' and therefore, the claimant need to prove urgency or at least allege that the enforcement of the eventual judgment may be frustrated or prejudiced by the defendant's insolvency or by him removing or concealing his assets.¹⁰⁰ As it was explained in Chapter 3 arrest of ships is not conditional on showing *periculum in mora* under the 1952 Arrest Convention; however, many civilian legal systems do require such proof anyway.¹⁰¹

4.4.1.1.2.3.1. England

In English law, consistently with the characterization of arrest of ships as an inherent part of the action *in rem*, there is no need to show the danger of the claimant being unable to enforce his claim after he has obtained an enforceable judgment because the debtor is financially insolvent, or in the process of so becoming.

4.4.1.1.2.3.2. Scotland

In the opinion of MAHER this is the primary principle for consideration in granting diligence on the dependence more generally.¹⁰² It explains the '*impatience of the tribunal*' in JIMENEZ DE ARÉCHAGA words, and it will generally involve demonstrating either that there is a significant risk of the defender's insolvency, or the defender is taking steps to conceal or dissipate his assets, or that there is a significant risk that the defender will remove his assets from the jurisdiction.¹⁰³

¹⁰⁰ G Maher (2004) 168.

¹⁰¹ See Chapter 3.

¹⁰² G Maher (2004) 172.

¹⁰³ *Karl Construction v Palisade Properties plc* 2002 SLT 312 [54] (OH) (Lord Drummond Young).

Contrarily to the common fear that this requirement poses a pursuer facing diligence on the dependence too much of a burden in practical sense, in the case of arrestment of ships on the dependence *periculum in mora* is easy to show. It could arguably be even presumed¹⁰⁴ since more often than not the ship is going to be in port for a few hours, so the risk of the defender removing his assets from the jurisdiction is actual and real; indeed the speed with which the ship could leave the jurisdiction is what arrest of ships has been always trying to counteract. Such presumption exists in some legal systems and it is regrettable that it was not introduced in the international Conventions on arrest of ships. Not surprisingly this could be probably explained also looking backwards; the endemic absence of safety that particularly affects the shipping endeavour since shipping was the preserve of adventurers has made the proof of the risk redundant; arguably though it would not be redundant in many cases in present times.

The Scottish reform goes in that line; the new 2007 Act pays account to the need to prove *periculum in mora* (or the specific need to use diligence)¹⁰⁵ and the relevant provisions apply to an arrestment on the dependence of an admiralty action;¹⁰⁶ again, consequently, it seems that even though *periculum in mora* is not a requirement under the 1952 Arrest Convention it will be so under Scots law once the new Act enters into force. The same comment done with regard to *fumus boni iuris* in terms of consistency with an *in ordinem* characterization of arrest of ships under the international Conventions as a provisional and protective measure applies here.

Oddly enough, whilst these features bring Scots law into line with the latest trends in the sphere of diligence it may be argued that it drives it apart from the

¹⁰⁴ A legal presumption in this sphere exists in some legal systems, for example, German law; see S Nieschulz, *Der Arrest in Seeschiffe: Eine rechtsvergleichende Untersuchung des deutschen, niederländischen und englischen Rechts* (Lit Hamburg 1997) 18 (Arrestgrund des § 917 I ZPO bei one ship companies).

¹⁰⁵ Pt 6 s 15 (E) and (F).

¹⁰⁶ 2007 Act pt VI (Diligence on the Dependence) s 15 (N).

1952 Arrest Convention. Possibly it is the 1952 Arrest Convention, which, in turn, has a very strong English taste, that is inconsistent with general principles of provisional and protective measures. The justification for that departure is found in the pressing needs of the maritime adventure.

4.4.1.1.2.4. Cross-undertaking in Damages

Of the civil law countries of continental Europe the law and practice of provision by the claimant of counter-security is not uniform.¹⁰⁷ In general, liability arises when it is proved that the arrest was not justified.¹⁰⁸ In the 1952 Arrest Convention the issue is left to the *lex fori arresti*, whereas the 1999 Arrest Convention expressly empowers courts with discretionary powers in this regard.¹⁰⁹ There are strong policy considerations in this matter that outweigh the technical (legal) ones.

4.4.1.1.2.4.1. England

Why is it necessary to provide a cross-undertaking in damages for obtaining security through a freezing order¹¹⁰ (formerly known as *Mareva* injunction) but there is no such requirement in the case of arrest of ships in English law? As well as in all the other elements relevant to characterise arrest of ships as a provisional and protective measure, the reason is the intrinsic and troublesome connection between arrest and action *in rem* in English law; and in turn, the lack of distinction between arrest *in rem* to enforce a maritime lien and arrest in the framework of interim measures of protection as a means of obtaining security.

¹⁰⁷ Scot Law Com Report No. 164 (1998) 137-138.

¹⁰⁸ Report on 1952 Arrest Convention CMI Bulletin 105, 3 quoted in Scot Law Com Report No. 164 (1998) 137.

¹⁰⁹ Art 6.

¹¹⁰ See s 25 of the CPR.

The absence of a cross-undertaking in damages in the case of arrest of ships may leave without remedy a defendant ship-owner who has suffered loss by an unjustifiable arrest but who is unable to establish malice or *crassa negligentia* (the only grounds for awarding damages for wrongful arrest under English law).

4.4.1.1.2.4.2. Scotland

Scottish courts have power to order counter security (caution or consignation in Scots law terms) though it is rarely invoked and virtually unknown in modern practice. The current rule in Scots law, which applies with regard to diligence more generally and not limited to admiralty arrestment, is that a litigant using diligence on the dependence is generally not liable for loss which has been caused if his claim should eventually prove to be unfounded; unless malice or want of probable cause could be proven, which is extremely difficult.¹¹¹ In that sense there are not profound differences between English and Scots law.

As explained in the SLC Report on Diligence on the Dependence and Admiralty Arrestments, a requirement for a pursuer to provide a cross-undertaking in damages is difficult to reconcile with the pursuer's entitlement to obtain a warrant for diligence on the dependence as of right (which was the position of Scots law until recently, but this has already changed); and with the rule that he is not liable for damages merely because the action in question turns out to be unsuccessful. In that sense, the caution could be required only to secure against damages for diligence which is wrongful and not against diligence that even when it is oppressive is not formally unlawful.¹¹²

¹¹¹ G Maher (2004) 167.

¹¹² Scot Law Com Report No. 164 (1998) 42 [3.65].

The first circumstance (entitlement as of right) has already changed in Scots law; with respect to the second one the SLC in its Report recommended that the pursuer should be liable in damages to the defender not only in the case of the warrant being wrongful (wrongfully obtained or executed) but also when it was unreasonable for the pursuer to apply for that warrant.¹¹³ The Scottish Executive in its consultation paper called *The Enforcement of Civil Obligations in Scotland*¹¹⁴ expressed its intention to apply the Commission's recommendation¹¹⁵ in relation to liability of the pursuer equally to admiralty arrestment on the dependence as to diligence on the dependence generally. However, in the following paragraph of the same document it was affirmed: '*In line with the Executive's intentions for diligence on the dependence generally, it is not intended to provide for the provision of security by the pursuer, as a condition of the grant of a warrant to arrest, or the maintaining of an arrestment of a vessel once executed*'.¹¹⁶ No reasons are given to justify such dogmatic position which is indeed inconsistent with the SLC finding that if their recommendation on liability of the pursuer was to be adopted there would be much greater scope for caution or consignment¹¹⁷ (cross-undertaking in damages). Particularly in the case of arrestment of ships the SLC suggested that '*there may be even cases where the competency of the diligence is in doubt, e.g. where a ship sought to be arrested on the dependence belongs to the defender, and warrant (if granted at all) has to be granted forthwith because speed is essential in the circumstances. In such a case, it may be useful for the court to require the arrester to find caution*'.¹¹⁸ Moreover, in this respect there is no issue of consistency with the 1952 Arrest Convention since the issue is expressly left to the *lex fori arresti* under article 6 (1).

¹¹³ Scot Law Com Report No. 164 (1998) 42 Recommendation 6 [3.63].

¹¹⁴ April 2002 available at www.scotland.gov.uk/consultations .

¹¹⁵ Recommendation 6 [5.51-5.56].

¹¹⁶ Scottish Executive *Enforcement of Civil Obligations in Scotland* [5.78] <http://www.scotland.gov.uk/consultations/justice/CivOb-00.asp>.

¹¹⁷ [3.67].

¹¹⁸ *Ibid.*

The justification might be that there is no need for reform, since the Scottish courts already have such power.¹¹⁹ In modern Scottish practice, however, a cross-undertaking in damages offered by the arresting pursuer is unknown in the field of diligence on the dependence more generally as well as in the field of admiralty arrestment; even when in theory may be competent.¹²⁰ Nonetheless, Recommendation 62 of the SLC Report advocated for liability for wrongful or unjustified diligence and the empowerment of courts, as a condition for granting warrant for an admiralty arrestment *in rem* or in the dependence, to request caution or consignment to the pursuer, i.e. to require the pursuer to provide security for any loss which may be incurred by another party to the action or any other interested party, as a direct result of the arrestment having been wrongful or unjustified. In the case of admiralty arrestment on the dependence and *in rem* to secure non-pecuniary claims the test should be higher than in the case of arrestment *in rem* to enforce a maritime lien since in the later case the pursuer has no choice but to arrest to make good his right in security. In such cases reasonableness is the SLC preferred criterion.¹²¹

It is indeed regrettable that these recommendations were not adopted in the new Act.¹²² Nothing was mentioned in the relevant provisions¹²³ about the power of the court to request a cross-undertaking in damages. This is inconsistent with the reforms introduced by the Act which makes arrestment on the dependence a discretionary diligence; and collides with the 'balance of convenience' between pursuer and defender that is paramount for provisional and protective measures.

¹¹⁹ Scot Law Com Report No. 164 (1998) 43 Recommendation 7 [3.71]. This position was further corroborated in *Observations of the Scottish Law Commission on the International Convention on Arrest of Ships* 1999, 13-14.

¹²⁰ Scot Law Com Report No. 164 (1998) 136.

¹²¹ Scot Law Com Report No. 164 (1998) 139.

¹²² The issue was raised in the context of diligence on the dependence in general, and in the context of arrestment of ships particularly (Scot Law Com Report No. 164 (1998) [3.64] to [3.71] and [7.111] to [7.124] respectively).

¹²³ See Debtors (Scotland) Act 1987, s 15, Pt 1 A (Diligence on the Dependence) ss 15 E (Grant of Warrant without a Hearing) and F (Hearing on Application) as introduced by Bankruptcy and Diligence etc. (Scotland) Act 2007, Pt 6, s 169.

In the field of arrest of ships the issue certainly raises difficult questions in terms of policy; and the disagreements (in fact the inability to reach an agreement) in respect of liability for wrongful arrest in the preparation of the two international Arrest Conventions so notes.¹²⁴ The main argument against reform seems to have been that Scots law should not be different from English law in this regard because the difference would, through 'forum shopping', affect negatively admiralty litigation in Scotland.¹²⁵ In the 2002 consultation paper referred above the Scottish Executive made it clear that Scotland should not be a less favourable jurisdiction within which to arrest than others.¹²⁶ This is a strong policy argument; and indeed the kind of argument that English law-makers would have been very ready to consider if the case was the opposite. Theoretically though the problem here lies in the fact that English law is arguably erroneous in this matter¹²⁷ and by following such pattern Scots law misses the opportunity to get in line with internationally accepted standards.

¹²⁴ The 1952 Arrest Convention leaves the whole issue to the *lex fori arresti*. The 1999 Arrest Convention confers on the court where arrest has been effected the power to impose a cross-undertaking in damages.

¹²⁵ In that sense, the risk is that litigants might prefer to litigate in England in order to take advantage of the absence of any judicial power to order counter-security there. On the same line, claimants in Scottish admiralty actions should not be under a significant disadvantage compared with claimants in England, (SLC Report 64, 138). This kind of consideration also led civilian countries to widen the scope of *forum arresti* in the 1999 Arrest Convention; in that sense showing that even at present when England is not the maritime empire it used to be, it is still very influential, arguably as a 'maritime legal practice empire', thus, all the other jurisdictions would like to share the pie!

¹²⁶ *Enforcement of Civil Obligations in Scotland* [5.70].

¹²⁷ *Centro Latino Americano de Comercio Exterior SA v Owners of the Kommunar (The Kommunar) (No.3)* [1997] 1 Lloyds Rep 22, 33 (QBD (Admlty)) (Colman J).

4.4.1.1.2.5. Proportionality

Bearing in mind that measures are to be granted ‘... without however adversely affecting the other guarantees of a fair trial’,¹²⁸ proportionality is vital.¹²⁹

4.4.1.1.2.5.1. England

The principles of the 1952 Arrest Convention in so far as the prohibition of multiple arrests are reflected in English judicial doctrine.¹³⁰ When there is a foreign arrest, no further English arrest will be allowed unless there is a reason affecting the security.¹³¹ So far as arrests in England are concerned, the Supreme Court Act 1981, section 21 (8) enacts a mandatory prohibition. Where a ship has been served with a claim form or arrested to enforce that claim no other ship may be served with such a form or arrested in that or any other action *in rem*.¹³²

4.4.1.1.2.5.2. Scotland

The issue of proportionality in terms of the availability of repeated arrestment of the same ship, and on the arrestment of two or more ships, on the

¹²⁸ Resolution No. 1 adopted by the 20th Conference of European Ministers of Justice, Budapest, 11-12 June 1996.

¹²⁹ English law considers proportionality a part of the overriding objective that interim remedies purport to obtain. See H Brooke (ed), *Civil Procedure* (Sweet and Maxwell London 2004) 547.

¹³⁰ However, in *Centro Latino Americano de Comercio Exterior SA v Owners of the Kommunar (The Kommunar) (No.2)* [1997] 1 Lloyd’s Rep 8 (QBD (Admlty)) it was held that s 21(8) of the Supreme Court Act 1981 is not to be seen as implementing the more flexible but wide prohibition on re-arrest provided for in the 1952 Arrest Convention art 3 (3).

¹³¹ *The Christianborg* (1885) 10 PD 141; *The Golaa* [1926] P 103 (PDAD); *Owners of the Cressington Court v Owners of the Marinero (The Marinero)* [1955] P 68; [1955] 1 Lloyd’s Rep. 230 (PDAD); *The Arctic Star* (The Times 5 February 1985 (CA)); *Tjaskemolen (Now Named Visoliet), The (No.2) Tjaskemolen, The (No.2) Visoliet* [1997] 2 Lloyds Rep 476 (QBD (Admlty)); *Owners of the Carbonnade v Owners of the Ruta (The Ruta)* [2000] 1 Lloyds Rep 359 (QBD (Admlty)).

¹³² *Centro Latino Americano de Comercio Exterior SA v Owners of the Kommunar (The Kommunar) (No.2)* [1997] 1 Lloyd’s Rep 8 (QBD (Admlty)).

dependence of the same action (or to secure the same claim) has raised difficulties within Scotland. Before the entry into force of the Administration of Justice Act 1956 there were no formal limits in Scots law on the number of ships owned by the defender which could be competently arrested on the dependence of an action for payment.¹³³ The leading case on how such right has been limited by the 1956 Act is *Interatlantic (Namibia) (Pty) Ltd v Okeanski Ribolov Ltd*¹³⁴. There it was held, following the English *dictum* in *The Banco*,¹³⁵ that the purpose of the 1956 Act was to incorporate into Scots law the provisions of the 1952 Arrest Convention and its general policy against multiple or repeated arrestment for the same claim. The 2007 Act, taking into consideration the SLC recommendation,¹³⁶ clarifies the issue and provides that a creditor in admiralty action may, on cause shown, obtain warrant to re-arrest a ship, or arrest a sister ship, on the dependence of that action.¹³⁷ This is consistent with article 3 (1) of the 1952 Arrest Convention.

4.4.1.2. The Protective Function of Arrest of Ships

The arrest of a ship places the *res* under judicial detention pending adjudication of the claim to ensure that the final award or judgment can be enforced. The 'asset-safeguarding' peculiarities in the case of arrest of ships in English and Scots law are as follows.

¹³³ Scot Law Com No. 164 (1998) 134. In *Sheaf Steamship Company v Compania Transmediterranea* (1930) SC 660, the Court of Session held that, while Scots Admiralty law may be the same as English Admiralty law, the law on remedies and procedure was not the same, and that an arrestment to found jurisdiction could be laid against a sister-ship of a wrong-doing ship though such arrest would have been incompetent under English law. The same reasoning could be applied to arrestment on the dependence; however, it is here submitted that the same reasoning cannot apply to arrestment *in rem*.

¹³⁴ 1996 SLT 819 (OH).

¹³⁵ *Owners of the Monte Ulia v Owners of the Banco (The Banco)* [1971] 1 Lloyd's Rep 49 (CA); see also *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co (The Sandrina)* [1985] 1 Lloyd's Rep 181 (HL) (Lord Keith of Kinkel).

¹³⁶ Recommendation 61, 135-136.

¹³⁷ Sch 4 introduced by s 197 (7) (3) (1) (B).

4.4.1.2.1. England

In traditional English law the only claimant who had the right to arrest the ship in the hands of a *bona fide* purchaser was the holder of a maritime lien. This position has been adopted in the 1952 Arrest Convention and there is no doubt, both in the Convention and in English law, that unless the claim is secured by a maritime lien, the right to arrest a ship in respect of a maritime claim exists only if that ship, at the time of the issue of the *in rem* claim form (in English law), or at the time of the arrest (in the Convention), is still owned by the person who owned her when the maritime claim arose.

Under section 21 (4) of the Supreme Court Act 1981, if a person who would be liable in an action *in personam* is, when the cause of action arises, the owner or charterer of, or is in possession or control of, the ship, an action *in rem* may be brought against: (a) the offending ship, if at the time when the action is brought, that person is either the owner or demise charterer; (b) a sister ship, if that person is the owner at the time when the action is brought. In that sense article 3 (4) of the 1952 Arrest Convention has been given effect in English law except for its last sentence.¹³⁸ The cause of action 'arises' when the incident occurs. The action is 'brought' when the *in rem* claim form is issued. The effect of this section is that if, when the claim form is issued, the person liable for the claim was either the owner or demise charterer of the ship, she may be arrested whoever owns the ship at the date the arrest is actually effected as clearly established in *The Monica S.*¹³⁹ To fully understand the impact of such a rule it is important to bear in mind that arrest can happen in England several months, and exceptionally years, after the issue of an *in rem* claim form. To be consistent with the international framework English law

¹³⁸ F Berlingieri (2006) 145.

¹³⁹ *Owners of Cargo Laden on Board the Monica Smith v Owners of the Monica Smith* [1967] 2 Lloyd's Rep 113 (QBD (Admin)).

should change the time of the link from the issue of the claim form to the arrest,¹⁴⁰ somehow in that respect coming back to the state of affairs of English law prior to the Judicature Acts 1873 to 1875. In that sense JACKSON is of the opinion that this link is a substantive aspect of the regulation of arrest of ships, and therefore, it cannot be left to English national rules.

4.4.1.2.2. Scotland

In the 1999 Arrest Convention article 3 (3) provided that the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship. It was presumed that *'this is a question of national law which is not expected to have a significant impact in common law countries'*.¹⁴¹ On the contrary, Scots law, where the property of a third party is not generally affected to satisfy the debts of another, has been modified in respect of arrestment of ships against demise charterers to allow judicial sale of the ship in those cases. In line with the 1999 Arrest Convention the reform allows the pursuer in an admiralty action against a demise charterer to be entitled to complete diligence by judicial sale of a ship which has been arrested on the dependence of the action. The sale is competent even though the ship is owned by a third party. This is a fundamental departure from traditional Scots law.¹⁴²

¹⁴⁰ D C Jackson (2005) 404; *The Po* [1991] 2 Lloyds Rep 206.

¹⁴¹ R Shaw and N Gaskell 'Arrest Convention 1999' [1999] LMCLQ 1, 10.

¹⁴² See Administration of Justice Act 1956, Ch 46, s 47 E (Sale of a ship arrested on the dependence of an action against demise charterer) as introduced by Sch 4 to the Bankruptcy and Diligence (Scotland) Act 2007.

4.5. FINAL REMARKS

While it is often assumed that Scots law will always follow English law in admiralty matters,¹⁴³ this Chapter has aimed to show that this statement is not entirely correct.¹⁴⁴ And in the sphere of arrest of ships is particularly inaccurate. The differences are historical and conceptual. Most of the historical ones have already been shown in Chapter 2. As far as the conceptual ones, the main difference is that admiralty arrestment in Scots law forms part of the general law of diligence that has no English counterpart. This has, in turn, advantages and disadvantages on both sides of the borders. Having a conceptual framework helps to understand the different functions and effects of the measure; however, these general concepts – with a clear Romanist mark – were not crafted to meet the needs of maritime commerce; whereas that can be said about arrest of ships as developed in English law.

In present times, however, the differences are not so much between English law and Scots law, but between arrest of ships to enforce a maritime lien or a mortgage, hypothecation or other charge of the same nature; arrest of ships to protect the *status quo* in the case of claims related to possession, title or forfeiture of the ship herself; and arrest of ships as a true protective measure, i.e. a measure to secure a maritime claim. And such differences are undisclosed within the international Conventions and within English law; arguably in the former due to the influence of the latter. It is the action *in rem* (and its intrinsic connection with maritime liens) that gives arrest of ships to enforce maritime liens distinctive features which should not be extended to cases where such ‘real’ linkage between

¹⁴³ *Boettcher v Carron Co* 1861 23 D 322; *Currie v McKnight* [1897] AC 97 (HL); *SS Blaimore Co Ltd v Macredie* (1898) 25 R (HL) 57, 59; *Clydesdale Bank Ltd v Walker & Bain* 1926 SC 72, 82; *The Goring* [1988] 1 AC 831 (HL) 853.

¹⁴⁴ As recognised by the Scottish Law Commission Discussion Paper No. 84 (1989) ‘There is no comprehensive systematic and authoritative comparison of the two systems of Admiralty law on which alone a sound generalisation could be based’ 206, statement affirmed by G L Gretton in the SME (8) [322].

the *res* and the claim does not exist. Indeed, the main functions of arrest of ships as identified in this thesis are attributed to the *in rem* claim rather than to arrest in English law.¹⁴⁵

The linkage between arrest and the *in rem* claim has fewer advantages than disadvantages. The latter have been highlighted by JACKSON: it creates confusion between the different functions of ship arrest: the protective function, on the one side, and the jurisdictional function, on the other side, by making arrest dependant on merits jurisdiction. This linkage has undermined the correct application of the 1952 Arrest Convention in English law.¹⁴⁶ The intricacies of English law in this respect show the '*schizophrenic approach of English law to maritime claims*' in JACKSON's words.¹⁴⁷ Interestingly enough, he mentions Ireland as a good example of a different experience. The 1952 Arrest Convention and the 1952 Collision (Civil Jurisdiction) Convention were implemented there by the Jurisdiction of Courts (Maritime Conventions) Act 1989 which recognised arrest as distinct from the substantive action *in rem*.¹⁴⁸ Maybe it was not necessary to look at another island. Scots law has always recognised the difference between arrestment and action *in rem*, and the enactment of the 1952 Arrest Convention in a self-contained section of the Administration of Justice Act 1956 for Scotland has not blurred that distinction. Scots law has all the possibilities, and makes a clearer distinction between the different categories. It could be said that it is not just a coincidence that a mixed legal system understands better the complexities of a mixed legal institution, but maybe this would be too presumptuous.

¹⁴⁵ A Mandaraka-Sheppard, *Modern Admiralty Law* (Cavendish London 2001) 11. He explains that commencing the *in rem* claim and arresting the ship merge all three functions of arrest of ships, namely, the 'protective function', the 'jurisdictional one', and the 'security function', securing the position of maritime claimants as preferred creditors.

¹⁴⁶ In Jackson's words '[Arrest of ships] necessary connection with the action *in rem* seems to have lead to a failure to put national law into a form which complies fully with the international obligations undertaken through ratification of the Arrest Convention' D C Jackson (2005) 402.

¹⁴⁷ D C Jackson (2005) 240.

¹⁴⁸ D C Jackson (2005) 402.

CHAPTER FIVE

Arrest of Ships, Security and Applicable Law

5.1. INTRODUCTION

Part II

'Maritime law is particularly suited as the basic subject on where a theory of conflict of laws may be developed,

*Because maritime law embraces both civil law (in its origins) and common law (in its more modern evolution), and is found as well in national statutes and international Conventions; in conflict Conventions, and in uniform rules.'*¹⁴⁹

¹⁴⁹ W Tetley, 'Charterparties and Choice of Law' [1992] *Il Diritto Marittimo* 1146.

CHAPTER FIVE

Arrest of Ships, Security and Applicable Law

5.1. INTRODUCTION

As examined in the previous chapters, arrest of ships as a provisional and protective measure serves several functions. The 'security'¹ function of arrest of ships as analysed in this thesis refers to arrest as a method of ensuring the availability of judicial sale.² It can be defined as the availability of the *res* for satisfaction of a judgment; i.e. the *judicatum solvi* function. It has been argued that

¹ It is necessary to distinguish from the outset of this Chapter the concept of security in this sphere from the radically different and unconnected concept of 'maritime security' in the public international law sense. The latter relates to safety at sea. The most far-reaching international instrument is the International Ship and Port Facility Security Code (ISPS Code), which contains detailed security-related requirements for Governments, port authorities and shipping companies.

In Scots law terms, to examine the security function of arrest of ships, actually means to study the *nexus* created by the arrestment as an effect of diligence; i.e. the judicial right in security that the arrestment confers on the creditor over the ship.

² Judicial sale is the final stage, ensuring that the security function of arrest is reflected in funds available to the claimant to satisfy his claim (D C Jackson *Enforcement of Maritime Claims* (4th edn LLP London 2005) 427). In English law a court may not order a judicial sale unless the ship is under arrest; see *The Wexford* (1883) 13 P D 10; *Continental Grain Co v Islamic Republic of Iran Shipping Lines and Government Trading Corp of Iran (The Iran Bohanar)* [1983] 2 Lloyd's Rep 620 (CA); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 Lloyd's Rep 253 (HL). Judicial sale may be made prior to judgment on the merits where the security of the arrester is reducing in value through the continuation of arrest; see *The Conet* [1965] 1 Lloyd's Rep 195 (PDAD); *The Myrto* [1977] 2 Lloyd's Rep 243 (QBD (Admlty)) 259-260; *The Emre II* [1989] 2 Lloyd's Rep (QBD (Admlty)) 182. In that sense, reflecting what Alvarez Rubio (*infra*) said about the effectiveness of arrest as a measure: putting pressure on the debtor in order to comply with the eventual judgment (J J Alvarez Rubio, *Derecho Marítimo y Derecho Internacional Privado, Problemas básicos* (Servicio Central de Publicaciones del Gobierno Vasco Vitoria-Gasteiz 2000) 102).

the security function of arrest of ships is indeed its most relevant one. On this token the argument is that the ultimate *ratio* of arrest of ships is to give the creditor the chance to create a right in security over the ship, and in turn, that possibility puts pressure on the debtor in order to comply with the eventual judgment; that is actually what makes it so effective.³

This function of arrest is differently understood in different legal systems. The nature and extent of the rights which arrest confers on the arrester vary significantly. Variations in this regard do not only happen between different legal systems, but, within one legal system between the different kinds of arrest of ships available therein. The main question in this regard is whether the arrest itself creates a right in security different from the preference originated by the cause of action.

As analysed in Chapter 4 at present in English and in Scots law, in line with the international Conventions on the topic, the right to arrest does not depend on the existence of a maritime lien,⁴ but is available for a broader but closed list of maritime claims. However, in English law, the link between arrest and liens still explains the most salient features of the law of arrest of ships, particularly in relation to its security function. There is not in this field great difference between English and Scots law, arguably due to the 'reception'⁵ of English jurisprudence in this area of Scots law.

³ J J Alvarez Rubio (2000) 102.

⁴ Nonetheless, in the opinion of Jackson, in English law the availability of arrest does depend on the existence of a lien, if not maritime, statutory, but always a lien (D C Jackson (2005) 395 [15.11]).

⁵ *Currie v McKnight* [1897] AC 97 (Lord Watson) '*From the earliest times the Courts of Scotland exercising jurisdiction in Admiralty causes have disregarded the municipal rules of Scottish law and have invariably professed to administer the law and customs of the sea generally prevailing among maritime states. In later times with the growth of British shipping the Admiralty law of England has gradually acquired predominance and resort has seldom been had to the laws of other States for the guidance of the Courts*'.

In domestic English and Scots law, traditional maritime liens attach only to a restrictive group of maritime claims, namely, seamen's wages, master's wages and disbursements, salvage, damaged caused by a ship and the bonds of bottomry and respondentia.⁶ These 'traditional maritime liens' enjoy priority when confronted with other causes of action, notably mortgages, therefore, a maritime lienee is generally among the first to be satisfied when various competing actions exist against the ship. On the contrary, it is established in English and Scots law that, for example, claims for necessities do not attract a maritime lien.

By contrast, in the United States and in some civil law jurisdictions, certain maritime claims which are not within the 'traditional maritime claims' of English and Scots law, such as claims for necessities, cargo damage, and general average, give rise to maritime liens or rights of preference. In Europe, France, Belgium, Italy, Portugal, and Spain are party to the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages in force since June 2nd 1931 that provides for those kinds of 'non-traditional' maritime liens.

Against this background, the conflict of laws arises after the ship has been arrested and sold by judicial sale in a certain jurisdiction; at the stage when that court has to determine how the distribution of the proceeds is to be made; in the cases where the maritime claim of the arrester (or any other party with a proprietary interest on the ship that has taken part in the proceedings) attracts a privilege of a certain status under the *lex causae* but it does not so in the same way under the *lex fori arresti*. In this context PIL has a primary role to play; and in present times a sound conflict-of-laws rule is paramount to achieve a good case management on the merits.

⁶ Bonds of bottomry and respondentia were considered obsolete already at the end of the first quarter of the twentieth century, yet, the Administration of Justice Act 1956 provides that a claim arising out of bottomry is within Admiralty Jurisdiction, and the Supreme Court Act 1981 which has taken the place of the former Act as far as England repeats the provision. See *The Conet* [1965] 1 Lloyd's Rep 195 (PDAD).

Therefore, the present Chapter, after looking at the security function of arrest of ships from a PIL perspective, addresses the applicable law issues connected with it, namely, the applicable law to the existence and qualification of the security right, and the applicable law to the question of priorities, examining the role of the security function of arrest of ships in the latter question in English and in Scots law.⁷

5.2. THE SECURITY FUNCTION OF ARREST OF SHIPS

A right in security⁸ is a

'[R]ight which a creditor may hold for ensuring payment or satisfaction of his debt, distinct from and in addition to his right of action and execution against the debtor under the latter's personal obligation'.⁹

Rights in security can be divided into express rights (agreement), tacit rights (implied by law) and judicial rights (diligence/protective measures). This threefold division can be exemplified in the case of ships as i) ship mortgage (express); ii) maritime lien/maritime hypothec (tacit); ship arrest/arrestment (judicial).

In comparative law, largely, the claimant who has arrested a ship will be treated as a secured creditor in the distribution of the sale proceeds. The question is whether such preference is previous, concurrent or consequential upon arrest; in other words whether the security derives from the cause of action (a preferential

⁷ It may be argued that the conflict-of-laws issues studied in this chapter do not really relate to arrest as a provisional and protective measure, since the matter arises at a later stage, at a moment in time where the provisional arrest has resulted in more permanent effects (as opposed to temporary ones) through judicial sale. Notwithstanding, the conflict of laws in this sphere affects the security function of arrest of ships as a provisional and protective measure in the first place, therefore, its revision is germane in the context of this thesis.

⁸ *'Pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum'* (Institutiones Justiniani iii.xiv 4).

⁹ W M Gloag & JW Irvine, *Law of Rights in Security, Heritable and Moveable: including Cautionary Obligations* (Green Edinburgh 1897) 2.

debt, or a claim to which a maritime lien attaches) or is created by the arrest (maritime claims attracting a right to proceed *in rem*, sometimes named statutory liens in English law); does the effectual arrest constitute or crystallise the right in security? The answer is 'it depends' on the applicable law.¹⁰

In civil law systems there are three different institutions that could come eventually under a broad conception of arrest of ships; the differences between the three lie upon the security function of arrest as displayed by each of them. These three types of measure, namely, arrest, *embargo* and seizure of ships have been studied by HERBERT¹¹, FRESNEDO¹² and AGUIRRE¹³. In their opinion, arrest is a protective measure whose only effect is to situate the ship in a particular jurisdiction, and prevent it from sailing, in order to make possible the adoption of a subsequent interim measure of protection, the latter being the one that provides security for the result of the pending or imminent proceedings.¹⁴ Hence, in this conception, arrest by itself is not a means of security but the mechanism to obtain such security. Security would then be set previously (maritime lien), concurrently or subsequently (seizure and/or *embargo*). Consequently, from this point of view, the priorities that constitute part of such security do not crystallise upon the arrest but

¹⁰ In this sense, a certain consideration of the *lex causae* (German law) was given to this issue by Langton J. in *Smith v Owners of the SS Zigurds (The Zigurds)* (1932) 43 Lloyd's Rep 156 (PDAD). Yet, after such consideration, German law was disregarded, on the grounds that it was a matter of German procedural law (and not substantive law); and it was for English procedural law to determine priorities. It is here submitted that the decision was correct in relation to the submission that issues related to the enforcement of a right are necessarily governed by the *lex fori*; nonetheless, as argued later on in this chapter, the issue of priorities in the sphere of maritime liens should be initially a matter for the *lex causae*.

¹¹ R Herbert and C Fresnedo de Aguirre, 'El Arresto de Buques y el Principio de Jurisdicción mas Próxima' [1993] *Revista de Transporte y Seguros (RTSS)* 158.

¹² *Ibid*; C Fresnedo de Aguirre, 'Embargo de Buques como Medida Cautelar en el Derecho Internacional Privado Uruguayo' (1997) 14 *Anuario de Derecho Marítimo* 385.

¹³ F Aguirre Ramirez, 'Embargo y Arresto de Buques en Uruguay' [2005] *RTSS* 275. Uruguay has not ratified the international Conventions on the field but nevertheless Herbert, Fresnedo and Aguirre do consider the doctrine emerging from the Arrest Conventions in order to formulate such distinctions. Even though this examination has been done according to Uruguayan law, it is indeed enlightening, and it is possible to apply it more generally to other legal systems where arrest of ships displays the same functions.

¹⁴ R Herbert and C Fresnedo de Aguirre (1993).

by a previous, concurrent or subsequent right enforced by the arrest. Differently, an *embargo*¹⁵ (civilian concept meaning in general terms a prohibition to sell) is an interim measure of protection that by itself guarantees the result of a pending or imminent proceeding. It provides the *embargo*-holder a priority against future encumbrances and any other future rights (*in rem* or *in personam*) constituted on the ship. It is usually an encumbrance that needs to be registered in order to be enforceable. In most legal systems to grant an *embargo*, the ship must have been arrested first; nevertheless, sometimes it is possible to register such encumbrance without the ship's prohibition to sail.¹⁶ In turn, seizure (*secuestro*) is usually either an interim measure of protection, or a measure in execution of a judgment, that implies the loss of possession of the ship by the owner. Generally, it is the way of making the *embargo* effective.

There are differences also in the availability of such measures depending on against who the proceedings have been or are to be brought. *Embargo* and seizure are available to the claimant only in the case of the owner being the defendant. By contrast, arrest is also available against the charterer. This evidences that the security function of arrest of ships goes beyond the relationship between claimant and defendant and strikes heavily in the effects of arrest with regard to third parties.

In common law systems, these differences present themselves between arrest of ships to enforce maritime liens and arrest of ships based upon statutory rights to initiate an *in rem* claim (statutory liens).

In Scots law, the effects of the security function of arrest differ depending on the type of arrestment, namely, arrestment of ships *in rem* in an action *in rem* (maritime liens); arrestment of ships *in rem* in an action *in personam* (non-pecuniary

¹⁵ It has to be borne in mind that the 1952 Arrest Convention has been translated into Spanish as 'Convenio sobre unificación de ciertas reglas relativas al *embargo* preventivo de buques' (emphasis added).

¹⁶ For example the so-called 'ship-register arrest' in Danish law.

obligations); and arrestment of ships on the dependence of an action *in personam* (all the other admiralty claims).

5.3. THE APPLICABLE LAW PROBLEMS

As already mentioned, the problem arises when a court is confronted with a maritime claim that under its *lex causae* attracts a certain privilege but it does not under the *lex fori arresti*. That court has two fundamental decisions to take. The court must, first, decide whether or not to recognise that foreign privilege (right of preference) regardless of the fact that a corresponding claim arising within the court's own territorial jurisdiction may not attract a similar preference. Secondly, if the court decides to recognise the foreign right, it must then decide how to rank the recognised preference in the distribution of the sale proceeds. It may be argued that these two issues are so intermingled that the decision process of the Court should not be split in the two steps mentioned above; that the distinction matters only as a methodological approach to the study of the problem. The discussion that follows examines this argument.

Traditionally in PIL studies these two applicable law issues, the applicable law governing the existence of the right of the creditor and the applicable law governing the ranking of maritime claims, have merited separate examination. Yet, in the case of maritime liens, since they are the two faces of the same coin, it is here submitted, in opposition to traditional authority, that they should not be governed by different laws. However, it has been argued that it remains critical to identify the two categories for characterization purposes.¹⁷ Nevertheless, from a dogmatic point

¹⁷ D C Jackson (2005) 682. See the decision of the Court of Appeal of England in *The Colorado* (1923) 14 Lloyd's Rep 251, a decision where it was recognised that the right (as opposed to the remedy) should be governed by the *lex causae*. Even though the distinction was drawn therein for the case at hand, the submission of priorities to the *lex fori* was supported upon previous cases where such distinction had failed to be drawn, and where the right (and not only the remedy) were examined under the loop of the *lex fori* (See

of view it is here submitted that a fragmented approach to the characterization of maritime liens jeopardizes its juridical continuity across national borders, the ultimate aim of PIL.¹⁸

Despite these theoretical considerations, most legal systems split the characterization of maritime liens into two categories, substance and procedure, or right and remedy, and provide for two different conflict rules, invariably deciding all questions of ranking according to the *lex fori*.¹⁹ It is submitted that in the current process of Europeanization of PIL the line between right and remedy, which is a derivative of the differences between substance and procedure, as understood in English and Scots law, should be re-aligned.²⁰

On the practical level, the analysis has to take as a starting point that, even though the issue arises sometimes out of different European systems, and confront common law with civil law concepts, the main problems arise in extra-community cases, and confront different common law jurisdictions.²¹

Scrutton LJ referring to *The Milford*, Swabey 362 and *The Tagus* [1903] P.44 at 255). Yet, Briggs seems to be of the opinion that it is possible to eliminate the demarcation *in totum* '...where lines of demarcation, or of characterization, can be eliminated without substantial cost, it is good that they should be. The line which separates right from final remedy is one which could usefully be eliminated, with the result that the *lex causae* would prevail generally...' (A Briggs, 'Conflict of Laws and Commercial Remedies' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP Oxford 2003) 286).

¹⁸ See D Operti Badán, *Exhorto y Embargo de Bienes Extranjeros* (Amalio M. Fernández Montevideo 1976) 327. In different words, Briggs acknowledges that in the sphere of commercial remedies '...the coherence of results is conducive to the doing of practical justice...' (Briggs (2003) 286).

¹⁹ See J Asser, *Maritime Liens and Mortgages in the Conflicts of Laws* (Gothenburg School of Economics and Business Administration Publications Gothenburg 1963). He gave examples of this fragmented approach in German law (p.19), in France (p.21), in Belgium (p.22) in England (p. 25-26), in the United States (p. 28) and in Argentina (p. 28).

²⁰ A successful example of a change of characterization is the case of 'limitation of actions'. It is submitted that a similar approach to proprietary remedies, including their prioritization, should follow that lead.

²¹ The contest arises usually between United States law and English or Scots law. Policy issues are entrenched particularly in respect to cargo liens on the ship. English law is very restrictive reflecting its tradition as a ship-owning nation, with the underlying policy to protect ship-owners, whilst the United States, as historically a shipper nation (up to World

5.3.1. Applicable Law Governing Rights of Preference²²

First and foremost, it has to be taken as the starting assumption that the topic is indeed a very difficult and complex one. It is primarily a matter of characterization, and particularly, the main decision to be taken is whether a maritime lien or similar right of preference is a procedural remedy governed by the *lex fori* or, on the contrary, should be regarded as a substantive right and therefore governed by the *lex causae*. The distinction has a very practical consequence: taking into consideration that the lists of claims which give rise to rights of preference do vary quite radically from country to country, the question of which legal system is to determine the existence of such rights is indeed very important in practice.²³ Arguably, the conflict of laws in this sphere is the reflection of a real conflict of interests between the ship financing sector²⁴ and ship operators. This explains the

War I the US mercantile fleet played only a very minor part in world shipping), has had the opposite traditions and interests (*W Tetley Maritime Liens and Claims* (2nd edn Blais Montreal 1998) 727). Nevertheless, as the world can no longer be divided into maritime and non-maritime nations, policy makers should review the convenience of the law provisions crafted upon such premises.

²² It was not easy to decide upon the right sub-heading for this part of the discussion. 'Preferential debts', 'privileges', 'maritime lien', 'maritime hypothec' are not necessarily identical or interchangeable concepts; but the selection is done bearing in mind the importance of characterization in PIL and the need to undertake such process in as broad internationalist spirit as possible, as acknowledged by Mance LJ in *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68, [2001] 1 Lloyd's Rep 597 (CA) [26-27].

²³ D R Thomas (1980) 320-321. From *Louis Castrique v William Imrie and W.J. Tomlinson* [1869-70] L.R. 4 H.L. 414 to *Andromeda Marine SA v O W Bunker & Trading A/S* [2006] WL 1078890 (QBD (Comm Ct)) there is a large number of cases decided in England and in Scotland on the topic.

²⁴ Mortgagees are the natural competitors of maritime lienees and this is reflected in the case law referred in this part of the discussion; however, it should be remarked that the study emphasises the examination of maritime liens, since it is in this field where, from an international point of view, the situation is rather confusing, if not chaotic. By contrast, registered mortgages are recognised practically world-wide and governed by the law of the country of registration.

limited success of the international Conventions²⁵ as well as the opposed views as to the characterization (and its consequences) of maritime liens.

In this context, the *lex fori* as a forum-centred methodology, is construed upon a positivistic approach that considers a Judge as an instrument of the legislative will and as such a way to apply forum policies.²⁶ The *lex fori* approach represents the most extreme and possibly the simplest solution to the applicable law issues hereby examined.²⁷ In the field of maritime liens its application has been justified in various ways, some of which are outlined as follows.

One way of applying the *lex fori* in this sphere is to adopt as a connecting factor the place where the ship is situated, and consider it as governed by the *lex rei sitae*; in this methodology, the ship is fixed by arrest to the territorial jurisdiction of the court and therefore the *lex fori* is applied *qua lex causae*.²⁸ Another way of enhancing the role of the law of the forum, as traditionally done in English PIL, is through the application of the 'substance and procedure rule'. It is with this 'escape device' that the examination in this Chapter is more concerned.

A radically different methodological approach with similar results, is the exclusion of foreign law via the 'international public policy' (*ordre public*) of the forum.²⁹ Nonetheless, none of these theories are applied by the Courts in a pure methodological form; practically, Courts strive to find a formula which in their opinion, and according to its own PIL rules, leads to the fairest solution in each case.

²⁵ The main criticism levelled at the principles of the 1926 MLM Convention is directed at art 2 (5) according to which the liens referred to in that paragraph, namely liens for claims resulting, *inter alia*, from contracts entered into by the master for the purpose of preserving the ship or continuing the voyage, take precedence over mortgages (J Asser (1963) 29).

²⁶ O von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten* (pt 1), 24 ACP 230 (1841).

²⁷ J Asser (1963) 14.

²⁸ *The Tagus* [1903] P.44 (PDAD).

²⁹ As done, for instance, traditionally, in France and Belgium (J Asser (1963) 14).

5.3.1.1. Generalities

A lien is a form of security interest in property which arises by operation of law. As such is accessory to a situation which has a legal character of its own (contract, tort/delict).³⁰ The concept of lien is applied widely in English and Scots law and responds mainly to two different concepts: the common law lien (possessory lien or 'right of retention') and the equitable lien. One of the main differences between these two is that the first depends on possession and arises usually out of a contract of services, whereas the latter disregards possession; arises by implication of law, and is lost when a sale of the *res* to a bona fide purchaser is performed. However, a 'maritime lien' is a distinctive legal institution:³¹ it does not depend on possession and it 'travels' with the *res* regardless of the hands of whose possession rests on; it is not registered anywhere; and is independent of notice. In the words of THOMAS '*maritime liens are secret and invisible*'.³²

In English law there is a further distinction between traditional maritime liens, and 'statutory liens' (or right to proceed *in rem*); the concept of lien is so intermingled with the arrest of the ship (as the only way to enforce maritime and 'statutory' liens), and the action *in rem* (the framework in which such enforcement takes place) that they get often confused with one another.³³ In the words of Sir John Jervis, the maritime lien '*it is inchoate from the moment the claim or privilege attaches,*

³⁰ The illustration of Jackson is clarifying '*A seaman to whom wages are due has a lien –to enforce his contractual right*' (D C Jackson (2005) 460).

³¹ Two monographic works have enlightened the theme of 'maritime liens'; see G Price, *The Law of Maritime Liens* (Sweet & Maxwell London 1940), and D R Thomas, *Maritime liens* (Stevens London 1980). For recent developments see J Brown, 'The extinction of maritime liens' (2003) 3 LMCLQ 361; N Hutton, 'The origin, development, and future of maritime liens and the action *in rem*' (2003) 28 Tulane maritime law journal (1) 81; P K Mukherjee, 'The Law of Maritime Liens and Conflict of Laws' (2003) 9 JIML (6) 545; R P Hayden and K C Leland, 'The Uniqueness of Admiralty and Maritime law: the Unique Nature of Maritime Liens' in (2005) 79 Tulane L. Rev. (5-6) 1227.

³² D R Thomas (1980) 4.

³³ For instance in G Bowtle and K McGuinness, *The Law of Ship Mortgages* (LLP London 2001) 119 a maritime lien is defined as '*the right of a person who has a claim against the ship to arrest the ship and, if the claim is not paid, to have the ship sold by the court and the claim paid from the sale proceeds*'.

and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached'³⁴.

STORY was the first to use the term 'maritime lien' in the North American case *The Nestor*.³⁵ In a few words, a maritime lien can be defined as a maritime privilege³⁶ which gives the privilege-holder a right on the ship and freight of a property kind. As it has been stated in *The Tolten*,³⁷ the lien travels with the ship into whoever's possession it may come and has a certain ranking with other maritime liens, all of which take priority over mortgages. This right arises with the claim without registration or other formalities.³⁸ In English law its first comprehensive definition appeared in *The Bold Buccleugh*.³⁹ However, there is no statutory definition of a maritime lien in either English or Scots law. In the words of JACKSON 'they are interests of prime importance and of no inconsiderable uncertainty'.⁴⁰ 'Maritime lien' is an Anglo-American term. In Scots law the institution is named as a 'maritime hypothec'. However, due to the use of the expression 'maritime lien' in English law and in international Conventions, this expression has been historically used in Scots law, even when it was not strictly accurate; hence, giving rise to confusion. For the sake of harmonization the issue has been recently clarified in a very straight-forward way: in Scots law a 'maritime lien' means a hypothec over a ship, cargo or other maritime property.⁴¹

³⁴ [1851] 7 Moo. P.C. 267, 284. The definition has been cited in various cases since then, for example, *The Halley* [1867] L.R. 2 P.C. 193, *The Feronia* [1868] L.R. 2 A. & E. 65, *The Charles Amelia* [1868] L.R. 2 A. & E. 330; *The Beldis* [1936] P. 51; *The Tolten* [1946] P. 135.

³⁵ (1831) 18 Fed Cas 9 (Case No. 10, 126) 11 (C.C. D. Me 1831) cited by W Tetley, 'Maritime Liens in the Conflict of Laws' in J A R Nafziger and SC Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (Transnational Publishers Ardsley, NY 2002) 439.

³⁶ Even though the 'maritime lien' is a common law institution there are similar ways of granting a preference in civil law systems, generally as 'preferential debts' or 'privilèges'.

³⁷ [1946] P 226 242.

³⁸ W Tetley (2002) 442.

³⁹ [1851] 7 Moo PC 267 (Sir John Jervis).

⁴⁰ D C Jackson (2005) 459.

⁴¹ See Administration of Justice Act 1956, Ch 46, s 48 (2), as amended by Sch 4 to the Bankruptcy and Diligence etc (Scotland) Act 2007, 'In this Act and in any other enactment

5.3.1.2. English Law

5.3.1.2.1. The *Lex Fori* Approach

The *lex fori* has been regarded as universal and exclusive in its application in the sense that *ab initio* every question has to be decided by reference to the *lex fori* and this dogma applies to every legal system.⁴² However, as a conflict-of-laws approach, the *lex fori* can be regarded as the main territorial predilection common to all times,⁴³ that can be traced back to the unilateralists of the sixteenth century. D'ARGENTRE assumed that courts should normally apply their own law, whereas foreign rules of decision were relevant only in exceptional cases.⁴⁴ WÄCHTER⁴⁵ adopted a similar position. Modern scholars such as CURRIE⁴⁶ and EHRENZWEIG⁴⁷ have also acknowledged the '*lex fori* approach'.

One of the arguments advanced for the remission of maritime liens to the *lex fori* on the 1960s was that it should not be possible '*...to enlarge the jurisdiction to benefit the foreign claimants when English claimants have no similar benefits conferred upon them*'.⁴⁸ This line of argument is very old in PIL. It was already advanced by JITTA who acknowledged that a judge cannot give to a juridical relation a character

(including an Act of the Scottish Parliament and any enactment comprised in subordinate legislation under such an Act) 'maritime lien' means a hypothec over a ship cargo or other maritime property'.

⁴² As mentioned in Chapter 3 a court should as a matter of course look to the law of the forum as the source of the rules of decision; see B Currie, *Selected Essays on the Conflict of Laws* (Duke University Press Durham, NC 1963) 183; O Kahn-Freund, 'General Problems of Private International Law' 143 RdC 139 (1974) 167; G C Petrochilos, *Procedural Law in International Arbitration* (OUP Oxford 2004) 6.

⁴³ Juenger referred to it as 'the twentieth century unilateralism' (F K Juenger *Choice of Law and Multistate Justice* (Martinus Nijhoff Dordrecht 1993) 34).

⁴⁴ B Currie (1963) 183.

⁴⁵ O von Wächter (1841).

⁴⁶ B Currie (1963).

⁴⁷ A A Ehrenzweig, *Private International Law: A Comparative Treatise on American International Conflicts of Law, Including the Law of Admiralty* (Oceana Leyden 1967).

⁴⁸ *The Acrux* (No. 3) [1965] 1 Lloyd's Rep 565 (PDAD) 573 (Hewson J).

different to that given to it by his national law.⁴⁹ Yet, this argument is at loggerheads with a modern conception of PIL.

More recently, FENTIMAN⁵⁰ asked himself whether the difficulty and expense of proving foreign law could imply in practice the convenience of the *lex fori* over the multilateral method of law-selection as conceived by SAVIGNY.⁵¹ FENTIMAN also questioned whether the whole system of law-selection based on objective connecting factors could be counted only as an '*experiment which has failed*', ruined by an inadequate procedural infrastructure.⁵² Without the need to go that far, it is possible to ascertain that, doubtless, the decision as to where to draw the line between substance and procedure, and right and remedy in a certain legal system is to decide on how far to take the *lex fori* approach within it. In doing so it should be borne in mind that from a teleological perspective, the *lex fori* approach is one-sided: it benefits only those litigants who are in the position to take the best out of 'forum shopping' opportunities.⁵³

5.3.1.2.1.1. A Thing of the Past?

In times gone by the principal authorities⁵⁴ in English case law were *The Milford*,⁵⁵ *The Tagus*,⁵⁶ *The Colorado*,⁵⁷ *The Zigurds*,⁵⁸ and *The Acrux*.⁵⁹ Except for *The*

⁴⁹ DJ Jitta, *La méthode du droit international privé* (Belinfante The Hague 1890) 198.

⁵⁰ R Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (OUP Oxford 1998) 2.

⁵¹ F C von Savigny, *Private International Law and the Retrospective Operation of Statutes. A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time* (tr W Guthrie 2nd edn Clark Edinburgh 1880).

⁵² As explained by Juenger there are various reasons why a non-choice rule such as the *lex fori* is simpler to most conflict approaches. He recognised that what courts apply as foreign law is often a bad replica of the foreign law itself (F K Juenger (1993) 157,162,158). For the complex issue of the application of foreign law see also R Fentiman (1998); S Geeroms, *Foreign Law in Civil Litigation: a Comparative and Functional Analysis* (OUP Oxford 2004).

⁵³ F K Juenger, *Choice of Law and Multistate Justice* (Martinus Nijhoff Dordrecht 1993) 162.

⁵⁴ D R Thomas (1980) 322-329.

Colorado, where the right was recognised by reference to the *lex loci contractus* (French law) but the ranking (priorities) was governed by the *lex fori arresti*; the common feature of all the other decisions is the submission of the 'assimilated-to-maritime-lien-right' to the *lex fori arresti*: in *The Milford* via characterizing it as a question of remedy and not of contract at all; in *The Tagus*, applying the *lex fori qua lex causae*, using as the connecting factor the territorial location of the *res* (*lex rei sitae*); in *The Zigurds* via posing the question as one of priorities (remedial) rather than connected to the existence of the right;⁶⁰ and finally in *The Acrux*,⁶¹ even though under Italian law the claim would have been considered as a maritime lien, it was remarked that no maritime lien existed under English law and therefore, (*obiter*) that the Italian maritime lien would have not been recognised under English law. Such observation was grounded on a strict '*lex fori* characterization' considering only the narrow scope of the domestic law category and adding that without legislative intervention there could be no extension of those categories.

The latest authority remains the *Halcyon Isle*.⁶² In this case, the Privy Council, in a three-to-two decision reversing the Singapore Court of Appeal, refused to recognise the status of maritime liens to any claims which differed from the six 'traditional' maritime liens recognised in English law. The majority decision was based on the notion that maritime liens, in the conflict of laws, are procedural remedies rather than substantive rights.⁶³ In consequence, the ship repairer's claim ranked below that of the mortgagee, because the repairman's claim, which according to its *lex causae* (*lex loci contractus*) (United States law) attracted a maritime

⁵⁵ [1858] Swab. 362.

⁵⁶ [1903] P.44 (PDAD).

⁵⁷ [1923] P.102 (CA).

⁵⁸ *Smith v Owners of the SS Zigurds (The Zigurds)* (1932) 43 Lloyd's Rep 156 (PDAD).

⁵⁹ *The Acrux (No. 3)* [1965] 1 Lloyd's Rep 565 (PDAD).

⁶⁰ *The Zigurds* (1932) Langton J.

⁶¹ Hewson J.

⁶² [1980] 2 Lloyd's Rep 325 (PC (Sing)).

⁶³ Speaking for the majority Lord Diplock held that maritime liens involve '*... rights that are procedural or remedial only and accordingly the question whether a particular class of claim gives rise to a maritime lien or not [is] one to be determined by English law as the lex fori*' *Ibid*, 331.

lien, did not so attract according to English law. In English law the claim was secured merely by a statutory right *in rem* which did not 'travel' with the ship and which ranked after the mortgage. The dissenting position,⁶⁴ on the contrary, citing various precedents, and in particular the English decision in *The Colorado*⁶⁵ observed that:

'A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. ...It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law'.⁶⁶

Thus, they argued that the *lex causae* of the foreign maritime lien merited recognition, even if English law denied maritime lien status to the equivalent claim arising in England. Commentators prefer the examination of the minority position.⁶⁷

In the opinion of TETLEY the approach taken to maritime liens in England is a consequence of the lack of codification of the matter.⁶⁸ It is submitted, though, that such approach may be a result of the fact that maritime liens are necessarily given effect through an action *in rem* and in turn this has generated such an amalgamation of the two concepts that the fusion is indeed a source of confusion. However, most probably, the characterization of maritime liens as procedural is just an 'escape device' used to disregard the application of the *lex causae* and apply the *lex fori* instead. In any case, despite the reasons or excuses to regard maritime liens as procedural rather than substantive, it seems that the arbitrary line is being moved and currently leading commentators affirm that '*the existence and quantification of each*

⁶⁴ Lord Salmon and Lord Scarman.

⁶⁵ *Hills Dry Docks & Engineering Company, Ltd. v. Colorado* [1923] P. 102 (CA).

⁶⁶ [1980] 2 Lloyd's Rep 325 (PC (Sing)) 339 (Lord Salmon and Lord Scarman).

⁶⁷ P M North and J J Fawcett, *Cheshire and North Private International Law* (13th edn Butterworths London 1999) 82; L Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (14th edn Sweet & Maxwell London 2006) 191.

⁶⁸ W Tetley (2002) 448.

creditor's claim is of course a matter for the *lex causae* of the claim' (emphasis added).⁶⁹ Probably, even when *dicta* have been very inconsistent in this matter, the decision in *The Colorado* and the dissenting opinion in the *Halcyon Isle*, have led the doctrine, in present times, to recognise the substantive nature of maritime liens, thus, the need to give due consideration to the *lex causae* as the applicable law. It is to be hoped that the judicature will follow that lead.

5.3.1.2.2. The *Lex Causae*

Some sources suggest that before 1835⁷⁰ certain kind of maritime liens, particularly liens for necessaries, were recognised in English and Scots law according to the *lex causae*, applicable to the substance of the case at hand.⁷¹ Yet, as mentioned above, decisions since then have not consistently followed this line.⁷²

Doubtless, the decision of the Court of Appeal in *The Colorado*⁷³ has represented a break through in the treatment of the issue. Scott L.J. in *The Tolten*⁷⁴ supported also the opinion that a maritime lien represents a substantive right. In his words the consequences of a lien are 'indubitably a rule of substantive law in admiralty'.⁷⁵ At present leading commentators, despite the opinion of the majority in the Privy Council decision of *The Halcyon Isle*,⁷⁶ agree on that. In *Cheshire and North's*

⁶⁹ L Collins (ed) (2006) 191.

⁷⁰ *The Neptune* [1835] 3 Kn. P.C. 94.

⁷¹ 'By the law of some foreign countries a person who supplies necessaries has a lien upon the ship, and at one time he could maintain such a suit in England; but in 1835 it was decided in the case of *The Neptune* (1835 3 Kn. P.C. 94) that the Admiralty Court had no jurisdiction to try such a case, and that the material or necessaries man could only bring an action against the owner and not against the ship' Lord Dewar (OH) in *Constant v Klompus* [1912] 2 S.L.T. 62.

⁷² P M North and J J Fawcett (1999) 82.

⁷³ [1923] P.102 (CA).

⁷⁴ [1946] P. 135, p. 159.

⁷⁵ [1946] P. 135, 145.

⁷⁶ The outcome in the *Halcyon Isle* has been strongly criticised by commentators. Nonetheless, it has also its supporters; see MM Cohen, 'In Defense of the *Halcyon Isle*' [1987]

*Private International Law*⁷⁷ it is affirmed that '...in the case of a right in rem such as a lien...the substantive right of the creditor depends on the governing law...'. On the same token, in *Dicey, Morris and Collins on The Conflict of Laws*⁷⁸ it is ascertained that '...the existence and qualification of each creditor's claim is of course a matter for the *lex causae* of the claim...'.

In TETLEY's opinion the *lex fori* could not displace the law of the legal system most closely connected with the parties and their transaction.⁷⁹ He argues that as a result of the Rome Convention 1980 the *Halcyon Isle* is probably a thing of the past. He is of the view that article 10 (1) (c) of the Convention submits to the *lex contractus* the 'consequences of breach' of the contract, and he understands that foreign maritime liens (generally, contractual liens) and related maritime rights surely fall within this term.⁸⁰

There are several options available for a court which is faced with a case involving foreign maritime liens, in terms of the determination of the *lex causae*, in the absence of a choice-of-law agreement between the parties to the claim: (i) to apply the law of the place of creation of such right (*lex loci contractus* or *lex loci delicti*, depending on whether it arises out of a contract or tort/delict); (ii) to apply the law of the place of enforcement of such right (*lex of the forum arresti* - as the arrest of the ship is the only way to enforce maritime liens) that is another way to apply the *lex fori qua lex causae*; or, as maritime liens are rights *in rem* (real rights) on the ship, (iii) applying the law of the flag, which has been traditionally the 'personal' law of the ship. These options have all been adopted by comparative law in modern legal systems. A further option would be to apply the *lex situs* (*lex rei sitae*) since the *situs*

LMCLQ 152 and the reply by W Tetley, 'In Defence of the Ioannis Daskalelis' [1989] LMCLQ 11.

⁷⁷ P M North and J J Fawcett (1999) 82.

⁷⁸ L Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (14th edn Sweet & Maxwell London 2006) 191.

⁷⁹ W Tetley (2002) 448.

⁸⁰ W Tetley (2002) 457.

is a well-known connecting factor in issues related to real rights and moveable property. However, bearing in mind the special kind of *res* the ship constitutes this connecting factor is probably not appropriate since a ship is 'too moveable' in this regard; and practically, as it is 'fixed' by the arrest, it would result in the same as applying the *lex fori arresti*.

A different approach is the one taken in the United States, where the *lex causae* is selected taking into consideration all the connecting factors mentioned above, but rejecting any mechanical process based only on legal categories and selection rules.⁸¹ Following that, foreign maritime liens will be recognised even where the rights they confer differ in character from those which would arise from the equivalent maritime claim under the *lex fori*;⁸² and maritime claims that would attract a maritime lien under the *lex fori* would not be given such status unless the *lex causae* so provides. Notwithstanding, United States courts have repeatedly applied the *lex fori qua lex causae* to foreign maritime liens, using PIL theories such as the 'most significant relationship'⁸³ as well as 'governmental interest analysis'.⁸⁴ In *Exxon Corp. v. Central Gulf Lines*,⁸⁵ for example, a ship was arrested in the U.S. on a claim relating to bunkering performed in Saudi Arabia, under a contract entered into in the U.S. The ship-owner, the charterer and the ship were American, as was the supplier. Applying governmental interest analysis, the Federal District Court for the Southern District of New York held that the 'proper law' to govern the existence of maritime liens in that case was U.S. law.

⁸¹ Seemingly, Jackson is of the opinion that such an approach is preferable to the one of English law dependent on the characterization of issues into choice of law 'categories'. He highlights that characterization [in his words, classification] is a first step away from reality (D C Jackson (2005) 717).

⁸² W Tetley (2002) 450.

⁸³ As introduced by the Restatement (Second) Conflict of Laws; under this well known theory the applicable substantive law is that law of the State which has the most significant relationship with the dispute and with the parties. It is an eclectic approach as compared to the traditional choice-of-law methodology of PIL, and considers various connecting factors equally *ab initio* in the law selection process.

⁸⁴ For the qualitative evaluation that contemplates a weighing of the governmental interests see generally B Currie (1963).

⁸⁵ 707 F. Supp. 155, 1989 AMC 2467 (S.D. N.Y. 1989).

5.3.1.2.2.1. The Law of the Flag

In English legal literature JACKSON supports the convenience of the law of the flag to determine the existence of a maritime lien. Traditionally the law of the flag has enjoyed a particular status in PIL issues of a maritime nature. Due to the particular kind of *res* that a ship constitutes it can be assimilated to the law of the domicile of a person or to the law of the incorporation in the case of a company. There are various examples in comparative law of the application of the law of the flag as the conflict-of-laws rule to maritime liens conflicts in modern national legal systems.⁸⁶ This rule received consideration in English jurisprudence in *The Rama*⁸⁷ where an action *in rem* against the owners of *Rama* in the Maritime Court of Panama was at stake. In the latest international Convention on Maritime Liens and

⁸⁶ Amongst them is the Netherlands 1993 Conflict of Maritime Laws Act art 3 (2); see W Tetley, *International Conflict of Laws: Common, Civil and Maritime* (Blais Montreal 1994) 1069. According to it the law of the ship's registry (flag) governs the question of whether a maritime claim is protected by a lien, as well as the scope and consequences of such a lien, except for the ranking which is subjected to The Netherlands law. Another example is art 9 of the 1958 Greek Code of Private Maritime Law that requires that the law of the ship's flag determine everything related to proprietary rights over ships. Interestingly enough, and differently from the case of The Netherlands, this provision has been interpreted by commentators as governing not only the recognition of the existence of the foreign lien but also the ranking of foreign maritime claims. Article 9 'The Law of the state under whose flag the ship is registered regulates property rights on it' (translation by the author) 'Το δίκαιον της πολιτείας, ης την σημαίαν φέρει το πλοίον, ρυθμίζει τα επ' αυτού εμπράγματα δικαιώματα'; see A M Antapassis, *Les Codes maritimes Grecs* (Librairie Générale Paris 1983) 114. See the text in English by T B Karatzas and N P Ready, *The Greek Code of Private Maritime Law* (Martinus Nijhoff The Hague 1982) 6. A third example is the Swedish Maritime Code 1994 (similar codes were adopted the same year by Denmark, Finland and Norway) according to which Swedish law governs maritime liens on Swedish-registered ships when the lien or right is invoked in Sweden (Swedish Maritime Code ch 3 s 51) (see the Swedish and English text (Juristförlaget Stockholm 1995)); in the case of foreign ships the effect of a maritime lien is determined by the law of the ship's registry. As far as priorities, foreign maritime liens rank after any maritime lien or right of retention provided for in ch 3 of the Code, and after any hypothec (ship mortgage). The order of priorities in such chapter complies generally with the Maritime Liens and Mortgages (MLM) Convention 1967 (that never entered into force). Furthermore, the Maritime Procedure Code of Panama provides for a conflict-of-law rule that establishes that in the case of maritime liens the applicable substantive law is that of the flag of the ship's registry (W Tetley, *International Conflict of Laws: Common, Civil and Maritime* (Blais Montreal 1994) 175-224).

⁸⁷ *Berliner Bank A.G. v C. Czarnikow Sugar Ltd (The Rama)* [1996] 2 Lloyd's Rep 281.

Mortgages⁸⁸ the law of the ship's place of registration governs the ranking of registered mortgages, 'hypothecques' or charges as between themselves and, without prejudice to the provisions of the Convention, their effect with regard to third parties. Being such securities effective only if they comply with the law of the place of registration of the ship, the conflict-of-laws rule in order to assert the law applicable to their recognition and to the ranking between themselves is perfectly coherent. However, this strong connection with the law of the flag existing in the case of registered securities is missing in the case of maritime liens that are *per se* non- registrable.⁸⁹

Following that, why should the law of the flag be more decisive than the *lex loci contractus* if the maritime lien attaches to a contractual claim; or the *lex loci delicti* if the maritime lien originated in tort/delict? The answer is not connected only to the law applicable to the existence of maritime liens but needs as a corollary to approach the two, in principle separable, issues of existence and priorities of maritime liens as one problem not to be split in two for PIL purposes via the process of characterization. Therefore, this solution is further analysed *infra* after the examination of applicable law issues with regard to priorities.

⁸⁸ 1993 MLM Convention.

⁸⁹ As far as the registrable character of arrest as such the MLM Conventions are silent; the issue is left to national law. For example, in French law, art 93 of the decree of 27 October 1967 provides that the arrest (*saisie*) is not effective vis-à-vis third parties prior to its registration in a special register (See *Ste Transunt v Baudoin Lefevre and Others (The Patrick Victor)* [1982] DMF 420). However R Rodière in *Le Navire* (Dalloz Paris 1980) 255 states that the arrest of ships when granted as a provisional measure (*saisie conservatoire*) is not registrable; Berlingieri disapproves that interpretation (2006) 133. In Spain and in Italy the arrest of ships (*embargo preventivo/secuestro conservativo*) is also registrable.

5.3.1.3. Scots Law

In *The Baltic*,⁹⁰ Lord Dewar understood the question for decision before him as whether the pursuer, a mortgagee, had a preferable claim to the proceeds of the judicial sale of the ship in virtue of his mortgage, or whether the competing defender was to be preferred in virtue of an alleged maritime lien (based upon coals supplied and cash advanced to the master of *The Baltic* when she was lying at the port of Copenhagen). In present times it could be argued that the issue for decision was a question of priorities; indeed it was –as it always is– a question of existence *and* priority of the foreign privilege; even though this decision, as so many other decisions of that time, earlier, and later ones, have not drawn a distinction between the substance of the right and the question of priorities.⁹¹ According to the law of Denmark (the *lex causae*) the coal supplier had a preferential claim. Nevertheless, Lord Dewar disregarded the application of the law of Denmark and after consideration of Scottish and English authorities,⁹² applied what he understood was the law of Scotland at that moment in time, submitting the issue to the *lex fori*. He explained his reasoning in the following terms: ‘...the only question is whether, according to the law of Scotland, the compearing defender has a maritime lien for the necessaries he supplied and the cash he advanced to the master of the “Baltic”’. Based on the settled principle of Admiralty law as administered in England where the ‘material man’ has no maritime lien for necessaries, he concluded that the defender did not have a maritime lien. He did not find anything in the Scottish authorities or doctrine to suggest that there was any peculiarity in the law of Scotland which distinguished it from the Admiralty law of England. On the contrary, he found authorities to point to the assimilation of both legal systems in this branch of jurisprudence.⁹³

⁹⁰ *Constant v Klompus* 1912 2 SLT 62 (OH) (Lord Dewar).

⁹¹ Because in fact there is none; the distinction itself is just a fallacious way of dealing with the issue with a view to applying the *lex fori*.

⁹² *Mecca* [1895] P.95, *Clark v Bowring & Co* 1908 SC 1168 and *The Tagus* [1903] P.44.

⁹³ *Hay v Le Neve* (1824) 2 Sh App 395; *Boettcher v Carron Co* (1861) 23 D 322.

The similarities between both legal systems in terms of the substantive law applicable to maritime liens are incontestable. Nonetheless, the conflict rule in Scots PIL should reflect the easier distinction in Scots law between arrestment of ships and maritime hypothec/liens. In this sense, it is submitted that there are no justifications in Scots PIL (IPL) to examine foreign preferential claims under the loop of the *lex fori*. Arguably, there are not justifications in English law either; but in Scots law, where a maritime hypothec/lien is clearly a substantive right, there is no explanation for treating foreign ones as procedural; therefore, there is no reason to follow the *lex fori* approach of English PIL in this regard.

In Scots law the arrestment of ships, on the one hand, and the maritime hypothec on the other, have always kept, conceptually, independent form each other; i.e. the substantive right and the way to enforce it, are distinct clear-cut categories. This represents a difference in the functionality of arrestment of ships as compared to English law; i.e. a warrant of arrestment to found jurisdiction and a warrant to arrest on the dependence are not necessarily connected to a maritime lien, and are not by themselves sufficient to effect a lien on a ship which has been arrested under either of these warrants; a warrant for arrestment *in rem* is necessary if it is desired to effect a maritime lien over a ship.⁹⁴ It is regrettable, then, that this difference has not had an impact on the understanding of applicable law issues to maritime hypothec/liens and its ranking, probably because English case law has been followed.

Notwithstanding the foregoing, in the nineteenth fifties DONALDSON⁹⁵ affirmed that in Scots conflict rules, as regards proprietary rights over ships situated in Scotland, Scots law as the *lex situs* should give way to the *lex causae* in special circumstances. Arguably, in Scots law submission to the *lex fori* in this sphere has

⁹⁴ *Mill v Fildes* [1982] S.L.T. 147.

⁹⁵ A Donaldson, 'Some Conflict Rules of Scots Law' (1953) 39 *Problems of Public and Private International Law* Transactions of the Grotius Society 145, 175.

not been justified on a fallacious distinction between substance and procedure but, on application of the *lex fori qua lex causae*. Scots law has for long disliked fallacious applications of the law, thus, the 'substance and procedure rule' in the English fashion would fit uneasily in the Scottish legal tradition. In the words of Lord Reid '*...During early stages of the development of a legal system legal fictions have been invaluable...But in this day and age I dislike them intensely. Why should we tell lies when the truth will serve our purpose equally well if only we give a little care to the formulation of our principles...*'⁹⁶

Even though the issue is strikingly complex, it is suggested that the decision in *The Baltic* could be regarded as a way of 'reception',⁹⁷ a form of legal development regarded as a fundamentally disruptive force in all legal systems⁹⁸; '*when one body of law is overwhelmed by another because of the intervention of powerful cultural and political forces the mixture that often results can be very much worse, not better, than the law drawn from a single tradition that was replaced*'.⁹⁹ In general terms, it has been argued that it is time that reception of English law at the expense of the civil law came to an end in Scotland. It is here submitted that the issue at hand offers a great opportunity for such a change.

⁹⁶ (1968) 54 Proceedings of the British Academy 189, 200 as quoted by Scot Law Com No 164 (1998) 186.

⁹⁷ 'Reception as a form of legal development requires that lawyers replace their own law, or a part of it, with a foreign body of law' (R Evan-Jones, 'Mixed Legal Systems, Scotland and the Unification of Private Law in Europe' in JM Smits (ed), *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia Antwerp 2001) 44). Lord Dewar in *The Baltic* concluded his judgment quoting the words of Lord Watson in *Currie v McKnight* [1897] AC 97: '*...In later times, with the growth of British shipping, the Admiralty law of England has gradually acquired predominance, and resort has seldom been had to the laws of other States for the guidance of the Courts*'.

⁹⁸ R Evan-Jones (2001) 45.

⁹⁹ R Evan-Jones (2001) 44.

5.3.2. Applicable Law Governing the Ranking of Maritime Claims

As mentioned at the beginning of this chapter, conflicts of ranking between maritime claims usually arise between maritime lienees *inter se* and between them and holders of other kind of security interests on the ship, such as maritime charges or mortgages. The order in which maritime claims rank varies from country to country and public policy considerations are usually at stake. Furthermore, the effect of the security function of arrest as such deserves consideration in this context. An illustration will probably show the extent of the problem better.

5.3.2.1. An Illustration of the Conflict of Laws: England v United States

The traditional ranking of maritime claims in English case law is as follows:¹⁰⁰ 1) special legislative rights; 2) court costs e.g. costs of arrest, *custodia legis* and judicial sale; 3) 'traditional' maritime liens (arising out of salvage, collision, masters's and seamen's wages and master's disbursements); 4) ship registered mortgages; 5) statutory rights *in rem* (necessaries: bunkers, repairs, supplies, towage, etc). However, questions of priority are not capable of being compartmentalized in the form of strict rules of ranking.¹⁰¹ Liens arising out of tort/delict will normally have precedence over contractual liens, but apparently rank *pari passu* among themselves.¹⁰² Salvage is usually treated as a contractual lien, but is given a priority not only amongst contractual liens but also against damage liens if the salvage has preserved the *res*.¹⁰³ It is within the discretionary powers of a Court

¹⁰⁰ W Tetley (2002) 445.

¹⁰¹ D Steel, J. (Adm. Ct.) in *The Ruta* [2000] 1 Lloyd's Rep. 359.

¹⁰² M C Meston, 'Admiralty' SME (1) [413].

¹⁰³ *Ibid.*

to organise priorities purporting to do justice to all in the case at hand, having regard to considerations of equity and public policy. Such discretion is very broad, and judges face the difficult task of analyzing the relevant authorities in the light of the particular features of each case. Bearing in mind that priority issues were already discussed in early nineteenth century cases,¹⁰⁴ that discretion has resulted in the advancement of multiple criteria, and as a consequence, in the 'chaos of the law of the sea governing the recognition and priority of maritime liens' that Lord Salmon and Lord Scarman mentioned in *The Halcyon Isle*.¹⁰⁵

By comparison, the United States has its own original ranking system which is different from the rest of the world. Under the United States system the priorities in maritime claims are as follows:¹⁰⁶ 1) special legislative rights; 2) *custodia legis* and court costs; 3) preferred maritime liens: a) wages of master and crew (including maintenance and cure), b) salvage (including contract salvage) and general average (cargo against the ship) c) maritime torts (e.g. collision), including personal injury and death, property damage and cargo tort liens; d) longshoremen (individuals, not stevedore company), e) U.S. contract maritime liens (necessaries) entered into before the filing of a U.S. preferred mortgage. This includes repairs, supply of bunkers,

¹⁰⁴ For instance, touching on the comparative priority of wages and damage claims see *The Aline* [1839] 1 W. Rob 111

¹⁰⁵ [1980] 2 Lloyd's Rep 325 (PC (Sing)) 339. Nevertheless, there are several hints. First, judges have had regard to considerations such as the voluntary or involuntary nature of a lien. In that sense a damage lienee's interest should be protected first if considered against a voluntary right holder because the latter may consider all the possible risks and decide what is most advisable for his own interest where the person suffering the damage has no option *The Aline* [1839] 1 W. Rob 111 In the words of Mr. Justice Gorell Barnes 'it is clear that liens arising *ex delicto* take precedence over prior liens arising *ex contractu*' *The Veritas* [1901] P. 304. Secondly, the availability of alternative security has been taken into account in several cases, to prioritise those lienees who have no other means of making good their rights *The Aline* [1839] 1 W. Rob 111; *The Chimera* [1852] 11 L.T. 113 (Dr. Lushington); *The Linda Flor* [1857] Swab. 309 (Dr. Lushington); *The Duna* [1861] 5 L.T. 217; *The Ruta* [2000] 1 Lloyd's Rep. 359 (Mr. J D Steel) Thirdly, the preservation of the fund (the *res*) has also been considered, i.e. a salvage lienee should have priority as the salvage services had preserved the ship *The Lyрма* [1978] 2 Lloyd's Rep. 30 (Mr. J Brandon) Finally, considerations of public policy as well as commercial expediency have always mattered.

¹⁰⁶ The U.S. order of priorities has been taken from W Tetley (2002) 445-446.

supplies, stevedores, towage, contract cargo damage liens and charterer's liens, etc. (and also including statutory maritime liens, e.g. for civil penalties); 4) preferred U.S. ship mortgage liens, as of the date of filing, as well as preferred ship mortgages on foreign ships whose mortgages have been guaranteed under Title XI of the Merchant Marine Act 1936;¹⁰⁷ 5) U.S. contract liens (necessaries) arising after the filing of the U.S. preferred ship mortgage; 6) foreign ship mortgages; 7) U.S. contract liens (other than necessaries) (e.g. contract cargo damage liens and charterers liens); 8) unregistered mortgages and perfected non-maritime liens (including tax liens and other Government claims which are subordinate to maritime liens), state chattel mortgages and liens and liens for maritime attachment, and foreign contract liens e.g. U.K. statutory rights *in rem*.

The problem arises if a maritime claim attracting a lien according to its *lex causae*, being the latter U.S. law, is to be ranked in English or Scottish courts according to the *lex fori*; the legal relation would certainly lose juridical continuity, exactly what PIL is trying to avoid. Ever since financing by means of credits granted by banks and other financial institutions became an increasingly important feature of maritime commerce, learned authors and national courts of all maritime nations have been trying to find a solution to this conflict of laws, a solution which would be reasonable, practical and theoretically sound.¹⁰⁸

5.3.2.2. Uniform Solutions: International Conventions

To solve this problem international Conventions have attempted to create a uniform framework in this field. There are three international Conventions on the topic: the 1926,¹⁰⁹ 1967¹¹⁰ and 1993¹¹¹ Conventions on Maritime Liens and

¹⁰⁷ 46 U.S. Code Appx. sect. 1101 *et seq.* at sect. 1271 *et seq.*

¹⁰⁸ J Asser (1963) 13.

¹⁰⁹ The 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels, April 10, 1926) in force since June 2, 1931. It has 24 States party as at 2005; see the status of ratifications of Maritime Conventions published in

Mortgages.¹¹² The 1967 Convention never entered into force. None of them has been ratified by the United Kingdom, despite the fact that the United Kingdom is a signatory of the 1926 Convention.

5.3.2.2.1. 1926 Convention

The order of priorities of maritime claims is established in Article 2 of the Convention. According to it, the ranking is the following: 1) cost of preserving ship in *custodia legis* and judicial sale costs; 2) immediately arising salvage and general average claims; 3) master and crew wages; 4) salvage and general average claims; 5) damage and personal injury claims; 6) master's disbursements or necessities provided, *inter alia*, the ship is away from her home port and the contracts were necessary for the preservation of the ship or the continuation of the voyage; 7) registered mortgages; 8) other claims.

This Convention is the only one to recognise a lien for necessities. In turn, articles 5 and 6 establish that, apart from claims for salvage and general average, claims arising immediately out of the last voyage have priority over claims of the same kind arising out of earlier voyages. That is the well-known rule¹¹³ about liens that rank *inter se* in inverse order of effectual attachment; the theory being that the

CMI Yearbook 2005-2006 at page 420-421 available at www.comitemaritime.org/2005_6/pdf/files/YBK05_06.pdf last accessed September 3, 2007.

¹¹⁰ The 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (Brussels, May 27, 1967).

¹¹¹ The International Convention on Maritime Liens and Mortgages 1993 (Geneva, May 6, 1993) in force since September 5, 2004. States party as at 1 April 2007: Ecuador, Estonia, Monaco, Nigeria, Peru, Russian Federation, Saint Vincent and the Grenadines, Spain, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu (UN Treaty website, <http://untreaty.un.org>, last accessed September 3, 2007).

¹¹² For a detailed exposition on the three international Conventions see D C Jackson (2005) 509-516.

¹¹³ G Price, 'The Priority of Maritime Liens' (1942) 24 *Journal of Comparative Legislation and International Law* 1, 38-40; M C Meston, 'Admiralty' SME (1) 197, [413].

latest services rendered tend to preserve the ship.¹¹⁴ Many civilian countries (including, in the European Union, Belgium, Estonia, France, Hungary, Italy, Luxembourg, Poland, Portugal, Romania and Spain¹¹⁵) are party to that Convention.

5.3.2.2.2. 1967 Convention

This Convention never entered into force. Its order of priorities is established in Article 4 of the Convention. The principal changes with respect to the previous Convention in so far as to the creation of maritime liens are: the abolition of master's disbursement claims; the broadening of 'collision claims'; and the exclusion of claims involving nuclear activities. Maritime liens are given priority over mortgages and any other liens created by a state, and the order of priorities between maritime liens themselves is specified by article 5 of the Convention.

5.3.2.2.3. 1993 Convention

The latest international Convention on the issue entered into force on the 5th of September 2004. Basically, it maintains the structure of the previous Conventions providing for the order of ranking in its articles 5, 6 and 7. It alters the order in the case of port dues and salvage claims, which are taken down in the first case and up in the second, and it suppresses the ship repairer's lien (in its place article 7 of the 1993 MLM Convention provides that a shiprepairer may be entitled to a right of retention (possessory lien) according to the law of the State where the ship was reconstructed or repaired). The numbers of claims which rank above mortgages have been reduced compared to the previous Conventions in order to stimulate ship financing operations. States are allowed to create privileges for other claims in their national law, but those claims rank after claims which have been secured by a

¹¹⁴ J Asser (1963) 25. This theory has been also reflected in the 1993 MLM Convention art 5 (4) in relation to maritime liens securing claims for reward for the salvage of the ship.

¹¹⁵ Spain is also a party to the 1993 MLM Convention.

mortgage. Amongst the European Union only Estonia and Spain are States party to this Convention.

5.3.2.3. The Conflicts Solution in English and Scots PIL

Whenever an international Convention exists and is in force between the legal systems concerned, that Convention should apply as the uniform law to govern the issue of priorities. This is the situation amongst the States parties to the 1926 and 1993 MLM Conventions. Yet, it is somehow puzzling that these Conventions appear to have so limited success. Thus, whenever there is no uniform order agreed between the relevant legal systems, a conflict-of-laws rule is necessary to determine which is the law governing the order of priorities of maritime claims.

The settled principle under English PIL is grounded on the assumption that priorities form no part of the transaction under which a creditor has acquired his right; it is remedial –extrinsic– and therefore subject to the *lex fori*.¹¹⁶ It is here suggested that this is an axiom that, applying COOK's thesis,¹¹⁷ 'shows that some imaginary line has been arbitrarily taken as a boundary'.¹¹⁸ As expressed already in 1935 by MENDELSSOHN¹¹⁹ the English conception of characterization of certain issues as remedial is closely knit with the whole of English PIL as a system. In the opinion of English leading commentators, the distinction between right and remedy, parallel to the distinction between substance and procedure, is an eternal truth of every system

¹¹⁶ *Pardo v Bingham* [1868] LR 6 Eq 485 (Ct Ch); *Re Melbourn (No. 1)* [1870] 6 Ch App 64 (CA Ch); *Hills Dry Docks & Engineering Company, Ltd. v. Colorado (The Colorado)* [1923] P. 102 (CA) '...But the right of priority forms no part of the contract. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the Court sits which is to decide the cause' (L.J. Bankes) at 107.

¹¹⁷ W W Cook, "Substance" and "Procedure" in the Conflict of Laws' (1933) 42 Yale Law Journal 333.

¹¹⁸ G N Lewis, *The Anatomy of Science* (1926) referred by W W Cook (1933) as the initial quotation.

¹¹⁹ A Mendelsohn Bartholdy, 'Delimitation of Right and Remedy in the Cases of Conflict of Laws' (1935) *The British Yearbook of International Law* 20, 23.

of PIL.¹²⁰ Following that, preferences depend on the law of the country where the remedy is sought.¹²¹

Scottish courts will normally follow English sources in this respect, which, however, differ among themselves.¹²² In the case of *Clark v Bowring & Co.*¹²³ it was held that the law of Scotland only could be applied in determining the ranking of claims on a British ship locally situated in Scotland. The same opinion was held in *Clark and Another v Hine and Others.*¹²⁴ The latter case involved a maritime lien obtained under the law of New York which the lienees tried to make good in Scotland. The judgment stated that '*as I can only apply our own law in determining the ranking of claims on a British ship locally situated in Scotland, they must be treated as unsecured creditors of the bankrupt owner*'.¹²⁵

The most obvious argument in favour of this traditional position is that the *lex fori* approach provides a clear solution for the cases where different competing rights in security, created under different legal systems, seek to be enforced against the sale proceeds of the same *res*. The reasoning being that in this kind of situation, where there are different governing laws, there is no other option but to be guided by the order of priorities of the *lex fori*. As already mentioned, the *lex fori* approach is surely the simplest solution. It is here submitted, however, that this solution hardly advances juridical continuity and enhances the undesirable consequences of 'forum shopping'.¹²⁶ On the one hand, when the *lex causae* of the competing rights is the

¹²⁰ P M North and J J Fawcett (1999) 82.

¹²¹ *Ibid.*

¹²² Scot Law Com No. 164 (1998) 176.

¹²³ 1908 S C 1168.

¹²⁴ (1908) 15 SLT 914 (OH).

¹²⁵ Lord Salvesen at 915.

¹²⁶ Already in the early 1900s pursuers/claimants and also defenders/ants considered where to litigate in terms of the impact of the applicable law to the possible outcome. In *Clark and Another v Hine and Others* (1908) it was considered that '*...the defenders have an obvious interest in resisting a judicial sale, for if the vessel was to go to an American port they would be able to enforce their alleged lien against her there...*' (L Salvesen, 915). Later on in the 1920s, when still 'forum shopping' was far from being named as such, claimants considered their

same or where even if they are different they lead to the same result, there is no justification for applying the order of priorities of the *lex fori*. On the other hand, even in the cases where there is a real conflict because of differences in the ranking of the relevant governing laws, the priorities should be organised trying to accommodate the ranking of the different legal systems connected to the case according to their respective underlying policies. The suggestion of JACKSON¹²⁷, that the *lex fori* has a claim to govern only as an arbiter, applies to this kind of situation.

5.3.2.4. The Law of the Flag Revisited

The traditional fragmented approach to the characterization of maritime liens, and its division into right and remedy for the sake of applicable law issues connected to them, favoured by the majority,¹²⁸ has various downsides. It can lead to bizarre results, for example, in an American maritime lien claimant obtaining a higher priority in Canada than it would in the United States. This is exactly what happened in *The Atlantis Two*.¹²⁹ In that case the court of Vancouver recognised a United States maritime lien in favour of a sub-charterer for breach of the charter-party. The court further recognised that if the priorities were to be determined

possibilities in such terms, as a result of the application of the *lex fori* to the order of priorities, instead of the *lex causae*. See *The Colorado* (1923) 'The repairers evidently thought now that they would have been better off if instead of bringing their action in England they had allowed the ship to proceed to her home port in France and had instituted an action there' (1923) 14 Lloyd's Law Rep 251 (CA) 252.

¹²⁷ D C Jackson (2005) 683; he had previously stated that '...the role of the forum as such in any matter of priority can be questioned particularly when the governing law of all relevant transactions is the same or where there are differing laws each leading to the same result. It is only where there is a conflict because of differences in the laws governing the competing transactions that the forum may be said to have an umpire's role simply because it is the forum.' *Ibid*, 682. See also E B Crawford and J M Carruthers, *International Private Law in Scotland* (Green Edinburgh 2006) '...[t]here is room for a little unease here. If all claims arise under the same law, perhaps the forum should defer to that law...' 201.

¹²⁸ It has to be recognised that most legal systems, even those recognising the substantive nature of a maritime lien –such as United States and Canadian law- distinguish between the lien (the substantive right, therefore governed by the *lex causae*) and the priority it entails (a procedural remedy, thus established according to the *lex fori*).

¹²⁹ [1999] 170 FTR 1.

according to the *lex causae* the sub-charterer's lien would rank behind the prior registered mortgage. However, the court held that priorities were to be determined according to the *lex fori*, and under Canadian law the maritime lien of the sub-charterer ranked ahead of the mortgagee. Hence, the sub-charterer received a higher priority in Canada, according to its *lex fori*, than it would have received before a court in the United States.

A similar situation (with a similar outcome) was faced by Hill J. in *The Colorado*¹³⁰ in the 1920s, affirmed by the Court of Appeal.¹³¹ In that case, applying the *lex fori* to the order of priorities led to the foreign claimant being benefited in a way that he would have not if the issue was submitted to the *lex causae*, since according to English law (*lex fori*), the mortgagee had priority over the necessaries men. Hill J. decided, via *lex fori* characterization of the French mortgage that the French mortgagee was to rank with priority over the ship-repairers of Cardiff. Yet, by French law the rights of the mortgagee were of quite a different character as compared to the ones of an English mortgagee, (the Court of Appeal assimilated them to the rights of maritime lien holder); yet, the French mortgagee under French law had no right to take possession or to sell the ship, and his rights were postponed to those of the necessaries men.

Against this background, the law of the flag as suggested by JACKSON provides one foreseeable answer. It also provides an answer for the frequent cases where there is a question of priority between two contractual liens, and these proprietary interests according to the *lex loci contractus* are governed by different laws, which in turn, produce different results in terms of the final outcome. JACKSON is supported by a large tradition of commentators, that despite different theoretical justifications, sees in the selection of the law of the flag a conflicts rule that tends towards the greatest uniformity, and finally that is the most equitable to creditors

¹³⁰ (1922) 13 Lloyd's Law Rep 474.

¹³¹ (1923) 14 Lloyd's Law Rep 251 (CA).

who can foresee the applicable law to which their lien will be subject.¹³² It is indeed difficult to find a counter-argument for such a proposition; since this conflict rule is the only one in this sphere that could provide uniformity of decision. That is why, following the internationally accepted link between a ship and the country of her flag for registered securities, it has been strongly argued that all issues of property in a ship should be referred to the law of the flag –unless, of course, an international Convention such as the 1993 MLM Convention applies to the case-.¹³³

Nevertheless, looking at the reality of ship registration systems, and bearing in mind that most ships nowadays fly flags of convenience,¹³⁴ adopting such a connecting factor could be regarded as anachronistic and the fear is that, even when providing uniformity and foresee-ability, applicable law issues connected to maritime liens could end up being governed by the law of a legal system totally unconnected to the case: there is frequently no close link between the country of registry and the owners, operators and insurers of ships.¹³⁵ Yet, since the priority issue needs one order as to the definitive solution, unless there is an international Convention, the only conflict rule to provide for one and only law to govern maritime liens as a whole, regardless of where the claim is to be raised, is the law of the flag. It has to be assumed rather than circumvented that the 'conflictualist' approach to this issue is unable to provide for a better solution hence an international uniform solution imposes itself.

¹³² Nonetheless, this theory has been hardly followed in judicial practice (J Asser (1963) 16).

¹³³ D C Jackson (2005) 718.

¹³⁴ A ship is said to be flying a flag of convenience (FOC) when it flies the flag of a country other than the country of ownership. There are various factors that could motivate a shipowner's decision to 'flag out'. However, it is generally understood that there should be a genuine link between the real owner of a ship and the flag that she flies. On flags of convenience see H E Anderson, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139.

¹³⁵ On the law of the flag generally in conflicts of maritime law see W Tetley (1994) 175-224.

5.3.3. The Role of the Security Function of Arrest of Ships in the Ranking of Maritime Claims

Differently from the issue of priorities, the effect of the security function of arrest of ships in the ranking of maritime claims is a matter inherently procedural, therefore, to be governed by the *lex fori*, unless there was international unification of procedural rules in this regard.

5.3.3.1. International Conventions

The 1952 and 1999 Arrest Conventions deal with the right to arrest but, apart from the declaration that nothing in the Conventions creates a right of action, do not provide for the consequences of the arrest on the property rights of persons interested in the ship. In turn, the Conventions on the Unification of Certain Rules Relating to Maritime Liens and Mortgages (MLM Conventions of 1926, 1967 and 1993) deal with maritime liens and rights of retention; they refer to arrest only in the context of maritime liens and mortgages, and assume that such causes of action carry with it the right to arrest; they do not deal with the right in security created by the arrest as such.

During the preparation of the 1952 Arrest Convention the French and the British delegates at the Diplomatic Conference expressly objected to create a link between the Arrest Convention and the 1926 MLM Convention, and attempts to move forward in the discussion of this issue were unsuccessful.¹³⁶ A new opportunity arose in the preparatory work undertaken pursuant to the 1999 Arrest Convention where, even though account was taken of the fact that in some countries

¹³⁶ The *travaux préparatoires* of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 10 May 1952 (CMI 1997).

an arrest not only prevents the physical removal of the ship but also results in a prohibition against disposal of the ship by sale or otherwise, the Conference still did not find it reasonable to include such a requirement in the definition of arrest.¹³⁷

It is indeed regrettable that currently the Arrest Conventions and the Maritime Liens and Mortgages Conventions did not enhance one another in this sphere.¹³⁸ The present state of affairs of 'chaotic inconsequence' in this area of the law¹³⁹ would certainly improve if it was possible to rely on coherent and consistent international standards for the different aspects of the international enforcement of maritime claims. Possibly the problems go far beyond technicalities, as these issues are very sensitive to public policy. Doubtless, this has represented an obstacle when it comes to international harmonisation of the law in this field.

5.3.3.2. English Law

In English domestic law the priority afforded by the *in rem* claim, or the right to proceed¹⁴⁰ *in rem*, depends on the nature of the cause of action, e.g. whether it encumbers a maritime lien, or a mere statutory right *in rem*, or derives from a mortgage or other charge of the same nature, it depends on the nature of the right, substantively, as outlined below.

Arrest in rem to enforce a maritime lien

¹³⁷ The *travaux préparatoires* of the 1999 Arrest Convention (F Berlingieri (2006) 526-28) (Report of the CMI on article 1(2) [29]).

¹³⁸ In fact, when the 1952 Arrest Convention entered into force more than fifty years ago, it did enhance the 1926 MLM Convention by filling the gap the latter left in so far the enforcement of liens and mortgages; see J M Kriz 'Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952. Part Two' (1964) 1 Duke Law Journal 70.

¹³⁹ In *The Halcyon Isle* [1980] 2 Lloyd's Rep 325 the dissenting opinion held that PIL had an important role to play in 'the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages' (Lord Salmon and Lord Scarman 339).

¹⁴⁰ Very often this right to proceed *in rem*, ie this procedural right, is mentioned as 'this right *in rem*', confusing the procedural nature of quasi *in rem* actions with the substantive feature of rights *in rem*.

When arrest of ships is granted to enforce a maritime lien the priority derives from the maritime lien and not from the arrest; this means that once the ship is arrested, the security function goes back in time to the moment where the lien attached, namely the moment the cause of action originated.

Arrest in rem to enforce statutory rights in rem

In so far as statutory rights *in rem* are concerned the security effect crystallises on the property from the time of the issue of the *in rem* claim form. This was established in *The Monica S*¹⁴¹ where Brandon J. pointed that '*It seems to me that it would be strange if a statutory right of action in rem only become effective, as against a subsequent change of ownership of the res, upon arrest of the res, and yet, by the same statute, as conferred the right of action, arrest was in many cases prohibited*'.¹⁴² It has been argued that policy considerations must have been determinant in this decision, which has remained unchallenged since 1967.¹⁴³ Consequently, it seems that in English law the position of a secured creditor in relation to maritime claims not secured by a maritime lien, arise from the issuance of an *in rem* claim form and not from arrest. However, this was not always the case. In *The Henrich Bjorn*,¹⁴⁴ the charge created upon the ship based on 'statutory liens' (right to proceed *in rem*) in favour of the claimant, was held to accrue from the time of the arrest of the ship. Nonetheless, in present times it is the issuance of an *in rem* claim form (and not the effectual arrest) that creates a security which cannot be defeated by insolvency and is available only for maritime claims.¹⁴⁵ It will only be defeated by a maritime claim

¹⁴¹ [1967] 2 Lloyd's Rep 113 (PDAD).

¹⁴² *Ibid* at 131.

¹⁴³ A Mandaraka-Sheppard, *Modern Admiralty Law* (Cavendish London 2001) 81.

¹⁴⁴ *The Northcote v Owners of the Henrich Bjorn (The Henrich Bjorn)* (1885) LR 10 PD 44 (CA).

¹⁴⁵ This is to be contrasted to the obtaining of security by means of a freezing order (formerly Mareva injunction) in English law. A freezing order does not create *nexus* (in Scots law terms), merely preserves a fund against which execution may be taken which in fact is liable to be defeated by insolvency process or by a prior execution creditor.

having greater priority.¹⁴⁶ In that sense, arrest does not create a right in security as defined earlier in this chapter, at least not a right that is distinct from, and in addition to, the right of action.

5.3.3.3. Scots Law

In Scots law some insight may be thrown into the particular effects of arrestment of ships from the general law of diligence.

Litigiosity¹⁴⁷ and Nexus in Scots Law

There have been two approaches to the effect of arrestment in general in Scots law: the prohibition theory and the attachment theory.¹⁴⁸ These theories can be easily applied to the arrestment of ships in Scots law and, to the arrest of ships as an institution more broadly. The prohibition theory considers arrestment as a mere prohibition upon the arrestee from parting with the arrested subject (and in that sense coinciding with the nature of arrest as understood by HERBERT, FRESNEDO and AGUIRRE). In turn, the attachment theory regards arrestment as being not only a prohibition but also laying a *nexus* (right in security) on the subject arrested (thus constituting an *embargo* in the opinion of the authors mentioned above). In the case of arrestment of ships this *nexus* is a *nexus realis*,¹⁴⁹ i.e. a *jus in re aliena* (a right

¹⁴⁶ N Meeson, *Admiralty Jurisdiction and Practice* (3rd edn LLP London 2003) 17.

¹⁴⁷ It has to be borne in mind that the principle of litigiosity in this sphere of Scots law may be undergoing reconsideration; notably, the 'fictional litigiosity theory' as understood by Erskine (Institute 111,6,19) has been severely rejected by the Scottish Law Commission in the 'Report on Diligence on the Dependence and Admiralty Arrestments' (Scot Law Com No 164 (1998) [9.23] 187). There the SLC argued that '*... the fictional litigiosity theory of the arrestee's preference should be abandoned and replaced by properly formulated principles. In our view however it would be preferable if this result were to be achieved by judicial development of the law rather than by legislation ...*' Litigiosity was then considered as an out-of-date doctrine in the sense that it represents a '*mere personal prohibition against the arrestee parting with the arrested property having no effect in competitions with third parties*' ... [9.14] 184.

¹⁴⁸ G L Gretton, 'Diligence' *Stair Memorial Encyclopaedia* (SME) (8) [285].

¹⁴⁹ Dicta have not been consistent to answer the question whether arrestment gives rise to a *nexus realis*. For an affirmative answer see [1898] *Inglis v Robertson and Baxter* 25 R

acquired by one over a thing belonging to another).¹⁵⁰ As GRETTON explains, from the times of STAIR these theories have been in the field of diligence in Scots law producing inconsistent *dicta*; some decisions reflect one theory, some the other.¹⁵¹ As a consequence, there is no settled rational framework in which the law can be developed.¹⁵² Seemingly, the attachment theory has gained more acceptance; the particular rules which depend on the prohibition theory are currently regarded as inconsistent.¹⁵³ In terms of specific effects both theories agree that arrestment results in *litigiosity*; but the prohibition theory holds that arrestment does not lay a nexus in addition to *litigiosity*.¹⁵⁴ BELL, when considering the effects of arrestment in security more generally, called it an '*embargo upon a man's floating capital, his goods and his money*';¹⁵⁵ that could be interpreted as arrestment creating not only *litigiosity* but also *nexus*.¹⁵⁶ To put the point another way, it seems that in modern Scots law arrestment as a form of diligence, excluding thus arrestment to found jurisdiction, creates a *nexus* (attachment¹⁵⁷) which gives a preference to the creditor over acts of the debtor and of the competing creditor.¹⁵⁸

(HL) 70 at 73 per Lord Watson. On the contrary view, Stewart's statement that arrestment of itself gives no real right (p 125) sits uneasily with his advocacy of the attachment theory; following Stewart, arrestment has been held to give no real right in several Scottish *dicta*; see G L Gretton SME (8) [285] fn 8.

¹⁵⁰ [1897] *The Ripon City P* 226 per Gorell Barnes J (242).

¹⁵¹ G L Gretton SME (8) [285].

¹⁵² Gretton argues that '*In the whole law of diligence, this failure to develop a coherent doctrine as to the effect of arrestment is probably the most remarkable and most inexcusable. The fault is perhaps lightened by being spread over many centuries*' (G L Gretton SME (8) [285]).

¹⁵³ G L Gretton SME (8) [285].

¹⁵⁴ *Ibid.*

¹⁵⁵ G J Bell (vol 2, 1870) 66.

¹⁵⁶ G L Gretton SME (8) [116].

¹⁵⁷ A J Sim, 'The Receiver and Effectually Executed Diligence' 1984 SLT (News) 25 '*...in modern Scots law...the orthodox view has been that an arrestment effects a true attachment – and so can be regarded as a diligence executed on property – with certain important and defined effects which cannot be explained on the principle of litigiosity...*' 28, as cited by Scot Law Com No 164 (1998) 184. Notwithstanding, the principle of litigiosity is still being used by Scottish courts; see *Iona Hotels Ltd v Craig* 1990 SC 330 (IH (1 Div)) 334-336, arguably, in the opinion of the SLC in the Report mentioned above, failing to take account of the way in which the law on the effect of arrestments has developed since the eighteenth century (Scot Law Com No 164 (1998) [9.17] 184).

¹⁵⁸ Scot Law Com No 164 (1998) 186. Note however, the position of Gretton who considers that viewing arrestment as an attachment rather than a mere prohibition is not

Arrestment on the dependence in an admiralty action in personam

According to the foregoing discussion on the effects of arrestment in the general law of diligence, an arrestment of a ship on the dependence creates a preference for the arrester which will be recognised and enforced in subsequent rankings of creditors. Seemingly ranking after 'traditional' maritime hypothecs and ship mortgages even though there are no modern authorities.¹⁵⁹ As stated above, it is likely that Scots law will follow English lead in this area of law.

Arrestment in rem in an admiralty action in rem to enforce a maritime lien

As well as in English law, when a warrant of arrestment is obtained in order to enforce a maritime lien, it is the maritime lien (in Scots law terms, hypothec) that constitutes the security and not the arrestment as such.

Arrestment in rem in an admiralty action in personam to enforce a statutory right in rem

An arrestment *in rem*¹⁶⁰ under a cause of action listed in section 47(2) paragraphs (p) to (s) of the Administration of Justice Act 1956 (non-pecuniary claims) does not have any effect on the ranking of creditors, or in competition with bona fide purchasers or mortgagees, or generally on the substantive rights of parties, other than rights to interim possession.¹⁶¹

Arrestment to found jurisdiction

Arrestment to found jurisdiction creates no *nexus* with the ship arrested. Thus, no security function is ever displayed by this kind of arrestment alone. That is

always true (G L Gretton, SME (8) [286]). Arrestment to found jurisdiction is indeed an example of an arrestment that it is not an attachment.

¹⁵⁹ J A G Lowe, 'Maritime Securities' SME (20) 118 [273 -315].

¹⁶⁰ According to s 47 (3) (b) the arrestment is *in rem* if the result of the cause of action in (p) to (s) of s 47(2) is non-pecuniary.

¹⁶¹ Scot Law Com No 164 (1998) 131.

the reason why it is usually applied for together with a warrant for arrestment on the dependence.

5.4. AT THE CROSSROADS: SUBSTANCE AND PROCEDURE AND RIGHT AND REMEDY IN PIL

In most systems of PIL there is an axiomatic rule: procedural issues are governed by the *lex fori* whereas substantive matters are governed by the *lex causae*. It has been proclaimed as '*the most inveterate doctrine of the conflict of laws*'.¹⁶² But when it comes to the point where it is necessary to decide what is procedure or remedy, as opposed to substance or right, things become doubtful and subject to acrimonious controversy.¹⁶³

The distinction became established in medieval times. In the thirteen century in a case before Parisian courts, the defendant alleged an excuse for non-appearance purporting that the 'custom of Normandy' allowed it. However, the defence was rejected on the ground that the matter was '*de processu causae*' and was therefore governed by the *lex fori*.¹⁶⁴ The following century the post-glossators BARTOLUS and BALDUS laid down the same distinction clearly.¹⁶⁵ Following them the forthcoming centuries took the rule as a settled axiom.

¹⁶² E H Ailes, 'Substance and Procedure in the Conflict of Laws' (1940-1) 39 Michigan Law Review 392 '...It is perhaps the most inveterate doctrine of the conflict of laws that all questions of procedure in a given instance are governed by the *lex fori*, or the law of the court invoked, regardless of the law under which the substantive rights of the parties accrued. For seven centuries, at least, courts and lawyers have broadly stated or assumed to be axiomatic the rule that substantive rights are fixed and immutable whilst the procedural devices by which such rights may be vindicated and enforced depend solely upon the law of the forum.'

¹⁶³ A Mendelssohn Bartholdy (1935) 33.

¹⁶⁴ [1265] Les Olim, I., Ed. Beugnot, 1839 630 as cited by E H Ailes (fn 185) 397.

¹⁶⁵ Bartolus de Saxoferrato (1313-1357), *Commentarius in Codicem Iustinianum: "de summa trinitate"* glossa "*quod si Bononiensis*" (Lyon 1521). His writings have been translated into English by J H Beale, *A Treatise on the Conflict of Laws of PIL* (vol 1 Harvard University

The rule has been of particular influence in common law systems, notably in English PIL. In 1896 DICEY expressed that ‘...English lawyers give the widest possible extension to the meaning of the term “procedure”. The expression as interpreted by our judges includes all legal remedies, and everything connected with the enforcement of a right’.¹⁶⁶ Arguably, the rationale behind such an expansive notion of procedure is that in English law this rule operates as an ‘escape device’¹⁶⁷ in terms of the functioning of PIL, thus, helping courts to achieve a fair judgment.¹⁶⁸ Yet, the line between substance and procedure has been consistently drawn to evade the impact of foreign law.¹⁶⁹ COOK explained the issue in the following terms,

‘if we admit that the “substantive” shades off by imperceptible degrees into the “procedural”, and that the “line” between them does not “exist”, to be discovered merely by logic and analysis, but is rather to be drawn as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?’.¹⁷⁰

In this respect Arden LJ has recently confirmed that ‘...when in the conflict of laws, the court says that a particular issue is one of procedure rather than substance, the court is really saying that it cannot, for whatever reason, apply the relevant foreign law to that issue’.¹⁷¹

Press Cambridge 1916). For Baldus de Ubaldis (1327-1400), disciple of Bartolus, see A Lainé, *Introduction au Droit International Privé* (vol 1 F Pichon Paris 1888/1892) 121.

¹⁶⁶ A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens London 1896) (1896) 712.

¹⁶⁷ By ‘escape device’ is meant to point out to PIL ‘tools’ such as the use of *renvoi* or the application of the exception of *ordre public*, amongst others.

¹⁶⁸ In *Chaplin v Boys* [1969] 2 Lloyd’s Rep 487 (HL) the ‘substance and procedure rule’ was described as a tool which ‘...in skilful hands...can be powerful and effective’ (Lord Wilberforce).

¹⁶⁹ As for the most recent example see *Harding v Wealands* [2006] UKHL 32.

¹⁷⁰ W W Cook (1933) 343-344.

¹⁷¹ *Harding v Wealands* [2005] 1 All ER 415, 437.

This approach has been repeatedly criticised. LORENZEN,¹⁷² in a letter written to AILES in 1929, concluded that the terms 'substance' and 'procedure' have no inherent meaning and that, for the purposes of conflict of laws, the only issue that matters is that the created rights are enforced in every court. He admitted only two exceptions to this main rule: when the local judicial machinery would be obstructed thereby (for inherently procedural matters), or if the enforcement or recognition of such rights '*would be shocking to the local community*'¹⁷³ (*ordre public* exception). On the same line, CHAMBERLAYNE went forward expressing that '*...the distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognised claim to use it, are legally speaking, part of the right itself...*'¹⁷⁴

Scottish courts have been more restrictive with the 'substance and procedure' device;¹⁷⁵ arguably, showing the internationalist spirit that has characterised Scots PIL. In present times CARRUTHERS¹⁷⁶ puts the issue under discussion in terms of self-restraint and self-promotion of the forum, arguing in favour of the former '*...for the whole foundation of the conflict of laws requires that a court should restrict the field of its own procedure and be prepared to follow as far as possible the foreign substantive law...*'¹⁷⁷

¹⁷² E G Lorenzen (ed), *Cases on Conflict of Laws* (West Publishing St Paul 1937).

¹⁷³ E H Ailes (1940-1).

¹⁷⁴ C F Chamberlayne, A W Blakemore and D C Moore *Handbook on the Law of Evidence* (M.Bender Albany, NY 1919) 171, 1911 as cited by E H Ailes (1940-1) 394.

¹⁷⁵ A E Anton, *Private International Law* (Green Edinburgh 1967) 542; A E Anton and P Beaumont, *Private International Law* (2nd edn Green Edinburgh 1990) 743. In the later (1990) it was '*...not as yet clear how far this approach will be developed...*' 743.

¹⁷⁶ J M Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in relation to Damages' (2004) 53 ICLQ 691 '*...Self-promotion on the part of any forum foments reluctance to concede that foreign rules are substantive, and encourage litigants to indulge in the vice of forum shopping. Self-restraint, on the other hand, fosters willingness to characterize foreign rules as substantive and, in turn, to apply those rules unless to do so would be impractical or impossible or offensive to the forum's public policy...*' 710.

¹⁷⁷ A H Robertson, *Characterization in the Conflict of Laws* (Harvard Press Cambridge MA 1950) 247 as cited by J M Carruthers (2004) 695.

The modern doctrinal approach (as opposed to the jurisprudential one),¹⁷⁸ thus, is to ascribe a natural meaning to the terms substance and procedure,¹⁷⁹ limiting the scope of 'procedural' to those issues strictly necessary to conduct court proceedings.¹⁸⁰ In PANAGOPOULOS words '*matters of procedure are concerned with manners, whereas matters of substance are concerned with matters*'.¹⁸¹ Doubtless, the original rationale behind the distinction, and its consequential rule that procedural matters are governed by the *lex fori*, is to '*avoid imposing upon a court foreign legal machinery with which it is unfamiliar*'.¹⁸² Since under this modern approach the scope of 'procedural' is therefore reduced to a considerable extent, specific areas have been the object of recent development (for example, in the sphere of limitation of actions, considered as a '*prelude of things to come*'¹⁸³) and some other areas, such as the field of remedies, is being tested in present times.¹⁸⁴

Surprisingly, the distinction between right and remedy in PIL has not deserved the same scholarly attention as its corollary, substance and procedure,¹⁸⁵ despite its relevancy as far as characterization is concerned. After MENDELSSOHN BARTHOLDY¹⁸⁶ analysis in 1935, which is actually more concerned with characterization [qualification], there is hardly any other well-know study of the topic. However, some studies devoted to the analysis of the distinction between substance and procedure in PIL give consideration to this issue.¹⁸⁷ Notably, the

¹⁷⁸ *Harding v Wealands* [2006] UKHL 32.

¹⁷⁹ G Panagopoulos, 'Substance and Procedure in PIL' (2005) 1 *Journal of Private International Law* 69, 70.

¹⁸⁰ [1991] *McKain v Miller* 174 CLR 1, 27 (HCA) by Mason CJ.

¹⁸¹ *Ibid* 71.

¹⁸² D R Thomas (1980) 322.

¹⁸³ G Panagopoulos (2005) 70.

¹⁸⁴ See G Panagopoulos (2005) 77.

¹⁸⁵ The distinction between substance and procedure within PIL has been the object of numerous studies since the early twentieth century until present times. See, for example, W W Cook (1933) 333; E H Ailes 'Substance and Procedure in the Conflict of Laws' (1940-1) 39 *Michigan Law Review* 392; J M Carruthers (2004); G Panagopoulos (2005).

¹⁸⁶ A Mendelssohn Bartholdy (1935).

¹⁸⁷ See W W Cook (1933) 341 '*...if...we examine into the distinction between "substantive law" and "remedial and procedural law" as that distinction is involved in legal problems, we find that*

question appears repeatedly in case law.¹⁸⁸ In 1949 LJ C Thomson in *McElroy v McAllister*¹⁸⁹ expressed,

'...matters of "remedy", being truly matters of procedure and not of substantive right, fall to be dealt with according to the law of the forum. There are sound reasons for this attitude. So far as remedy is concerned the reasons are practical, though the line between what is a matter of remedy, and what is substantive right may be difficult to draw...'¹⁹⁰

Traditionally, there have been two main approaches: the 'traditionalist' and the 'realist'. For the traditionalist the difference is axiomatic, and is seen as a useful device for the administration of justice; by contrast, for the realist the distinction is not well grounded, and in some cases is even inconvenient for it '*involves a denial of right which is the more reprehensible in that it purports to rest upon a "mere" denial of "remedy"*'.¹⁹¹

The traditional approach has received considerable support since the distinction became established in medieval times.¹⁹² Yet, it is here submitted that in the case of maritime liens the realist approach is to be preferred since it is actually a field where to deny the remedy means to deny the right.

This approach has been recently supported by PANAGOPOULOS.¹⁹³ He argues that, on the one hand, remedies are certainly not norms ruling on the manner in which court's proceedings should be conducted and therefore, should not be seen as inherently procedural. On the other hand, the remedy is an integral part of the right

this distinction is drawn for a number of different purposes, each involving its own social, economic or political problems.'

¹⁸⁸ See e.g. *Kendrick v Burnett* (1897) 25 R 82 (Lord Kinnear) 90 '*...The rule that whatever belongs to the remedy is to be determined by the lex fori...depends upon the distinction between questions as to the constitution of obligations and questions as to the mode in which they are to be enforced*'; *Naftalin v LMS Railway* 1933 SLT 193 (Lord Murray) 200; see also D M Walker, *The Law of Civil Remedies in Scotland* (Green Edinburgh 1974) 19.

1949 SC 110 (IH (Ct of 7 Judges)).

¹⁹⁰ *Ibid* at 117.

¹⁹¹ E H Ailes (1940-1) 394.

¹⁹² E H Ailes (1940-1) 396.

¹⁹³ See G Panagopolus (2005)77.

being enforced, actually affecting its existence and scope, therefore, it should be characterised as substantive.¹⁹⁴ JACKSON is also of the opinion that issue of priorities in the case of maritime liens should be submitted to the same law governing the existence of the security right.¹⁹⁵

In this modern (realist) conception, therefore, there is no place to consider maritime liens as procedural; moreover, there is no place either to consider the priorities they imply as remedial. Consequently, neither the right nor the priorities intrinsically adjudged to the right should be considered procedural under the modern loop of PIL. Both right and priority are inherently substantive and should coherently be governed by the *lex causae*.

The inconvenience of the fragmentation into right and remedy for PIL purposes has been recently examined by BRIGGS.¹⁹⁶ In his opinion '*...there should be no line which separates right from remedy in the conflict of laws, or, to put it another way, the remedial rules of the lex causae should apply in an English court unless it would be contrary to public policy to do so, at which point the nearest English equivalent should apply instead...*'.¹⁹⁷ Outwith PIL, in modern times Goudling J has observed that '*...right and remedy are indissolubly connected and correlated...it is as idle to ask whether the court vindicates the suitor's substantive right or gives a suitor a procedural remedy as to ask whether thought is a mental or a cerebral process*'.¹⁹⁸ Leading commentators, however,

¹⁹⁴ G Panagopoulos (2005) 78.

¹⁹⁵ D C Jackson (2005) 681-682. In his opinion '*Any reference of priority to the law of the forum assumes that questions of the substance or nature of a right (which should be a matter for the law governing its creation) and priority of the right as against other rights are distinct issues. But, on the contrary, priority may be dictated by the nature... To distinguish nature and priority is to draw a distinction inherently inconsistent with the whole framework of which the two aspects are part*' [26.36]; '*Following that argument, the role of the forum as such in any matter of priority can be questioned particularly when the governing law of all relevant transactions is the same or where there are differing laws each leading to the same result. It is only where there is a conflict because of differences in the laws governing the competing transactions that the forum may be said to have an umpire's role simply because it is the forum. Otherwise, it is artificial to refer the connected issues of priority and substance to different laws*' [26.37].

¹⁹⁶ A Briggs (2003) 274.

¹⁹⁷ A Briggs (2003) 277-278.

¹⁹⁸ *Chase Manhattan Bank NA v Israel-British Bank (London)* [1981] Ch 105, 124.

along with traditional authority, still affirm that in general terms the question of priorities is a remedial matter for the *lex fori*.¹⁹⁹ Nonetheless, the latest edition of *Dicey, Morris and Collins* recognise that ‘...the principle that priorities are governed by the *lex fori* is not, however, a universal one.’²⁰⁰ It looks as if the door is being left open to future developments of the law in this regard.

5.5. CONCLUSIONS

As mentioned in the first chapter of this thesis arrest of ships benefits both creditors and ship-owners.²⁰¹ Yet, when it comes to applicable law issues connected to it, the conflict of interests in the adjacent field of international interests in ships makes it very difficult to strike a balance acceptable to the shipping community as a whole. Therefore, unification of the law in this field remains paramount. Nonetheless, even though a first step towards uniformity has been achieved with the entry into force of the 1993 MLM Convention in 2004, in present times, conflict-of-laws rules in the matter studied in this chapter are far from being redundant.²⁰²

¹⁹⁹ P M North and J J Fawcett (eds) (1999) 83.

²⁰⁰ L Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (14th edn Sweet & Maxwell London 2006) 191.

²⁰¹ It may be argued that also in this sense arrest of ships has, functionally, the characteristics of a right in security. Already in the *Corpus Juris Civilis* it was established that ‘*Pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum*’ (A security is given for the benefit of both parties: of the debtor in that he can borrow more readily, and of the creditor in that his loan is safer). *Institutiones Book III, Tit. XIV* translated in T L Mears, *Analysis of M. Ortolan’s Institutes of Justinian: including the history and generalization of Roman Law* (Stevens London 1876). Even though this definition describes express security rights given by agreement, in the case of ships the rationale behind the common benefit encompasses all three kinds of security rights mentioned above.

²⁰² Arguably, even if the 1993 MLM Convention achieves greater success, a good conflict-of-laws rule will always be needed to supplement the Conventional system. For the supplementary role of PIL in substantive unification see C Fresnedo de Aguirre and V Ruiz, ‘El Derecho Marítimo y El Derecho Internacional Privado’ [2005] 22 *Anuario de Derecho Marítimo* 189.

The main argument submitted in this chapter is that a fragmented approach to the characterization of maritime liens in PIL, either through the distinction between substance and procedure or right and remedy, should be resisted.²⁰³ When a given 'procedural' question is treated differently in the different legal systems connected to a certain PIL case (i.e. as 'procedural' for the *lex fori* and as 'substantive' for the *lex causae*) the outcome of the case in terms of applicable law will probably differ depending on the chosen forum. This, undoubtedly, enhances the undesirable consequences of 'forum shopping'. To put it another way, the *lex fori* approach, *qua lex fori* or *qua lex causae* should be avoided; in the 21st century a lienee should not be in a position of having his claim substantially satisfied or entirely shut out, depending upon the legal system of the jurisdiction in which the ship is arrested and sold.²⁰⁴ Moreover, an appropriate conflict rule cannot be based on the fallacy that the maritime lien/hypothec is a procedural aspect of the maritime claim and therefore governed by the *lex fori*.²⁰⁵ As THOMAS remarked in 1980 the *lex fori* approach in the English fashion was a minority position considering other maritime courts around the world, where the trend was to define a maritime lien as a substantive right and consequently, subject to the *lex causae*.²⁰⁶

Against this background, the far-reaching concept of 'procedure' in English law as to cover the existence of maritime liens should be seen as a thing of the past. The modern doctrinal approach is consistent in asserting that the characterization of certain aspect of a claim as 'procedural' should be restricted to matters directly related to the conduction of court proceedings. Matters that affect the existence,

²⁰³ See P B H Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1 arguing that 'the habit of thinking of the law in terms of wrongs and remedies encourages a malignant, criminal model of the civil law', what he calls 'discretionary remedialism'; a 'model where "rights" dissolve'. Indeed, if the distinction is applied for the purposes of characterization (and consequently the determination of the applicable law) to maritime liens, 'the right does dissolve'.

²⁰⁴ J M Kriz, 'Comment' (1955) 64 Yale Law Journal 878, 893.

²⁰⁵ For the same opinion see W Tetley (1998) 7.

²⁰⁶ D R Thomas (1980) 23.

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²⁰³ See P B H Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1 arguing that '*the habit of thinking of the law in terms of wrongs and remedies encourages a malignant, criminal model of the civil law*', what he calls '*discretionary remedialism*'; a '*model where "rights" dissolve*'. Indeed, if the distinction is applied for the purposes of characterization (and consequently the determination of the applicable law) to maritime liens, 'the right does dissolve'.

²⁰⁴ J M Kriz, 'Comment' (1955) 64 Yale Law Journal 878, 893.

²⁰⁵ For the same opinion see W Tetley (1998) 7.

²⁰⁶ D R Thomas (1980) 23.

scope and enforceability of the rights themselves, are inherently substantive, therefore, should be left to the *lex causae*.²⁰⁷

Furthermore, it is here submitted that it is inconvenient to refer the connected issues of existence and ranking of maritime liens to different laws; it could lead to incoherencies that would not advance the policies underlying neither the *lex causae* nor the *lex fori*. Using the same illustration as throughout this chapter, if for example,²⁰⁸ a United States lien is ranked following the English priority system it will probably not advance the rationale underlying either United States law or English law, therefore jeopardizing the juridical continuity of the legal relation and disregarding the rationale of the foreign system of priorities. JACKSON suggests that '*a priority issue necessarily poses a proprietary issue and the whole should be considered as a matter of substance*'.²⁰⁹ Time is ripe for the re-examination of PIL rules in this sphere. It is here submitted that the ranking of the *lex causae* should be used unless there are such circumstances amounting to an application of the *ordre public* exception, grounded on international public policy issues, which is the only possible justification in modern PIL for disregarding the application of the *lex causae*.

The change of characterization on 'limitation of actions'²¹⁰ within English and Scots²¹¹ PIL shows how feasible is to change from one category to the other, and

²⁰⁷ D C Jackson (2005) 681-682

²⁰⁸ In the United States there are a considerable number of maritime liens which are organised according to priorities; in English law there are a restricted range of maritime liens with no clear-cut system of priorities. The priority order is determined in a case-by-case basis and it is related to the relation between the different types of lien (D C Jackson (2005) 682).

²⁰⁹ D C Jackson (2005) 683.

²¹⁰ Nowadays the Foreign Limitation Periods Act 1984 provides that time-bar provisions are governed by the *lex causae* and not by English law unless the latter is the *lex causae*. This welcomed modification attuned with the general modification in English PIL of contracts after the Rome Convention helps to harmonise characterisation of statutes of limitation within Europe as substantive (P M North J J Fawcett 121). Nevertheless English law on limitation will still apply to determine the time at which the limitation period stops running against the plaintiff and may apply if the application of the *lex causae* is contrary to public policy; see A Briggs *The Conflict of Laws* (OUP Oxford 2002) 38.

how arbitrary the boundaries in reality are. Hopefully, this change could gradually lead to a better general understanding of maritime liens as the preferential rights they are, and consequently, to re-align the distinction between right and remedy in the future, as to allow for the intrinsic issue of priorities to be governed also by the *lex causae*.

In a nutshell, the common law of England and Scotland, as prepared to refine its categories and conflict-of-law rules, conscious of the interplay between the two,²¹² should consider maritime liens and the priorities they entail as a matter of substance submitted to a conflict-of-law rule that points out to an appropriate applicable law. In the words of BRIGGS, '*...if there is to be an elimination of the doctrinal choice of law which separates right from remedy, there will need to be a clearer certainty that the choice of law rules for substantive rights are themselves in good shape...*'.²¹³ As mentioned above, JACKSON is of the opinion that the appropriate conflict rule in this sphere should indicate that all issues of property in a ship are referred to the law of the flag.

Finally, as far as the role of the security function of arrest of ships in the distribution of the sale's proceeds there is no uniform framework for the law to develop in; neither in national, international or regional law. This carries the uncertainty of the effect of arrest on third party proprietary interests.²¹⁴ This is

²¹¹ A similar process occurred in Scots law; see the SLC Report on Prescription and the Limitation of Actions – Report on Personal Injuries Actions and Private International Law Questions (Scot Law Com No 74 (1983)); D M Walker, *The Law of Prescription and Limitation of Actions in Scotland* (6th edn Green Edinburgh 2002).

²¹² A Scott (2007) 47; *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68, [2001] 1 Lloyd's Rep 597 (CA) (Mance LJ) [26].

²¹³ A Briggs (2003) 279.

²¹⁴ Jackson recognises that '*Arrest is a mode of establishing security for a claim and its role in the context of a bankruptcy or liquidation clearly raises potential conflicts with the rules relating to secured and unsecured claimants in that context*' (D C Jackson *ibid*). '*Arrest in English law when used is simply an early step ensuring physical retention of an asset in that process. In relation to arrest as such the only relevant issue [in the context of arrest as security] is the extent to which an arrest may be void or stayed as an interference with the bankruptcy and liquidation framework*' (D C Jackson (2005) 404).

certainly an area that needs further clarification and uniformity for the sake of predictability and legal certainty in the sphere of ship-financing transactions. It is here submitted that, in present times, this is a fertile field for unification of procedural law. At the CMI Conference held in Amsterdam in 1949 pursuant to the adoption to the 1952 Arrest Convention, the British representative, Mr. Cyril Miller affirmed that it was quite '*...impossible to attempt, and indeed undesirable, to unify the law of procedure...*'²¹⁵ Fifty years later the international community does not think the same way.²¹⁶

6.1. INTRODUCTION

The purpose of this chapter is to provide a general overview of the current state of international procedural law. It will first discuss the historical development of international procedural law, and then focus on the current state of international procedural law. The chapter will also discuss the role of international procedural law in the context of international law, and the role of international procedural law in the context of international law.

The chapter will first discuss the historical development of international procedural law, and then focus on the current state of international procedural law. The chapter will also discuss the role of international procedural law in the context of international law, and the role of international procedural law in the context of international law.

²¹⁵ See Berlingieri (2006) 6.

²¹⁶ See, for example, the ALI/Unidroit Principles of Transnational Civil Procedure adopted in 2004 (2004) 4 Unif. L. Rev. 758-809. In the particular field of international security interests see the UNIDROIT Convention on Mobile Equipment (Cape Town Convention) in force since the 30th of March 2006.

CHAPTER SIX

Arrest of Ships and Jurisdiction on the Merits

6.1. INTRODUCTION

Ship-related businessmen have always been particularly affected by jurisdictional issues since shipping by its very nature involves contacts with various countries, their laws and their adjudicatory powers. Some of the most fiercely contested conflicts of jurisdiction take place in shipping disputes and much effort and resources are devoted to solve the jurisdictional issue –which in many cases becomes much more important than the subject matter itself.¹ Hence, this is an area of law where certainty and foresee-ability are more necessary than in most others.

The arrest of ships plays a paramount role in that conflict of jurisdictions. As jurisdiction on the merits based on the arrest of the ship is an established jurisdictional basis under some national systems of law and under international Conventions, it provides almost always for concurrent jurisdictions in the field, therefore, the threat of parallel litigation is always latent.

¹ In *The Spiliada* it was made clear by Staughton J at first instance that the decision as to the appropriate forum will put one party or the other into a stronger negotiating position; see *The Spiliada Maritime Corporation v Cansulex Ltd*) [1987] 1 Lloyd's Rep 1 (HL). The same reasoning was followed in *Golden Ocean Assurance and World Mariner Shipping SA v Martin (The Goldean Mariner)* [1989] 2 Lloyd's Rep 390 (QBD (Comm)).

In general terms, it can be said that at the present time a court is entitled to exercise jurisdiction on the merits if it is a forum with which the dispute has a substantial connection. And the main duty of PIL is to identify what constitutes a substantial connection across the whole range of PIL categories. Furthermore, a court is entitled to exercise jurisdiction even if it does not have a substantial connection with the dispute for the sole purpose of interim relief. Therefore, two main themes arise in connection with jurisdiction and the arrests of ships. On the one hand, the jurisdictional function of arrest, that is, arrest as a substantial connection with the forum for the purpose of grounding jurisdiction on the merits. In this sphere the assessment is done through the position of the *forum arresti* in the international Conventions and, as in the 1952 Arrest Convention the issue is left, to a certain extent, to the law of the *forum arresti*, to its position in English and Scots law. Both legal systems provide, albeit differently, for arrest as a jurisdictional ground for the merits of admiralty claims. On the other hand, the distinction between jurisdiction on the merits based upon arrest from jurisdiction to arrest for the sole purpose of interim relief (hereinafter called 'ancillary jurisdiction'). In English law, this distinction whilst clear in principle is jeopardised by the intrinsic connection between arrest of ships and the action *in rem*. The second issue is only outlined in this chapter. Ancillary jurisdiction is indeed more related to judicial cooperation than to direct jurisdiction that is why its analysis is left to Chapter 7.

Thus, the main task of this Chapter is to examine the jurisdictional function of arrest of ships to unravel the foundations of the *forum arresti* principle. Essentially the aim is to identify the type of connecting factor that justifies the exercise of jurisdiction on the merits as a consequence of the arrest of ships, with a view towards enhancing its theoretical legitimacy.

6.2. THE JURISDICTIONAL FUNCTION OF ARREST OF SHIPS

As outlined in Chapter 1, the jurisdictional function of arrest of ships has historical foundations. The impact of English law on this history is remarkable. In turn, the English rule is a consequence of the inherent link between arrest and action *in rem*. It can be said without hesitation that if English law would have not recognised such basis of jurisdiction, it would certainly not be nowadays an internationally accepted jurisdictional ground.²

This jurisdictional ground, despite the fact it has been for long part of the law of the 'great maritime nations',³ it has not been free from criticism. Already in 1902, during the *Comité Maritime International* (CMI) Conference held in Hamburg, where preliminary work pursuant to the 1910 Collision Convention⁴ was undertaken, several opinions were submitted against the *forum arresti* as a jurisdictional basis for the merits of the dispute. The two main arguments against it those days were: first, that this jurisdictional basis could result in the infinite multiplication of courts that may have jurisdiction to address a particular dispute⁵ [nowadays it could be added that this represents a higher risk of 'forum shopping', *lis pendens* and irreconcilable judgments]; secondly, it was argued that this

² Because English law recognised such jurisdictional ground the international community thought that it was wiser for the other countries -in the absence of any hope of the English abandonment of such basis- to opt for allowing themselves as well to be competent on such a basis but with limitations (Franck, *The travaux préparatoires* of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 10 May 1952 (CMI 1997) 399 '*... voulez-vous donc que nos amis Anglais puissent saisir nos navires et faire juger nos affaires a Londres et qu' il n' y ait pas de réciprocité ?...'*).

³ *Ibid* 398.

⁴ The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision signed at Brussels on 10 May 1952.

⁵ M Autran, *The travaux préparatoires* of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 10 May 1952 (CMI 1997) 398.

excessive extension of jurisdiction came from the lack of a distinction between jurisdiction on the merits and jurisdiction for the sole purpose of interim relief.⁶

This lack of distinction, reflecting the lack of distinction between the different functions of arrest of ships, which was not surprisingly quite extensive among the national representatives during the preparatory sessions previous to the 1952 Arrest Convention,⁷ was, and still is, the core of the problem. Admittedly, the extended practice is to allow for arrest of a ship as a provisional and protective measure as broadly as possible. However, to establish jurisdiction on the merits upon arrest is a completely different question.⁸

Another distinction was also missing in those days. Those who were against arrest of ships as a jurisdictional basis for the merits of the dispute argued that the only jurisdictional basis for such purpose should be the domicile or habitual residence of the defendant;⁹ doubtless, they did not consider the distinction between general and specific jurisdictional bases.¹⁰

⁶ M Autran *ibid* '... Cette extension abusive de compétence provient à mon sens de l'absence de distinction entre les mesures provisoires et le jugement du fond... '.

⁷ See E Alten (Oslo) The *travaux préparatoires* of the 1952 Arrest Convention (CMI 1997) 410 '...the object of an arrest shall not be to press the ship-owner to furnish a guarantee for a claim which cannot be satisfied by execution in the ship. The object of the arrest must be to secure execution of a judgment pronounced in the State where the arrest is made or, in exceptional cases, execution of a foreign judgment which is recognised as binding and enforceable in that State...our proposal only states the principle that there shall be no arrest lying in the ship unless the judgment of the local court or a foreign court can be executed in the ship... '.

⁸ The distinction between ancillary jurisdiction and jurisdiction on the merits is examined in Chapter 7.

⁹ M Autran (1997) 398.

¹⁰ Interestingly enough, for example, as early as in 1930 a plea of *forum non conveniens* was sustained in a Scottish court against jurisdiction based on the arrestment of a ship to found jurisdiction (Scottish jurisdiction, Dumbarton) in favour of the court of the domicile of the defendant (Spain) in *Sheaf Steamship Co Ltd v Compania Trasmediterranea* (1930) 36 Lloyd's Rep 197 (IH (2 Div)).

6.2.1. Bases of Jurisdiction

A jurisdictional basis is the link between a certain forum and a certain international dispute. Bases for assuming adjudicatory jurisdiction rest on different kind of relationships between the forum and the dispute, or the forum and the parties. The strength of these links vary from minimal, i.e. defendant's transitory presence, to a strong concern of the forum, based either in its relationship with the parties or the dispute. HILL distinguishes three categories of jurisdictional bases in the PIL arena: 'consensual' jurisdiction; 'connected' jurisdiction; and 'universal' jurisdiction. In turn, he recognises four different strands of the 'connected' basis, i.e. exclusive, general, special and protective.¹¹ Without entering into detail as to the different categories it is clear that *forum arresti* in the case of ships is a case of 'connected' jurisdiction, that in turn it is neither exclusive nor protective.¹² Thus, the general and special categories call for examination.

6.2.1.1. General and Specific Jurisdiction

This classification was first coined by VON MEHREN and TRAUTMAN in a very influential article¹³ more than forty years ago.¹⁴ These American scholars

¹¹ J D Hill, 'The Exercise of Jurisdiction in Private International Law' in P Capps, M Evans & S Konstadinidis (eds) *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Oxford 2003) 39, 49.

¹² Protective jurisdictional bases are those adopted to achieve a better balance between the parties favouring the weak party linked with the *forum*. Examples of protective *fora* are jurisdictional bases related to consumer contracts, employment contracts, and to incapable and maintenance creditors; see D P Fernández Arroyo, 'Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will They Ever Survive' in *Festschrift für Erik Jayme* (Sellier Munich 2004) 169, 171.

¹³ A T von Mehren and D T Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 *Harvard Law Review* 1121.

¹⁴ This distinction has been recently adopted by Hill who defines the two categories in the following terms 'A court with general jurisdiction may adjudicate any type of dispute as long as there is a particular connection between the defendant and the forum. By contrast a court with special jurisdiction may adjudicate only disputes which are related to the particular connecting factor on which jurisdiction is based' (J D Hill (2003) 52).

distinguished, on the one hand, jurisdictional bases based on the relationship between the forum and the person or persons whose legal rights are to be affected (general jurisdiction) and, on the other hand, jurisdictional bases based on the relationship between the forum and the dispute (specific jurisdiction).¹⁵

The universal assertion *actor sequitur forum rei* (being the connecting factor the habitual residence of the defendant) would be according to their opinion the only internationally acceptable one in terms of general jurisdiction.¹⁶ However, many legal systems do consider other jurisdictional bases that are also general – even if not all of them have such extended international acceptance- such as the defendant’s nationality, and personal connections such as domicile, habitual residence or nationality of the claimant. None of them, not even the wide accepted defendant’s domicile, is free from criticism.¹⁷ Party autonomy can also be considered a source of general jurisdiction in the sense that it is related to the will of the parties and not necessarily to a certain connection between the forum and the dispute, even though some legal systems only authorise the choice by the parties of a forum connected with the case.

The other category –specific basis of jurisdiction- includes the connecting factors based on an objective link between the forum and the dispute, such as the place of the specific performance in contractual matters, the place where the damage occurred for tort/delict claims, or the place where the *res* is situated for jurisdiction regarding proceedings in relation to immovable/heritable property. It is clear that modern trends tend to elaborate more and more specific jurisdictional bases.

¹⁵ L I de Winter, ‘Excessive Jurisdiction in Private International Law’ (1968) 17 ICLQ 717, 718.

¹⁶ *Ibid.*

¹⁷ D P Fernández Arroyo (ed) *Derecho Internacional Privado de los Estados de Mercosur* (Zavalía Buenos Aires 2003) 157.

A clash between general (party autonomy) and specific (*forum arresti*) jurisdiction arose in *The Bergen*.¹⁸ The case involved a jurisdiction and choice-of-law clause in a bill of lading providing for disputes to be decided where the carrier had his principal place of business (Germany) under the law of such country; the bill of lading provided (as usual) for the parallelism between law and forum. The relevant ship was served and arrested in England. Under English domestic law (which in turn, arguably,¹⁹ was applicable through article 7 of the 1952 Arrest Convention, due to the *lex specialis* provision of the Brussels Convention) the English Courts had jurisdiction to determine the claim on the merits. The core of the problem was whether the forum clause of the bill of lading invalidated the jurisdiction of the *forum arresti*. Clarke J, after acknowledging the conflict existing between Article 7 of the Arrest Convention which enables jurisdiction to be founded on the arrest of a ship, and Article 17 of the Brussels Convention [article 23 of Regulation 44/2001], by which an agreement on jurisdiction excludes the jurisdiction of courts of other Member States than that of the chosen court, upheld the jurisdiction of the English Court.

Yet, modern trends in international jurisdictional theory seem to be pointing otherwise. Party autonomy is the undisputed 'star' in terms of jurisdictional

¹⁸ [1997] 1 Lloyd's Rep 380 (QBD (Admlty)). It is interesting to compare the decision in *The Bergen* with the decision of the Court of Appeal in *OT Africa Line Ltd v Magic Sportswear Corporation and Others* [2005] 2 Lloyd's Rep 170 (CA). In the latter the Court of Appeal affirmed that where the parties to a contract of carriage had entered into an exclusive jurisdiction agreement in favour of the English court, but, a provision in Canadian law allowed proceedings to be brought there, the English court had jurisdiction to grant an injunction preventing the Canadian proceedings from continuing. The question is whether the difference in terms of precedence between the 'consensual' and the 'connected' jurisdiction is due to the fact that the former is an intra-Community case and the latter is an extra-Community one, or whether the difference lies in the fact that the supremacy of party autonomy in the former led to a foreign court having jurisdiction, and in the latter pointed to the English courts.

¹⁹ See the more restrictive interpretation mentioned *infra* supported by A Philip (1977) note 87; J P Verheul (1983) note 87 and F Berlingieri (2006) note 88.

grounds (and also in terms of applicable law).²⁰ It is clear that when in a contractual claim there is a valid choice of forum or arbitration clause the parties to the contract have promised to do something;²¹ if the forum/arbitration clause is an exclusive one (which is usually the case) the parties have also promised not to do something else; in the latter case, the arguments for upholding the parties to their bargain is even stronger. Doubtless, Clarke J would have totally agreed with that;²² nevertheless, his point was centred on the priority of article 7 of the Arrest Convention over the rules of the Brussels jurisdictional system; i.e. in terms of general and specific jurisdiction, he favoured the latter over the former.

²⁰ As O Kahn-Freund recognised '*The rule of 'autonomy' in the conflicts of law is like nature: you cannot drive it out even with a pitchfork*'. Cited by T M C Asser, 'Choice of Law in Bills of Lading' (1974) 5 Journal of Maritime Law and Commerce (3) 355. On party autonomy see H Kronke, 'The Scope of Party Autonomy in Recent UNIDROIT Instruments and the Conflict of Laws in the MERCOSUR and the European Union' in *Liber Amicorum Opertti Badán* (FCU Montevideo 2005) 301. In Re party autonomy and jurisdiction see the new Hague Convention on Choice of Court Agreements concluded on the 30th of June 2005 that is indeed the result of the much broader aim of an international Convention on Jurisdiction, which proved too ambitious a goal. On the 2005 Convention see T C Hartley, 'The Hague Choice-of-Court Convention' (2006) 31 Edinburgh Law Review 414; A Bucher, 'La Convention de La Haye sur les accords d'élection de for' (2006) 1 Revue suisse de droit international et européen (RSDIE) 33; M M Celis Aguilar 'Convención sobre los acuerdos de elección de foro' (2006) 5-6 Derecho del Comercio Internacional Temas y Actualidades (DeCITA) 613.

²¹ See *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan and Another* [2003] 2 Lloyd's Rep 571 (CA).

²² Indeed he argued that '*...the conclusions of principle which I have reached are unlikely to have far-reaching consequences because the practical result of applying art. 17 on the one hand and the principles of English domestic law on the other is likely to be the same in the vast majority of cases*' *The Bergen (No 1)* [1997] 1 Lloyd's Rep 380 (QBD (Admlty)). However, principles do matter a great deal when trying to construe a jurisdictional framework in the EU. It is here suggested that principles in this regard are to be analysed in the light of the Community aims that they are trying to achieve, and not in the light of the practical effects that is likely to produce in so far as English domestic law. In that sense the *arguendo* of *The Bergen* is not advancing harmonization in the EU.

6.2.1.2. Excessive or Exorbitant Jurisdiction

It is difficult to give a clear definition of what constitutes an excessive or exorbitant jurisdictional basis.²³ FERNÁNDEZ ARROYO provides a negative definition and describes exorbitance as lack of reasonableness.²⁴ In general terms it can be said that when the balance between the interests of the claimant and the defendant is not even, and one or the other is put in such a position close to a practical denial of justice, the situation is unacceptable from an international point of view. Hence, if a judgement is rendered in such conditions in a certain forum it should not be recognised and enforced abroad. Certainly, this kind of explanation is related to the fact that international jurisdiction is not a goal in itself but it is a way of ensuring juridical continuity to international legal relations. This link has been already signalled by MANN who appreciated that the issue of adjudicatory jurisdiction in international litigation could not be studied separately from the problem of the recognition of foreign judgments.²⁵

Historically, there have been clear cases of exorbitant jurisdictional bases in many legal systems. The most well known examples were article 14 of the French Civil Code, establishing that a Frenchman could always sue an alien in France even if the obligations have been contracted in a foreign country; article 213 of the German Code of Civil Procedure and paragraph 99 of Austrian Code of Civil Procedure, both provisions conferring adjudicatory jurisdiction on their courts against non-resident defendants if assets belonging to the defendant could be found within the country; seizure of assets belonging to debtors residing abroad, as

²³ See among others K H Nadelmann, 'Jurisdictionally Improper Fora in Treaties on Recognition of Judgements: The Common Market Draft' (1967) *Columbia Law Review* 995; L I de Winter, (1968) 712; F A P Mann, *The Doctrine of Jurisdiction in International Law* (1964) 111 RdC 1; K A Russell, 'Exorbitant Jurisdiction and Enforcement of Judgements: the Brussels System as an Impetus for the United States Action' (1993) *Syracuse Journal of International Law and Commerce* 2; C Kessedjian, 'International jurisdiction and foreign judgements in civil and commercial matters' HccH PIL Prel Doc 7 (1997).

²⁴ D P Fernández Arroyo (2004) 170.

²⁵ L I de Winter (1968) 712.

in The Netherlands and Belgium law; and arrestment of movables belonging to non-residents as in Scottish rules of jurisdiction. All of these jurisdictional grounds were bases of general jurisdiction and, not surprisingly, met with disapproval as considered excessive.²⁶ In the European Communities these excessive jurisdictions have been all re-examined, and excluded from the European jurisdictional scheme.

The arrest of ships -even though included in the broadest 'general' category of 'seizure of the defendant's asset within the territory'-, has survived as a basis of 'specific' jurisdiction via the *lex specialis* rule included in article 57 of the Brussels and Lugano Conventions, now article 71 of EC Regulation 44/2001.

6.3. FORUM ARRESTI: THE PROBLEMS

6.3.1. The Different Perspective in International Litigation

The reasonableness of a certain jurisdictional basis in international litigation needs to be judged not only from the point of view of the defendant but also the claimant. In the law of procedure all over the world and throughout the ages the traditional rule *actor sequitur forum rei*, i.e. the defendant must be sued at the court of his domicile is the leading principle of general jurisdiction, both domestic and international. However, it has been argued that its acceptance in the international sphere, particularly its adoption as the main jurisdictional rule in the European scheme, has to do with the lack of acknowledgment of the difference in the underlying principles of venue (domestic jurisdictional rules) and jurisdiction in the international sphere.²⁷ The trouble and expense involved in instituting proceedings or in defending an action in a foreign court are always considerable:

²⁶ L I de Winter (1968) 708.

²⁷ R Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 Michigan Journal of International Law 1003.

therefore there are certain issues to examine in international litigation that are not present when selecting an objective jurisdictional ground for the purpose of domestic litigation. As WINTER expressed already forty years ago, '*the position of a claimant in international cases is already far from enviable owing to the fact that even if he gets judgment against the defendant in his own country, it will usually be difficult to make this judgment effective. So at least his interest in being provided with an accessible jurisdiction should not be entirely neglected*'.²⁸

As in most issues in law [and in life], it is a matter of balance of convenience. One thing is not to neglect the burden of the claimant and other very different is to argue, as it has been done,²⁹ under the umbrella of the claimant's convenience, the supremacy of certain *fora* when it comes to admiralty disputes. This is not acceptable in present times. Even when it is possible to agree that for assessing the balance of convenience between the claimant and the defendant practical considerations should be taken into account, these considerations should not go as far as to consider one forum better equipped than others because of its own 'greatness'.

²⁸ L I de Winter (1968) 717.

²⁹ '*the practical convenience of treating a ship as domiciled where it can be found, is to prevent a man from possibly starting from a not very civilised State or sending his ship into civilised waters navigating recklessly and doing mischief and then retiring into some country – may I say some South American State? where possibly justice is not of the purest- the advantage of seizing his ship is so great and the advantages in practice of the English and American Courts of Admiralty are so great that we are quite prepared to submit our ships to arrest in other countries and we strongly maintain the power of proceeding against a ship where it can be seized*' W Phillimore, *The travaux préparatoires* of the 1952 Arrest Convention (CMI 1997) 400. Fortunately this *mentalité* has been changing. A quarter of a century after Sir Philimore's opinion, Lord Reid recognised that '*There was a time when it could reasonably be said that our system of administration of justice though expensive and elaborate was superior to that in most other countries. But today we must admit that as a general rule there is no injustice in telling a plaintiff that he should go back to his own courts*' in *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes)* [1973] 2 Lloyd's Rep 197 (HL) 200. Note, however, that in the same case Lord Denning M.R. said, ([1972] 2 Lloyd's Rep 446, 451) '*...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*'. As Lord Reid recognised, there was times '*when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races*' ([1973] 2 Lloyd's Rep 197 (HL) 200).

6.3.2. The Lack of a Proper Balance between Principles and Practicality

However, this kind of considerations have given rise to opinions like HILL's, who considers that jurisdictional issues in PIL have become too dominated by practicalities related to cost and convenience, and that the proper division of competence between States is being left aside. He stresses that as a matter of principle '*unless the parties have expressly or impliedly chosen the forum in question, the exercise of jurisdiction is not legitimate if the dispute does not have some territorial connection with that forum*'.³⁰ Furthermore, he criticises 'conexity' (jurisdiction being extended to co-defendants and third parties), surprised by the fact that this jurisdictional basis has been rarely criticised [and indeed, it has been recognised in international Conventions]. He believes that this lack of opposition derives from the referred emphasis on practical issues rather than theoretical ones.

It should be stressed that even though his arguments have solid foundations the issue of principles should not be taken that far. International adjudication of jurisdiction is in any case not an aim on its own but a way of assuring juridical continuity to international legal relations. Therefore, practical consequences are important ones; and a proper balance between principle and practicality is needed.³¹ As described in Chapter 1, the specific aim of PIL has been since its origins to solve the problem that arises when legal relations are confronted with the diversity of legal systems throughout the world. Therefore, at the centre of PIL there is a dynamic objective, i.e. the juridical continuity of legal relations across national borders. This is the ultimate target, and principles do serve its function if they contribute to that goal. But principles are not values *per se*; their value depends on the solutions that they contribute to achieve. In the opinion of MACCORMICK,

³⁰ J D Hill (2003) 45-48.

³¹ As an example of rules where this balance is looked for see the Principles of Transnational Civil Procedure of ALI/UNIDROIT as adopted in 2004 (2004) 4 Unif. L. Rev. 758-809.

there are two desiderata: that the law should be readily comprehensible to and sensibly organised for those who work with it [and for that purpose principles are paramount], and that it should also make as much sense as possible to the non-professionals whose lives are regulated by it.³² Hence, practicalities do matter a great deal.

6.3.3. Concurrent Jurisdictions

It is often the case that the courts of more than one country will be able to exercise jurisdiction over a particular dispute. It is intrinsic to an international legal relation to have substantial connections with more than one forum. And in these cases most legal systems allow the claimant a choice of forum. The problem arising out of this permission is that two parties to a dispute may bring similar proceedings in different jurisdictions; or even more troublesome, that the same party could present the same claim in more than one forum. Therefore, many efforts have been done relatively recently, particularly in integrated areas, to find a solution to the problem of parallel and related proceedings. There is no definite consensus yet as to the best way of addressing these problems.

This is a matter of special concern in shipping cases where there will be invariably a number of potential fora whose jurisdictional rules would permit the dispute to be entertained. Ship-related businessmen have always been vulnerable to the existence of concurrent jurisdictions because of the nature of their business which takes them from forum to forum, making maritime claims 'particularly vulnerable to "forum shopping"³³ and rendering every port an 'admiralty

³² N MacCormick, 'Law as Institutional Fact' in N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Kluwer Dordrecht 1986) 63.

³³ *DSV Silo und Verwaltungsgesellschaft mbH v Owners of the Sennar (The Sennar)* (No 2) [1985] 1 Lloyd's Rep 521 (HL) (Lord Diplock).

emporium'.³⁴ Hence, maritime law is a particular area where jurisdiction of the court of a given country is prescribed by international Conventions to which that country is a signatory.

What are the principles underlying the solutions coined by such Conventions?

6.3.4. Principle of Territorial Proximity

In the field of jurisdiction for the purposes of interim relief, *forum arresti* as a forum selection criterion has been made objective through the proximity principle (jurisdiction is based on the proximity between the forum and the case³⁵), particularly by the principle of territorial proximity (*principio de jurisdicción mas próxima*).³⁶ However, it seems at least debatable whether this theoretical foundation could be applied to sustain direct jurisdiction on the merits. Nevertheless, it is worth an attempt.

The international jurisdiction to adjudicate is a direct consequence of the international jurisdiction to legislate which in turn is derived from State sovereignty.³⁷ Consequently, since sovereignty is territorial in character, the public international law impact on civil jurisdiction has remained firmly rooted in territoriality.³⁸ As a rule jurisdiction extends and is limited to everybody and everything within the sovereign's territory. Already STORY³⁹ taught that every

³⁴ *The Atlantic Star* (Lord Simon of Glaisdale).

³⁵ P Lagarde, *Le principe de proximité dans le droit international privé contemporain* (1986) 196 RdC 9, 131-132.

³⁶ For an analysis of this principle in relation to the arrest of ships in Uruguayan law see C Fresnedo de Aguirre and R Herbert, 'El Arresto de Buques y el Principio de Jurisdicción mas Próxima' [1993] *Revista de Transporte y Seguros* 158.

³⁷ F A P Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years* (1984) 186 RdC 9, 51.

³⁸ *Ibid.*

³⁹ J Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray & Co Boston 1834).

nation possesses an exclusive sovereignty and jurisdiction within its own territory.⁴⁰ As a result, a defendant was not subject to the jurisdiction unless he had been served with process within the jurisdiction or had voluntarily submitted to it. In turn, jurisdiction *in rem* could not be exercised over a *res* unless it was situated within the forum.

A century later COOK⁴¹ purported to free the common law from what he considered the misleading notion of territoriality and associated theories. He demonstrated that STORY's theory was defective in that STORY accepted that jurisdiction *in rem* and jurisdiction *in personam* could be exercised independently. COOK, on the contrary, understood that to exercise jurisdiction over a *res* within the forum necessarily involved the exercise of some jurisdiction over persons claiming an interest in it.⁴²

More recently, the strictly territorial character of the doctrine of international jurisdiction has been loosening up particularly in the commercial sphere; as HILL remarks, the application of the territorial principle is likely to lead to jurisdiction being exercised on insubstantial connections, leading therefore to a high incidence of parallel and related proceedings.⁴³ Reasonableness,⁴⁴ fairness, and substantial contacts with the forum, have dominated the supplementary connections. Nevertheless, in admiralty the subsistence of the *forum arresti* in the

⁴⁰ In his view it would be '*wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory*' M M Bigelow, *Story's Commentaries on the Conflict of Laws* (8th edn Little, Brown Boston 1883) 20.

⁴¹ W W Cook, *The Logical and Legal Bases of Conflict of Laws* (Harvard University Press Cambridge, Mass. 1942).

⁴² W W Cook (1942) '*Legal rights cannot exist independently of legal persons and when a court exercised jurisdiction over a thing it necessarily affected the rights of persons interested in that thing. Thus if a court exercised in rem jurisdiction over a res and persons claiming some interest in the res were outside the jurisdiction, the court was doing what Story said it could not be done – binding persons not resident in the forum*' (62).

⁴³ J Hill (2003) 61.

⁴⁴ Reasonableness has been evaluated as a strong principle in the elaboration and interpretation of jurisdictional rules in Europe; see D P Fernández Arroyo (2004) 173.

case of arrest of ships as a specific jurisdictional ground shows that the traditional territorial character of jurisdiction remains firmly rooted in territoriality, despite it is indeed likely to lead to a high incidence of parallel and related proceedings.

This is possibly so, not because of any principles but because –as these paragraphs have attempted to show- in this traditional and distinctive area of law, that of maritime law, there is a difference in perspective due to its inherent internationality, and furthermore, it may be argued, there is a ‘justifiable’ imbalance of practicalities over principles.

These peculiarities fit easier into certain kind of jurisdictional paradigms than in others. The following paragraphs aim to asses that fitness in the European regime, and in turn, in England and in Scotland.

6.4. DIFFERENT PARADIGMS OF INTERNATIONAL JURISDICTION

As MICHAELS⁴⁵ explains, a paradigmatic account ‘must be painted with a broad brush’; details within each system are neglected; the aim is to draw a picture that is not necessarily complete but comprehensive enough to discuss the central concern of this thesis. Hence, a general outline of the main features of each paradigm is offered and some material peculiarities are highlighted.

Paradigmatic differences are very important in practice. These differences in *mentalité*⁴⁶ (mentality) define the inner structure of a legal system and by comparing different ones unrecognised similarities and differences come to the surface and may help to unravel big knots.

⁴⁵ R Michaels (2006) 1026.

⁴⁶ See H P Glenn, ‘Legal Cultures and Legal Traditions’ in M van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Oxford 2004) 7.

6.4.1. The European Paradigm of Jurisdiction⁴⁷

6.4.1.1. Generalities

The Brussels regime⁴⁸ is modelled on a civilian system as far as jurisdiction is concerned. The central principle is that where a defendant is domiciled in a Member State, proceedings against him should be brought there;⁴⁹ that is, general jurisdiction in the European scheme is based on the defendant's domicile. In addition, the European regime recognises choice of court agreements (party autonomy) and specific jurisdictional grounds based on a close link between the court and the action. In that sphere the European paradigm searches for one and only one connecting factor as a jurisdictional ground for each legal category⁵⁰ (parallel to the Savigny-like⁵¹ style of choice-of-law methodology). Following that, the European regime has battled against exorbitant *fora* and has banished entirely

⁴⁷ There is an enormous wealth of legal literature on this theme and it would be impossible to even try to refer to them without running the risk of not mentioning the most relevant ones.

⁴⁸ When reference is made to the 'Brussels regime' or the 'European regime' or similar, the author is referring to all texts dealing with judgments and jurisdiction in civil and commercial matters, adopted in the frame of the European integration. Council Regulation (EC) No. 44/2001 entered into force in the United Kingdom on 1 March 2002 and replaced the Brussels Convention, except in relation to Denmark and to the EFTA countries. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1998 (The Lugano Convention) came into force in the UK on 1 May 1992. The Lugano Convention adopts the principles of the Brussels Convention so that the two Conventions produced a largely uniform regime for civil jurisdiction and the recognition and enforcement of judgments in EU and EFTA states.

⁴⁹ Council (EC) Regulation 44/2001 art 2, OJL/12/3.

⁵⁰ R Michaels (2006) 1043.

⁵¹ Surprisingly enough, the term 'seat' in the field of jurisdiction, was used by Lord Reid in the English decision of the House of Lords in *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes)* [1973] 2 Lloyd's Rep 197 in a radically different (or maybe not so much radically as of late?) paradigm of jurisdiction. Indeed it was not only the term that coincided with the European paradigm but the whole idea; he expressed '*the plaintiff should not be "driven from the judgment seat" without very good reason*' (*The Atlantic Star*, Lord Reid, 200). However, it is important to be very careful when it comes to the parallelism between conflict-of-laws and jurisdictional issues in PIL, since practically and theoretically those are separable problems which, for the most part, implicate quite distinct policy considerations.

from the application among the States parties the use of certain controversial jurisdictional bases.⁵²

To put it in terms of rule and exceptions, the general rule is domicile and the exceptions are (i) statutory exclusive jurisdiction,⁵³ (ii) choice-of-court agreements,⁵⁴ (iii) special jurisdictional bases either recognised in the regime⁵⁵ or recognised in particular specialized Conventions⁵⁶ and (iv) protective *fora*.⁵⁷

In terms of legal technique the civilian approach seeks to resolve jurisdictional problems through an integrated framework of hard-and-fast rules. The role of judicial discretion is very limited.⁵⁸ Oversimplifying it, civilian systems have restrictive jurisdictional grounds but jurisdiction on that grounds needs to be exercised by the courts and there is hardly no room to stay proceedings when the court is internationally competent to hear them as far as the defendant is domiciled in a member State.⁵⁹ The system is based on narrowly defined bases of jurisdiction, which a claimant is entitled to invoke as of right.

⁵² As far as the United Kingdom, three jurisdictional bases are expressly excluded from the European regime. Rules which enable jurisdiction to be founded on (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom, or (b) the presence within the United Kingdom of property belonging to the defendant, or (c) the seizure by the claimant of property situated in the United Kingdom. Noteworthy, these include arrestment to found jurisdiction in Scots law under (b) and (c).

⁵³ Council (EC) Regulation 44/2001 art 22 OJL/12/7.

⁵⁴ Council (EC) Regulation 44/2001 art 17vOJL/12/7 see *The Bergen(No 1)* [1997] 1 Lloyd's Rep 380 (QBD (Admlty)), cf *Ladgroup Ltd v Euroeast Lines SA* 1997 SLT 916 (OH) and *Erich Gasser v MISAT* [2004] 1 Lloyd's Rep 222 (ECJ).

⁵⁵ Council (EC) Regulation 44/2001 art 5 OJL/12/4.

⁵⁶ Council (EC) Regulation 44/2001 art 71 OJL/12/16.

⁵⁷ Council (EC) Regulation 44/2001 arts 8-14;15;18 OJL/12/5-7.

⁵⁸ Contrarily the common law perception of jurisdiction is based on wide jurisdictional bases contained by judicial discretion.

⁵⁹ If the defendant is domiciled outside a contracting state and the domestic law of the *lex fori* of the court first sized on the mater recognises the doctrine of *forum non conveniens* it is possible to so apply it through article 4 of the EC Regulation (former article 4 of the Brussels Convention); see *Re Harrods (Buenos Aires) Ltd. (No.2)* [1992] Ch. 72 (CA); *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd* [2004] Lloyd's Rep. I.R. 846 (QBD (Comm)).

In terms of priorities, in the case of parallel proceedings, automatic precedence is given to the court first seized.⁶⁰ A clear ranking of principles is established where the aim to avoid parallel proceedings is above all other considerations. No explicit precedence *inter se* amongst the different categories of jurisdictional grounds⁶¹ is established except for the case of protective *fora* and exclusive jurisdiction. This regime has the advantage of simplicity but the disadvantage of inflexibility. The Community mutual trust principle is paramount as it has legal certainty as an aim. The interest of the parties are sought to be protected via the predictability achieved by the regime.⁶² The recent trilogy of PIL cases heard by the European Court of Justice, *Erich Gasser v Misat*⁶³, *Turner v Grovit*⁶⁴ and *Owusu v Jackson*⁶⁵ do not leave room for doubt in this regard. Following that it has been held that European jurisdictional thinking is 'international'; what matters is the relation between nations.⁶⁶

⁶⁰ Articles 27 and 28 of the EC Regulation 44/2001 (formerly articles 21 and 22 of the Brussels Convention). In this context it was discussed whether the parties of an *in rem* claim could be the same with the parties of an *in personam* claim commenced in another European state, and this issue was sorted out affirmatively by the ECJ in *Maciej Rataj (The Tetry)* [1995] 1 Lloyd's Rep 302 (ECJ).

⁶¹ The Regulation does not prioritise general over special jurisdictional grounds or vice versa. Arts 2 (general jurisdictional ground-domicile of the defendant) and 3 (possibility to sue elsewhere under special rules) are linked with a 'may'. The claimant 'may' opt at his best interest. It could be argued that this parity in treatment is what concurrent jurisdiction is about; a prioritization would amount to subsidiary rather than concurrent jurisdictional grounds. However, certain precedence in case of parallel litigation does not necessarily means subsidiarity as a corollary. The claimant would still be able to opt, and, in principle, all the concurrent jurisdictional grounds would be available to him. *De lege ferenda*, in the case of parallel proceedings, a certain order of precedence amongst jurisdictional grounds could provide an alternative solution to that of the court first seized, certainly unfair in so many ways and causing so many disruptions in the system (for example the '*Italian torpedo*').

⁶² The main aim of the Regulation was to facilitate the sound administration of justice by making rules on jurisdiction highly predictable (Recitals 11 and 12 of Regulation 44/2001).

⁶³ [2005] 1 QB 1 (Case C-116/02) (ECJ).

⁶⁴ [2005] 1 AC 101 (Case C-159/02) (ECJ).

⁶⁵ [2005] QB 801 (Case C-281/02) (ECJ).

⁶⁶ R Michaels (2006) 1049.

6.4.1.2. The *lex specialis* provision

Notwithstanding the foregoing analysis, the European regime gives way to other international Conventions where further specific bases of jurisdiction have been recognised. The purpose of the *lex specialis* provision is to 'ensure compliance with the rules on jurisdiction laid down by specialised Conventions, since in enacting those rules account was taken of the specific features of the matters to which they relate' [specificity].⁶⁷

This is particularly the situation in respect of jurisdiction based on the arrest of ships in the terms of article 7 of the 1952 Arrest Convention, and article 1 of the 1952 Collision Convention⁶⁸ where the *forum arresti* acquires jurisdiction on the merits in certain specific circumstances. This is an example of a jurisdictional basis that, even though excluded from the European regime in general, has been preserved for the case of ships, according to the *lex specialis* provision (article 71 of Regulation 44/2001) (formerly article 57 of the Brussels Convention) of the European regime.

The particular case of jurisdiction based on the arrest of ships was considered during the preparatory work pursuant to the accession of the United Kingdom, Ireland and Denmark to the Brussels Convention 1968 (Accession

⁶⁷ *Maciej Rataj (The Tatry)* [1995] (Case C 406/92) 1 Lloyd's Rep 302 (ECJ). This decision was criticised by P Beaumont on the grounds that art 57 was then construed too narrowly. In his opinion, it had the 'the effect of distorting the Arrest Convention by adding a rigid *lis pendens* rule that was not provided for by the drafters of that Convention' (P Beaumont, 'European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1997) 46 ICLQ (1) 205, 211). Nonetheless, the ECJ did look at the case from the uniformity of application of the then Brussels Convention application, and not from the Arrest Convention point of view. Furthermore, the most important consequence of the *lex specialis* rule is that provisions on jurisdiction contained in special Conventions are to be regarded as if they were provisions of the European regime themselves; but it means to subsume this special jurisdictional grounds under the much broader scheme provided for by the European Regulation as it currently is.

⁶⁸ In relation to the Collision Convention the Court of Appeal in *The Po* [1991] 2 Lloyd's Rep 206 (CA) was content to uphold substantive jurisdiction under the latter on the basis that the claimant had complied with the Convention and English law.

Convention 1978). The possibility of introducing a special part in the Convention in order to 'protect' admiralty jurisdiction as exercised particularly in the U.K. and Ireland was considered.⁶⁹ SCHLOSSER remarked that

'it would have been inappropriate to limit the exercise of admiralty jurisdiction to the basis of jurisdiction included in the 1968 Convention in its original form. If a ship is arrested in a State because of an internationally recognised maritime claim, it would be unreasonable to expect the creditor to seek a decision on his claim before the courts of the ship-owner's domicile'.⁷⁰

Again here, practicalities prevail over questions of principle. The common understanding was that the United Kingdom would have suffered an unacceptable loss of jurisdiction if a special provision⁷¹ had not been introduced. The same was said in relation to the Irish *in rem* jurisdiction.⁷² No wonder the story of *forum arresti* would have been very different if the United Kingdom had not won this battle at that point in time.

⁶⁹ P Schlosser, 'Official Report on the Association of the Kingdom of Denmark Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1979) OJ C/59/140. In relation to Ireland see P Terry, 'Convention of Accession of Denmark, Ireland and the United Kingdom to the Convention of Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1980) 4 Journal of the Irish Society for European Law 31. He acknowledges that '*The application of the general jurisdiction rule based on domicile would have seriously eroded the Irish in rem jurisdiction in maritime claims*'.

⁷⁰ *Ibid.* The issue went far enough to consider a special section dealing with admiralty jurisdiction; see H Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano Competence Internationale, reconnaissance et execution des jugements en Europe* (Librairie générale de droit et de jurisprudence Paris 1993) 155. Finally this proposal was dropped and instead a Joint Declaration urging the Community States to accede to the 'most important of all the Conventions on maritime law, namely the Brussels Convention of 10 May 1952' was signed in Luxemburg on the 9th of October 1978. Furthermore, in the transitional provisions art 36 was introduced reproducing (with some interesting differences) arts 1, 3 and 7 of the 1952 Arrest Convention. The interesting difference compared to the relevant provisions of the 1952 Arrest Convention is that according to [1] effectual arrest was not necessary to found jurisdiction; alternative security in lieu of arrest sufficed. It goes without saying that all this has only background importance since at the moment the 1968 Convention has been superseded by the Council Regulation (EC) 44/2001.

⁷¹ Art 57 (2) of the Brussels Convention was amended by art 25 (2) of the 1978 Accession Convention in a way which clarified the priority of specialised Conventions (P Beaumont (1997) 211).

⁷² P Terry (1980) 31 acknowledges that '*The application of the general jurisdiction rule based on domicile would have seriously eroded the Irish in rem jurisdiction in maritime claims*'.

The 'special laws'⁷³ providing for specific heads of jurisdiction in particular matters are to be read together⁷⁴ with the Regulation in relation to jurisdictional grounds. That means that even States which are not parties to the special Convention must recognise and enforce decisions given by courts which have jurisdiction only under the special Convention.⁷⁵ For jurisdiction to be based on arrest of ships within Europe, i.e. for the *forum arresti* to be operative within the European regime through the priority provision, actual arrest must have been made under the circumstances provided for in article 7 of the 1952 Arrest Convention. Security for the claim provided *in lieu* of arrest is not sufficient to found jurisdiction in the case of the 1952 Arrest Convention.⁷⁶ Nonetheless it is so in collision cases if the priority provision gives place to article 1 of the 1952 Collision Convention.⁷⁷ Hence *forum arresti* has taken on an enhanced importance in Europe.

The operational issues in relation to the *lex specialis* provision are various and complex enough to have been left open to judicial and doctrinal development.⁷⁸

⁷³ D C Jackson, *Enforcement of Maritime Claims* (4th edn LLP London 2005) 155.

⁷⁴ This methodology was advanced by the opinion of the Advocate-General, Mr Tesouro in the ECJ case *Maciej Rataj (The Tatry)* (Case C 406/92) [1995] 1 Lloyd's Rep 302 (ECJ).

⁷⁵ P Schlosser (1979). Even though it seems apparently clear that they are to be read together, if conflict was to arise between the provisions of the special law and the Regulation there are no clear indications of the criterion; seemingly, the Regulation should prevail. In the Schlosser Report it was explained that a number of questions in this regard were to be left opened 'to leave the solution of the outstanding problems to the legal literature and case law' [240]. A clash between article 7 of the 1952 Arrest Convention and article 17 of the Brussels Convention (currently article 23 of Regulation 44/2001) arose in *The Bergen (No 1)* [1997] 1 Lloyd's Rep 380 (QBD (Admlty)). Some interesting contributions of legal literature in this regard are J J Alvarez Rubio, 'Los Foros de Competencia Judicial Internacional en Materia Maritima en los Convenios de Bruselas y Lugano' (1997) 14 *Anuario de Derecho Maritimo* 143; G A L Droz, 'Entrée en vigueur de la Convention de Bruxelles revisee sur la competence judiciaire et l'execution des jugements' (1987) 2 *Revue critique de droit international privé* 269.

⁷⁶ *Owners of Cargo Lately Laden on Board the Deichland v Owners and/or Demise Charterers of the Deichland (The Deichland)* [1990] 1 QB 361 (CA) 370; *The Tatry* [1995] 1 Lloyd's Rep 302 (ECJ); cf *The Anna H* [1995] 1 Lloyd's Rep 11 (CA).

⁷⁷ *Owners of the Bowditch v Owners of the Po (The Po)* [1991] 2 Lloyd's Rep 206 (CA).

⁷⁸ P Schlosser (1979).

As far as the stage of development these have reached to date it seems that whether the rules of the specialised Convention override, are additional to, or are alternative to the Regulation depends on the specialised Convention.⁷⁹ In this context, it is regrettable that the decision in *The Bergen*⁸⁰ referred above did not follow the argument that the specialised Convention overrides the Brussels regime to its ultimate consequences. Doing that would have meant to read article 7 of the 1952 Arrest Convention as a whole, where in fact choice of forum agreements are expressly recognised (article 7 (3)), and where it is stated that if the forum has been agreed by the parties, the arresting court is fully competent to exercise ancillary jurisdiction (for the purpose of the arrest as security), but, for the merits of the case the arresting court would limit itself to establish a time limit to bring the claim to the agreed forum. It is somehow puzzling that the core of the dispute has been centred in the alleged conflict between the 1952 Arrest Convention and the Brussels Convention, when such conflict does not exist in such terms.⁸¹ Both Conventions are fully consistent as to the keep the parties to their bargain. The issue should rather have been centred in the scope of application of article 7 (3) of the Arrest Convention, according to which the arrest can still be effected but solely displaying the protective and security functions, as the forum would be exercising merely ancillary jurisdiction based in the proximity principle. The problem with the outcome of *The Bergen* is that it takes back with one hand what the system is bound to give the parties with the other.⁸²

⁷⁹ D C Jackson (2005) 156; P Schlosser (1979) [240]. The Jenard Report on the Brussels Convention (P Jenard (1979) OJC/59/60) highlighted that the rules of jurisdiction laid down in the special Conventions have been dictated by particular considerations relating to the matters of which they treat; and he remarks the case of the place of registration of a ship as a special connecting factor in maritime Conventions where domicile is not often used as a jurisdictional basis.

⁸⁰ *The Bergen* [1997] 1 Lloyd's Rep 380 (QBD (Admlty)).

⁸¹ This argument is supported by K M Siig, 'Maritime Jurisdiction Agreements in the EU' [1997] LMCLQ 362, 367 'it is highly arguable that no conflict between the two Conventions exists'.

⁸² Clarke J. argued that in fact it did not, because even though English courts –in his opinion- had jurisdiction to hear the merits, (*obiter*) they also had discretion as to whether the case should be stayed; but as the latter was not an issue before the court, the court

In the opinion of JACKSON⁸³ the dictum in *The Bergen* seems to follow from deriving Community jurisdiction from the specialised Convention and in that sense reference is made to another decision of the ECJ in *Nurnberger Allgemeine Versicherungs AG v Portbridge Transport International BV*.⁸⁴ In this case the ECJ held that Article 57 (2) (a) of the Brussels Convention should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued, may derive its jurisdiction from a specialised Convention to which the first State is also a party, and which contains specific rules on jurisdiction. Furthermore, the ECJ has held in a different case that unless the particular Convention contains its own provisions for the prevention of parallel litigation, the provisions of the European regime will apply to elucidate the conflict.⁸⁵ Therefore, the court seized second will have to dismiss its action.

It seems clear that the purpose of the *lex specialis* provision of the Brussels regime is to ensure compliance with the rules of jurisdiction laid down by specialised Conventions;⁸⁶ and in the case of arrest of ships that means with the rules of jurisdiction of the 1952 Arrest Convention as a whole, not only with the rule laid down in Article 7 (1). Moreover, it has been expressed that

‘since the purpose of Article 57 [71 in the EC Regulation] of the Jurisdiction Convention is not to affect unification realised through Conventions on particular matters, only the special links listed in [the 1952 Arrest Convention] Article 7 (1) under (a) to (f) prevail over the provisions of the Jurisdiction Convention, while when jurisdiction is based on the domestic rules of the country in which the arrest is made the provisions of the Jurisdiction Convention remain wholly operative’.⁸⁷

retained jurisdiction according to the Arrest Convention, *The Bergen* [1997] 1 Lloyd’s Rep 380 (QBD (Admlty)).

⁸³ D C Jackson (2005) 135.

⁸⁴ Case C-148/03 Judgment of 28 October 2004.

⁸⁵ Art 27-30; *The Maciej Rataj* (Case C-406/92) (ECJ).

⁸⁶ A Briggs, ‘The Brussels Convention Tames the Arrest Convention’ [1995] LMCLQ 161.

⁸⁷ A Philip, ‘Maritime Jurisdiction in the EEC’ [1977] Nordisk Tidss-Krift for internationale ret 121; see also J P Verheul, ‘The Convention Relating to the Arrest of

This restrictive interpretation has been favoured by BERLINGIERI who is of the opinion that the first sentence of article 7 (1) of the 1952 Arrest Convention – recourse to the *lex fori* – as a PIL conflicts rule is indeed a reference to the Convention [now Regulation] provisions themselves as the '*lex fori*' (a special kind of *renvoi*).⁸⁸ In other words, the aim of the *lex specialis* provision of the European regime was not to interfere with harmonisation achieved amongst the State parties in jurisdictional issues in specific matters. And arrest of ships as a provisional and protective measure, according to the 1952 Arrest Convention, found jurisdiction in certain circumstances. Therefore, even recognising article 7 of the 1952 Arrest Convention as in force through article 71 of the EC Regulation, it is at least debatable that the remission to the *lex fori* of article 7 operates in such broadness as a remission to traditional jurisdictional rules before the European regime was established.

This is certainly not the position in Scotland where the reference to the *lex fori* is still interpreted as a reference to the traditional jurisdictional rules before the European regime was established. In *Ladgroup Ltd v Euroeast Lines SA*⁸⁹ it was held that the Brussels Convention and Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 left unaffected the pre-existing law of Scotland in admiralty causes where arrestment *ad fundandam jurisdictionem* provided a basis for jurisdiction.⁹⁰

Seagoing Ships of 1952: Some Questions' [1983] Netherlands International Law Review 383, 386.

⁸⁸ 'The first sentence of art 7 (1) pursuant to which the courts of the country in which the arrest is made have jurisdiction on the merits if such jurisdiction is granted by the *lex fori* has the nature of a rule of PIL. The consequence is that if the country where the arrest is made is a party to the Jurisdiction Convention [now the EC Regulation] its provisions shall apply except for the special links set out in art 7 (1)' (F Berlingieri (2006) 279).

⁸⁹ 1997 SLT 916 (OH).

⁹⁰ In the opinion of Lord Prosser 'art 57 of that Convention may have the effect of giving the 1952 Arrest Convention primacy insofar as it deals with jurisdiction in a case of this type. The 1952 Arrest Convention can in turn colourably be argued to give primacy to the domestic law of Scotland and while for many purposes that law will be found in sch 8 to the 1982 Act it can at least colourably be argued that sch 8 has nothing to do with the matter since this is one of the types of action excluded from sch 8 by the express terms of sch 9. While I appreciate that broadly speaking one

6.4.2. The English Paradigm of Jurisdiction

English thinking about jurisdiction is dramatically different. English law is a system in which the judge rather than the academic is the major force and in which precedent rather than principle is the major source of law.⁹¹ Long-established rules include a wide range of jurisdictional bases, some of which do not require there to be a substantial connection with England.⁹² They are shaped by judicial discretion.⁹³ Value-based judgments; tailor-made solutions crafted to meet individual circumstances; judicial discretion is idiosyncratic since Henry II.⁹⁴ All these concepts do not form part of the European vogue.

may regard the provisions of the Brussels Convention as providing the domestic law of Scotland on jurisdiction in cases where sch 8 does not do so more specifically there is something mildly odd or paradoxical if art 57 and the 1952 Arrest Convention have taken us away from those provisions in holding that one is sent back to them by virtue of the reference in the 1952 Arrest Convention to our domestic law. The element of oddity or paradox is increased if one is being driven in this direction due to the inapplicability of sch 8 to the 1982 Act, that non-applicability resulting precisely from the acknowledgment in sch 9 that there will be admiralty causes in which the jurisdiction is based on arrestment in rem or ad fundandam jurisdictionem. ... [T]he broad new codes regulating jurisdiction both in the Brussels Convention and in sch 8 to the 1982 Act leave unaffected the pre-existing domestic law of Scotland in admiralty causes where according to that pre-existing law arrestment ad fundandam jurisdictionem provided a basis for jurisdiction'.

⁹¹ R Evan-Jones, 'Mixed Legal Systems, Scotland and the Unification of Private Law in Europe' in JM Smits (ed), *The contribution of mixed legal systems to European private law* (Intersentia Antwerp 2001) 42-43.

⁹² Subject to statutory provisions, mostly deriving from international Conventions to which the United Kingdom is party, English courts recognise the general principle of party autonomy, as a direct application of the more general principle of freedom of contract, especially to choose the *forum* and the applicable law. English courts are willing to exercise jurisdiction even though the contract has no connection with England except for the choice of court agreement (*Unterweser Reederei GmbH v Zapata Offshore Co (The Chaparral)* [1968] 2 Lloyd's Rep 158 (CA)).

⁹³ *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 Lloyd's Rep 1 (HL).

⁹⁴ Lord J Mance 'Is Europe Aiming to Civilise the Common Law?' The Chancery Bar Lecture 27th March 2006.

6.4.2.1. Generalities

It is generally acknowledged that the exercise of jurisdiction in maritime matters plays a far greater role in England than elsewhere in the United Kingdom or the rest of Europe.⁹⁵ Its jurisdictional trends have spread worldwide through the international Conventions where such approach to jurisdiction has been taken into account, remarkably, in the 1952 and 1999 Arrest Conventions.

In the maritime sphere since the late nineteenth century until very recently all that was required for a claimant to raise an action in England was the defendant's or the ship presence within English territorial jurisdiction, however accidental or fortuitous this presence might have been.⁹⁶ English courts were insensitive to arguments to the effect that proceedings in England would be inconvenient or inappropriate for the factual circumstances of the case,⁹⁷ even in the case of international parallel proceedings.⁹⁸ This approach has undergone a very dramatic revision. In the *Abidin Daver*,⁹⁹ Lord Diplock described this change in attitude of the

⁹⁵ P Schlosser (1979).

⁹⁶ *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes)* [1973] 2 Lloyd's Rep 197 (HL).

⁹⁷ See the significant change in this regard in *Vishva Abha* [1990] 2 Lloyd's Rep 312 (QBD (Admlty)); *Caltex Singapore v BP Shipping* [1996] 1 Lloyd's Rep 286 (QBD (Admlty)); *Caspian v Bouygues* [1997] 2 Lloyd's Rep 533 (CA); *Owners of the Herceg Novi v Owners of the Ming Galaxy* [1998] 2 Lloyd's Rep 454 (CA); *The Kapitan Shvetsov* [1998] 1 Lloyd's Rep 199 (CA (HK)).

⁹⁸ It is in this sphere where the greatest changes in the English paradigm have taken place as of late. It used to be the case that parallel litigation in the international sphere was considered inconvenient in English law only when it was vexatious or oppressive, and it was not considered vexatious to bring an action in more than one country where there were substantial reasons of benefits to the claimant. In the words of Jessel M R '...if there are substantial reasons to induce him [the claimant] to bring the two actions, why should we deprive him of that right?...' (*Peruvian Guano Company v Bockwoldt* (1883) LR 23 Ch D 225 (CA)). In that sense, the imbalance between the parties was not particularly linked to one specific jurisdictional ground but it was embedded in the whole system, which was notoriously claimant-orientated. Arguably though, it still is so orientated; see A Scott, 'Substance and procedure and choice of law in torts' [2007] LMCLQ 44, 61, commenting on *Harding v Wealands* [2006] UKHL 32.

⁹⁹ *Owners of the Las Mercedes v Owners of the Abidin Daver* [1984] 1 Lloyd's Rep 339 (HL).

English courts in the last quarter of the twentieth century: Judicial chauvinism¹⁰⁰ has been replaced by judicial comity and, in turn, that has amounted to the recognition and development of the Scottish legal doctrine of *forum non conveniens*.¹⁰¹ The path towards this new vision of the exercise of jurisdiction was not free from encumbrances. The House of Lords in its three-to-two decision in *The Atlantic Star* showed the resistance to open the door to its neighbour's doctrine.¹⁰²

In terms of legal technique, as discretion has such a central role it results in unpredictable litigation on jurisdictional points. Uncertainty is therefore an inherent component of the English common law jurisdictional system.¹⁰³ In terms of priorities, the common law approach considers all the relevant connecting factors initially equally. The circumstances of the particular case will result in a certain factor having more relevance than the others but there are no definite rules to be drawn in general. Another fundamental difference between the European and the English (and indeed also the Scottish) paradigms of jurisdiction is the right to decline to exercise jurisdiction.¹⁰⁴

¹⁰⁰ For a non-exclusive jurisdiction clause in favour of England see *Royal Bank of Canada v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] 1 Lloyd's Rep 471 (CA).

¹⁰¹ *The Abidin Daver* (*supra*) 203.

¹⁰² It was held by Lord Reid that in re the plea of *forum non conveniens* that even though it was desirable to diminish remaining differences between the law of the sister countries [England and Scotland]... 'I am not at all satisfied that it would be proper for this House to make such a fundamental change [by accepting the application of the plea in English law] or that it is necessary or desirable' *The Atlantic Star* [1973] 2 Lloyd's Rep 197, 200.

¹⁰³ J Hill (2003) 58.

¹⁰⁴ A great scholarly work in this regard is J J Fawcett (ed), *Declining Jurisdiction in Private International Law* (Clarendon Press Oxford 1995). Even though it seems that the right to decline to exercise jurisdiction is an unchallenged right of English courts, this has not always been so. In *Owners of Cargo Lately Laden on Board the Eleftheria v Owners of the Eleftheria (The Eleftheria)* [1969] 1 Lloyd's Rep 237 (PDAD) and in *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119 (CA) the parameters on which English courts should exercise their discretionary powers to grant or refuse a stay of proceedings as enforcing a foreign choice of court agreement were first established by Brandon LJ 'who had made this area of the law particularly his own' (*Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co (No.1)* [1998] 2 Lloyd's Rep. 229 (CA) (LJ Phillips)). More recently the main rule in English law was expressed by the House of Lords in *Donohue v Armco* [2002] 1 Lloyd's Rep 234 (HL) 'But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to

The fact that the English Admiralty Court 'is one of the most famous and historic courts in the world'¹⁰⁵ constitutes also part of the English paradigm. The welfare of England is ultimately at stake. Therefore, trying to keep its leadership as a centre for international litigation could be regarded as the 'public interest' attained in every decision on the matter. This leadership is almost incontestable and is used¹⁰⁶ by English courts both positively and negatively with the respective doctrines of *forum conveniens* and *forum non conveniens*. Changing theories and principles within a certain paradigm does not necessarily change the *mentalité* embedded in it; particularly in Admiralty issues the dramatic change insofar as the assumption of jurisdiction by English courts has not affected this idea of 'superiority' of the Admiralty Court in England and *forum arresti* and ultimately the arrest of ships is very much fed by, and consequential upon, such feature of the English paradigm.

6.4.2.1.1. Two Schemes under One Paradigm

There are three different sources for bases of jurisdiction in England: case law, the rules of the Supreme Court, and statutes.¹⁰⁷ And nowadays there are two different jurisdictional schemes, the 'traditional' and the 'intra-community'

that obligation in the absence of strong reasons for departing from it' [24] and *Turner v Grovit* [2002] 1 WLR 107 (HL) and is that English courts will ordinarily secure compliance with an exclusive jurisdiction clause unless the party suing in the non-contractual forum can show 'strong reasons' for suing in that forum.

¹⁰⁵ *The Atlantic Star* [1974] (HL) (Lord Simon of Glaisdale).

¹⁰⁶ Judges and commentators agree in that the '*Admiralty court is a court to which suitors from a range of maritime countries have been accustomed or content to resort. No chauvinism is involved in recognizing as a fact that it has been at the choice of many ship owners from other countries that Admiralty cases have been brought in the English Admiralty Court*' (*The Atlantic Star* (Lord Morris of Borth-y-Gest)). This kind of arguments have motivated the most critical reactions from non-English lawyers and scholars, who do see there chauvinism, indeed. Nonetheless, it is a fact that the exercise of jurisdiction in maritime matters has traditionally played a far greater role in the United Kingdom than elsewhere, as recognised by P Schlosser (1979) *op cit* [121].

¹⁰⁷ Nowadays those statutes are the ones implementing the EC Regulation 44/2001.

(European) one. The complexity that derives from these two schemes under English law has underlined the need for an Admiralty Code.¹⁰⁸ The critical issue is whether the existence of two different jurisdictional regimes is desirable in English law, or whether the Scottish approach –that is a more general revision of jurisdictional grounds in general, even outside the European framework- is preferable or defensible,¹⁰⁹ or in the words of JACKSON, whether English maritime jurisdiction should fit into Europe or vice-versa.¹¹⁰

6.4.2.2. Forum Arrest?

In England a ship can be arrested whenever the claimant has the right to initiate an action *in rem* against the ship. The English implementation of the 1952 Arrest Convention, through the reform in the Administration of Justice Act 1956 of the internal jurisdictional rules of the Admiralty Court, up to a certain extent served different purposes from that of the Convention itself. In plain contradiction to the Convention, the jurisdictional rules established in English law make arrest dependent on assertion of merits jurisdiction *in rem*.

Strictly there is no *forum arresti* recognised under English jurisdictional rules. The link between arrest and action *in rem* does not make arrest a jurisdictional basis but instead, the basis is service of an *in rem* claim form.¹¹¹ The

¹⁰⁸ D C Jackson (2005) 7.

¹⁰⁹ D C Jackson, 'Fitting English Maritime Jurisdiction into Europe –or vice versa?' [2001] LMCLQ 219.

¹¹⁰ *Ibid* 232.

¹¹¹ Jurisdiction for the arrest as an interim measure of protection, and jurisdiction for the merits of the dispute, have been clearly distinguished in England since *Mike Trading and Transport Ltd V R Pagnan & Fratelli (The Lisboa)* (1980) 2 Lloyds Rep 546 (CA). In that case Lord Denning M.R. made it clear that proceedings to obtain security were separable for proceedings to establish liability and, therefore, even when –as it was the case- there was an exclusive choice of forum as to the merits, this would not invalidate the jurisdiction of the *forum arresti* as to the arrest of the ship; bearing in mind that the purpose of the latter was to obtain security. In the opinion of Berlingieri, that decision is correct under the 1952 Arrest Convention.

paradox cannot be overestimated. The legal system that spread the *forum arresti* and fought for it in the international sphere does not exactly provide for it in a plain sailing way!

Both substance and interim relief jurisdiction in England depend on the initial service of an *in rem* claim form. Following that, jurisdiction on the merits is previous to the arrest in English law instead of consequent upon arrest as it is in the international Conventions. The question is how this encompasses the application of Article 7 of the 1952 Arrest Convention through the *lex specialis* provision of the Brussels regime as already explained above. JACKSON has suggested that, as a consequence of the European regime, jurisdiction on the merits cannot be based on service of the *in rem* claim form but '*may require arrest or submission*'.¹¹² In his words '*this has brought the jurisdictional nature of security [arrest] to the fore*'.¹¹³

6.4.3. The Scottish Paradigm of Jurisdiction

Civil Jurisdiction in Scotland after 1987 is a daunting area.¹¹⁴ The Scottish rules of jurisdiction are set out in Part III and Schedule 8 to the 1982 Act. These rules are of general application in patrimonial matters where neither the European scheme nor the scheme for allocation within the United Kingdom applies. These general rules are not to affect 'the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter or specific grounds' (s 21(1)). This rule has the same aim as the *lex specialis* provision inserted

¹¹² D C Jackson (2005) 428.

¹¹³ *Ibid.* In fact 'the jurisdictional nature of security' is itself a cumbersome expression entrenching two different (but of course inter-related) functions of arrest of ships, and showing the intermingled character of the measure.

¹¹⁴ See L Edwards and J A K Huntley, 'Creating a Civil Jurisdiction Adviser' 5th BILETA (British and Irish Legal Technology Association) Conference, April 3 2005 available at www.bileta.ac.uk/Document%20Library/1/Creating%20Civil%20Jurisdiction%20Advisers.pdf (last accessed 1 September 2007) [2.3].

in the European regime. Already more than ten years ago it was argued that a more far-reaching solution should be adopted to eliminate exorbitant jurisdictional bases –like arrestment *ad fundandam jurisdictionem*- and to use the provisions of the Brussels regime to resolve all jurisdictional disputes.¹¹⁵

As well as in the English paradigm of jurisdiction, policy considerations are paramount. Indeed, the jurisdiction *rationae rei situs* was extended to personal obligations attaching movables unconnected therewith to encourage the commerce of the country.¹¹⁶

6.4.3.1. Generalities

In Scots law arrestment of a ship does not necessarily found jurisdiction. Indeed arrestment of a ship on the dependence as such does not; neither does an arrestment *in rem* in an action *in personam*. Only in an action *in rem* an arrestment *in rem* founds jurisdiction.¹¹⁷ Apart from the latter case, an *arrestment ad fundandam jurisdictionem* needs to be ordered together with the warrant of arrestment of a ship on the dependence, or an arrestment *in rem* in an action *in personam*, to found the jurisdiction of the Scottish courts.

The Scottish jurisdiction based on arrestment is primarily a common law one and wider than that provided for by the 1952 Arrest Convention. However, since the implementation of this Convention in the United Kingdom and moreover, since the entry into force of the Civil Jurisdiction and Judgments Act 1982, the special jurisdiction based on the arrestment of ships derives from a sequence of

¹¹⁵ A E Anton and P Beaumont, *Civil Jurisdiction in Scotland* (2nd edn Green Edinburgh 1995) 21.

¹¹⁶ *Société du Gaz de Paris v La Societe Anonyme de Navigation 'Les Armateurs Francais'* [1925] 23 Lloyd's Rep 209 (HL) (Lord Sumner).

¹¹⁷ A E Anton, *Private International Law Private International Law: A Treatise from the Standpoint of Scots Law* (Sweet and Maxwell Edinburgh 1967) 115-117; Civil Jurisdiction and Judgments Act 1982 sch 5 [7] and sch 9 [6].

statutory provisions. The Scottish arrestment jurisdiction in admiralty actions is expressly excluded from Schedule 8: Section 21(1) (b) provides that Schedule 8 does not apply to the proceedings listed in Schedule 9. In turn Schedule 9(6) provides for the exclusion of certain admiralty causes *inter alia* "[A]dmiralty causes in so far as the jurisdiction is based on arrestment *in rem* or *ad fundandam jurisdictionem* of a ship cargo or freight". This exclusion follows a similar provision in Schedule 5(7) concerning 'Certain Admiralty proceedings in Scotland'. And its justification (and the different treatment compared to Admiralty jurisdiction in England) obeys to the fact that in England the arrest of ships is based on statutory provisions implementing the 1952 Arrest Convention. Proceedings therefore brought under these provisions would be excluded by the operation of the provision included in Schedule 5(6) (proceedings under certain Conventions). In turn the Civil Jurisdiction and Judgments Act 1982 provides in Section 20 (1) that Schedule 8 has effect to determine in what circumstances a person may be sued in civil proceedings in the Court of Session or in a sheriff court. Notwithstanding, Section (21) establishes that Schedule 8 does not affect (a) the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds; (b) without prejudice to the foregoing generality, the jurisdiction of any court in respect of any matter mentioned in Schedule 9. In turn, the latter (Proceedings Excluded From Schedule 8) in paragraph 6 includes admiralty causes in so far as the jurisdiction is based on arrestment *in rem* or *ad fundandam jurisdictionem* of a ship, cargo or freight.

6.4.3.2. Arrestment *ad fundandam jurisdictionem*

'There is perhaps no more curious doctrine in any legal system than the Scottish form of arrestment *ad fundandam jurisdictionem*, namely the procedure by which jurisdiction is established over a foreigner by arresting such of his goods as are situated in this country'.¹¹⁸

¹¹⁸ A R G McMillan, 'The Theory of Arrestment *ad fundandam jurisdictionem*' (1922) SLT (News) 89.

This type of arrestment, also known as arrestment *jurisdictionis fundandae causa*, originated as a practice displaying the security and the jurisdictional function of arrestment, i.e. providing caution *de judicio sisti et judicatum solvi*. It existed as part of the *lex mercatoria* and was applied as early as in the thirteenth century by the *pie-poudre* Courts which sat in the great fairs which were held in England.¹¹⁹ Its origins are inherently linked with commerce, transport and foreigners as these three relate with each other. It was certainly followed at a very early date in the Admiralty Court of Scotland.¹²⁰ However, the original conception was already entirely departed from by the end of the nineteenth century.¹²¹ Since then¹²² it is solely a means of establishing jurisdiction against a defender that would otherwise not be subject to the Scottish courts on the basis of the presence¹²³ within Scotland of moveable assets.¹²⁴ Already in the 1920s it was criticised as running counter to one of the main planks of Scots law, namely *actor sequitur forum rei*.¹²⁵ MCMILLAN argued that it was merely a legal fiction and as such not conforming with either the principles of the *lex mercatoria* from which it originated or to those of the civil law on which the law of Scotland is founded.¹²⁶ Furthermore, he suggested that as a matter of principle it should be discarded entirely as a useless and indefensible theory, or the theory should be restored to its original substantial form as displayed in the *lex mercatoria*. None of these has happened and arrestment to found

¹¹⁹ A R G McMillan (1922) 89.

¹²⁰ *Ibid.*

¹²¹ *Guthrie v Brunsgaard Kjoesterud & Co* (1896) 3 SLT 265 (IH (1 Div)).

¹²² *Fraser Johnston Engineering Co. Ltd. v. Jeffs* (1920) 2 Lloyd's Rep 33 (IH (1 Div)).

¹²³ Already in 1896 Lord McLaren described its main features in the following terms '*...[a]rrestment jurisdictionis fundandae causa does not attach the property arrested. ... It seems to me merely to attest the fact that the ship is at the time within the jurisdiction and that notice has been given that it is the intention of the person using the diligence to raise an action founding on the jurisdiction which results from the property being within the country. ... No disability is imposed upon the owner of the ship, and the master is put under no obligation to make the ship forthcoming. ... [t]he action should fall if the party who had used the diligence had not followed up the arrestment within a reasonable time*' (*Guthrie v Burnsgaard Kjoesterud & Co* (1896)).

¹²⁴ G L Gretton, 'Diligence' *Stair Memorial Encyclopaedia* (SME) (8) 75 [249].

¹²⁵ A R G McMillan (1922) 89.

¹²⁶ *Ibid.*

jurisdiction continues to be a peculiarity of modern Scots law.¹²⁷ Subject to a few exceptions¹²⁸ arrestment to found jurisdiction may not be executed where the defender is domiciled in the U.K. or a European Union State.¹²⁹ Arrestment to found jurisdiction confers jurisdiction upon the Court of Session and the sheriff courts of the place where the goods are located.¹³⁰ In times gone by, the rationale of arrestment to found jurisdiction was that the pursuer has got hold of something that would satisfy a judgment in his favour.¹³¹ In modern times arrestment of movables to found jurisdiction has lost that function and is used instead along with an arrestment on the dependence of an action.¹³² It has been described as ‘...an

¹²⁷ As such, and particularly for the case of arrestment of ships against demise charterers, its competence has been recently provided for in Scots law; see Administration of Justice Act, Ch 46, s 47 H (Arrestment to Found Jurisdiction in Action against Demise Charterer) as introduced by Schedule 4 to the Bankruptcy and Diligence etc (Scotland) Act 2007.

¹²⁸ The exceptions are (a) In an action of reparation arising out of the collision or manoeuvring of ships or non compliance with ship collision regulations under s 45 of the Administration of Justice Act 1956 (b) in an Admiralty cause where the defender is domiciled in the U.K. or elsewhere except another European Union State.

¹²⁹ Arrestment to found jurisdiction is nowadays regarded as internationally unacceptable as an exorbitant ground of jurisdiction in non-maritime cases, and it is precluded within Europe by Regulation 44/2001. However, Rule 2 (8) of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 has preserved this jurisdictional ground for extra-UK and extra-EU cases. The Maxwell Committee despite the general acknowledgment of the fact that this jurisdictional basis is exorbitant considered that it was appropriate to retain it in relation to persons against whom there may be no other ground of jurisdiction to convene them to the Scottish Courts (Maxwell Report [13.164]). In this context the comments of Fernández Arroyo merit consideration ‘...European States should not be proud of keeping in their legislation certain criteria against which they have clearly objected. It is impossible to understand that, what is considered unacceptable in European (Brussels and Lugano) and world (Hague) transactions can be tolerable in other cases. With a fundamental right [such as the access to justice] the double standard is completely unacceptable. The motivations behind preserving exorbitant fora (which can be understood but not shared) should not prevent one from trying to eliminate them...’ (D P Fernández Arroyo (2004) 186).

¹³⁰ Rules of the Court of Session 1994, as amended; Sheriff Courts (Scotland) Act 1907, as amended.

¹³¹ *Union Electric Co Ltd v Holman & Co* 1913 SC 954 (IH (1 Div) CS) (Lord President) 957.

¹³² G Maher and D J Cusine, *The Law and Practice of Diligence* (Butterworths Edinburgh 1990) 104 [4.58].

*anomalous procedure which should be strictly looked at and should not be extended...*¹³³ Proceedings are *ex parte*; no service is required; and the application is granted *de plano*.¹³⁴ It may be argued that in terms of its doctrinal justification,¹³⁵ the rationale behind, on the one hand, jurisdiction based on presence of moveable assets within Scotland and, on the other hand, jurisdiction based on the arrest/arrestment of a ship as understood in modern times, is different. The latter is justifiable in terms of the proximity principle; the former is based on commercial needs.¹³⁶ Functionally, the differences are also considerable. Arrestment to found jurisdiction displays the 'compelling' feature as described in Chapter 1, due to the fact that it '*renders the foreign owner liable to be convened in a process issuing from the Court of Session at the instance of the arrester for recovery of a personal debt*'; '*but [differently from arrest of ships as provided for in the international Conventions] it does not necessarily guarantee that the subject arrested will remain within the jurisdiction*'.¹³⁷ This general jurisdictional basis has always been subject to the right of the court to decline jurisdiction on the principle of *forum non conveniens*.¹³⁸

¹³³ *Stenhouse London Ltd v Allwright* 1972 SLT 255 (IH (2 Div)) 258 (LJ-C Grant). Cf. *Leggat Brothers v Gray* 1908 SC 67 (IH (1 Div)) 72; *Alexander Ward & Co v Samyang Navigation Co Ltd* [1975] 2 Lloyd's Rep 1 (HL) (Lord Kilbrandon).

¹³⁴ A E Anton and P Beaumont, *Private International Law* (2nd edn Green Edinburgh 1990) 189.

¹³⁵ For example, in North America, various theories have been developed to justify jurisdictional bases, the most noteworthy triad being the relational/sovereignty, power, and interest theories. For example, the relational theories have been used to explain jurisdiction based on domicile/habitual residence or nationality of the defendant; and the power theory has been used to explain *inter alia* art 23 of the German Code of Civil Procedure, which gives courts general jurisdiction based on the presence of assets of the defendant.

¹³⁶ As applied by the *lex mercatoria* in medieval times, it was the only effective method of subjecting itinerant merchants to the local jurisdiction of the territory within which they might at the time be situated (A R G McMillan (1922) 89).

¹³⁷ *Mill v Fildes* [1982] SLT 147 (OH).

¹³⁸ In present times as especially provided for in Section 22 (1) of the Civil Jurisdiction and Judgments Act 1982.

6.4.3.3. Arrestment of Ships *ad fundandam jurisdictionem*

The jurisdiction based on the arrestment of ships is provided for in the Sheriff Courts (Scotland) Act 1907, Chapter 51 s. 6 (c) 'Any action competent in the sheriff court may be brought within the jurisdiction...Where the defender is a person not otherwise subject to the jurisdiction of the courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction'. Looking at this provision alone it seems that jurisdiction based on arrestment of a ship is thereby established as a general jurisdictional ground. However, this has to be read in conjunction with the provisions mentioned above of the Administration of Justice Act 1956 Chapter 46 Part V (Admiralty Jurisdiction and Arrestment of Ships in Scotland) s 47 (Arrest of ships on the dependence of an action *in rem*). Following that, jurisdiction based on the arrestment of ships in Scotland, despite arrestment being a general jurisdictional basis according to the 1907 Act, has become a specific ground of jurisdiction regarding admiralty actions by the operation of the 1956 Act.

To conclude that jurisdiction based on the arrestment of ships in Scotland has become a special jurisdictional basis is indeed indispensable for its survival under the European regime. Only 'special' heads of jurisdiction can survive under the *lex specialis* provision of the Brussels regime. And even then, there is the more restrictive interpretation mentioned above that considers the survival of *forum arresti* through the *lex specialis* provision limited to the particular circumstances in which this jurisdictional basis is recognised in article 7 of the 1952 Arrest Convention regardless of the *lex fori arresti*; namely, if the claimant has (a) his habitual residence or principal place of business, or (b) the claim arose, in the country in which the arrest was made; (c) if the claim has arisen during the voyage of the ship during which the arrest was made; or in cases of (d) collision, (e) salvage, (f) mortgage or hypothecation.

Yet, in *Ladgroup v. Euroeast Lines S.A.*¹³⁹ Lord Prosser dismissed a motion for recall of an arrestment of a ship on the dependence and *ad fundandam jurisdictionem* based on the argument that both, the Brussels Convention and Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, left unaffected the pre-existing law of Scotland in admiralty causes where arrestment *ad fundandam jurisdictionem* provided a basis for jurisdiction.

In terms of its functional analysis, in modern times, it seems that the only operative function in this kind of arrestment is the jurisdictional one. However, the jurisdictional function is not consequential upon arrest as it is in the case of arrestment *in rem* but consequential upon the ship being fixed in Scotland; hence, the sole purpose and effect of an arrestment to found jurisdiction is to fix the locality of the subjects arrested in Scotland. As in modern practice arrestment to found jurisdiction and arrestment on the dependence can be sought simultaneously,¹⁴⁰ the protective and security functions are displayed together with the jurisdictional one by virtue of one warrant, though technically arrestment to found jurisdiction precedes any other kind of measure in a certain action, since it is its pivotal ground in terms of the court assuming jurisdiction.¹⁴¹

Even though the general rule in Scots law is that the subjects arrested must belong to the debtor in the capacity in which he is being sued,¹⁴² section 47 H of the Administration of Justice Act 1956 as introduced by Schedule 4 to the Bankruptcy and Diligence (Scotland) Act 2007, has the effect that where a pursuer wishes to

¹³⁹ 1997 SLT 916.

¹⁴⁰ Rules of the Court of Session 1994, Ch 16, [16.15] as amended.

¹⁴¹ *Société du Gaz de Paris v La Société Anonyme de Navigation 'Les Armateurs Français'* [1925] 23 Lloyd's Rep 209 (HL). This is not peculiar to ships but according to the general theory of arrestment to found jurisdiction in traditional Scots law; in BELL's terms '*...in the case of a debtor abroad but whose effects are in Scotland, arrestment cannot be made on the dependence without a previous arrestment used for the purpose of founding jurisdiction...*' (G J Bell (vol 2, 1870) 65).

¹⁴² A E and P R Beaumont (1990) 190.

raise an action against a demise charterer to enforce a claim listed in section 47 (2) but the demise charterer is not within the jurisdiction of the court, the pursuer can arrest the ship under demise charter (providing it is within the court's territorial jurisdiction) to found jurisdiction for the action and allow it to be heard by that court.

6.4.3.4. Forum Non Conveniens

This is also a doctrine of general application in Scots law.¹⁴³ In *Sim v Robinow*¹⁴⁴ Lord Kinneir in a widely quoted passage explained that '*the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interest of all the parties and for the ends of justice*'.¹⁴⁵ It was confirmed for the first time by the House of Lords in *Société du Gaz de Paris v La Société Anonyme de Navigation "Les Armateurs Français"* where Lord Sumner put the rule rather differently in the following words,

'...the court has to consider how best the ends of justice in the case in question and on facts before it, so far as they can be measured in advance, can be respectively ascertained and served....The object in the words '*non conveniens*'... is to find that forum which is the

¹⁴³ It has been particularly preserved during the process of law reform that radically changed the law of Civil Jurisdiction in Scotland. The Civil Jurisdiction and Judgments Act 1982, which entered into force in 1987, has a supplementary provision that specially establishes: '(1) Nothing in Schedule 8 [Civil Jurisdiction in Scotland] shall prevent a court from declining jurisdiction on the ground of *forum non conveniens*.' The doctrine has successfully developed in the United States of America; see among the leading cases *Canada Malting Co Ltd v Paterson Steamships Ltd* [1932] 285 US 413; and later on, in England. On the latest developments of the doctrine outside Britain see *Lloyd's Underwriters v. Cominco Ltd* 2007 BCCA 249 (CA British Columbia); *Sinochem International Co Ltd v Malaysia International Shipping Corp*, 5 March 2007, 549 US (2007). For a recent illustration of its use within the United Kingdom, in the context of judicial review, see *Tehrani v Secretary of State for the Home Department* 2007 SC (HL) 1. For a survey of the development of the doctrine in other jurisdictions see D J B Svantesson, 'In Defence of the Doctrine of Forum Non Conveniens' (2005) Hong Kong Law Journal 395.

¹⁴⁴ [1892] 19 R 665.

¹⁴⁵ at 668.

more suitable for the ends of justice, and which is preferable because pursuit of litigation in that forum is more likely to secure the ends of justice'.¹⁴⁶

When it appeared the doctrine took various tags: *forum non conveniens*, *forum conveniens* and *forum non competens*. The earliest cases identified as the origins of the doctrine date from the 1830s.¹⁴⁷ In *Brown's Trs v Palmer*¹⁴⁸ an arrestment was used against funds in Scotland owed to an executor under a will executed under English law in India who had all along remained in India and subject to the jurisdiction of the courts there. The Scottish decision held, without referring to the doctrine by name, that the arrestment was not a sufficient authority to found the jurisdiction of the Scottish courts to hear the case.¹⁴⁹ In *Tulloch v William*¹⁵⁰ the first decree to use the expression '*forum competens*' appeared; surprisingly, it was a case found on a jurisdictional ground other than arrestment. In *Longworth v Hope*¹⁵¹ the doctrine was developed a step further; in that case Lord Deas said that even though the question raised in the case had been named as *forum competens* or *forum non competens*, the plea was really not that the forum was incompetent but that the other forum ought to be preferred. A year later Lord Justice Clerk Inglis in *Clements v Macaulay*¹⁵² asserted that for the ends of justice the case may more suitably be tried elsewhere; from then on the plea was labelled *forum non conveniens* and it was in that form that reached *Sim v Robinow*,¹⁵³ where Lord Kinnear¹⁵⁴ made the doctrine

¹⁴⁶ [1925] 23 Lloyd's Rep 209 (HL) 213.

¹⁴⁷ The origins of the *forum non conveniens* have been taken from the account of Lord Hope of Craighead (HL), 'Forum non conveniens: where next?' Conference Paper, Journal of Private International Law Conference 2007, Birmingham 26 June 2007.

¹⁴⁸ (1830) 9 S 224.

¹⁴⁹ On the same line see *Macmaster v Macmaster* (1833) 11 S 685 cf *Peters v Martin* (1825) 4 S 108. These cases have been referred to by Lord Hope of Craighead (HL) in 'Forum non conveniens: where next?' Conference Paper, Journal of Private International Law Conference 2007, Birmingham 26 June 2007.

¹⁵⁰ (1846) 8 D 657.

¹⁵¹ (1865) 3 M 1049.

¹⁵² (1866) 4 M 583.

¹⁵³ (1892) 19 R 665.

¹⁵⁴ *Ibid*, 668.

'fit for export'¹⁵⁵ providing the world with a valuable device to secure the ends of justice; and particularly, to contain far-reaching general jurisdictional bases.

Interestingly enough the Scottish jurisdictional system has traditionally counted on, on the one hand, a broad jurisdictional basis such as *arrestment ad fundandam jurisdictionem* (as a general jurisdictional basis; and not limited to the arrestment of ships) and, on the other hand, a device to adjust it: *forum non conveniens*. The two make sense in terms of the other. That is why *forum arresti* does not fit so easily in legal systems that do not provide for a device to contain it and *forum non conveniens* is seen as jeopardizing legal certainty in jurisdictional systems that do not contemplate broad jurisdictional basis.

6.5. FORUM ARRESTI: THE INTERNATIONAL SOLUTIONS

The approach taken in the international Conventions dealing with the arrest of ships indicate that when arrest is considered as a jurisdictional ground it should be a basis of special jurisdiction only; the availability of arrest is always limited to a certain category of 'maritime claims', therefore, in the international Conventions, no issue of general jurisdiction ever arises.

Jurisdiction for the arrest is distinguished from jurisdiction on the merits expressly. Article 7 of both international Arrest Conventions of 1952 and 1999 is apparent in this regard. The first paragraph deals with direct jurisdiction; the rest of the article's provisions deals with arrest in the context of judicial cooperation.

The Conventions permit, rather than require, State parties to exercise jurisdiction over the merits of the claim in respect of which ships have been arrested within their waters. In that sense it has been argued that the jurisdictional

¹⁵⁵ Lord Hope of Craighead (HL) *supra* (2007) 4.

function is at most consequential upon arrest. However, the importance of the jurisdictional function of arrest of ships should not be underestimated.

Under the 1952 Arrest Convention such function arises (in the provided circumstances) upon effective arrest; there is no jurisdiction based on alternative security -differently from the 1952 Collision Convention.¹⁵⁶ This has been changed in the 1999 Arrest Convention where the jurisdictional function operates if 'an arrest has been effected or security provided to obtain the release of the ship'. The CMI had proposed a deeper change, as to allow security 'to avoid arrest' to operate as a jurisdictional ground as much as effectual arrest and security to release the ship from arrest.¹⁵⁷ This proposal faced with strong opposition at the Diplomatic Conference in Geneva;¹⁵⁸ hence, only security given to release the ship from arrest can be counted towards establishing jurisdiction on the merits.

¹⁵⁶ Article 1 (b) of the Collision (Civil Jurisdiction) Convention 1952 reads: '(1) An action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced: (b) [b]efore the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished' [emphasis added].

¹⁵⁷ Paragraph 1 of article 7 of the Draft prepared by the CMI International Sub-Committee read: 'The courts of the State in which an arrest has been made or security given to avoid arrest or obtain the release of the ship shall have jurisdiction to determine the case upon its merits...' (See *The Travaux Préparatoires* to the 1999 Arrest Convention in F Berlingieri (2006) 633). The definite drafting has deleted the mention to 'security to avoid arrest'. Clearly the English view on that issue is that alternative security in lieu of arrest should found jurisdiction as much as effectual arrest. On that line, art 36 (transitory provisions) of the Accession Convention 1978, pursuant to the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention, took such broader view into a black letter -though transitory- provision (D C Jackson (2005) 161).

¹⁵⁸ The *travaux préparatoires* of the 1999 Arrest Convention shows not only that there was no unanimous opinion as to this matter but also the strong opposition of Spain, supported amongst others by France and Italy as to the inclusion of wording allowing for security given to prevent arrest as a jurisdictional ground (see Proceedings of the Main Committee at the Diplomatic Conference held in Geneva, 5 March 1999 in F Berlingieri (2006) 638-643). Apart from the particular result, and the triumph of the civil law countries in this aspect, it is noteworthy that *forum arresti* is still in present times being associated with 'forum shopping', and because of that, the issue is still, and arguably it will always be, very sensitive to public policy considerations.

6.5.1. The 1952 Arrest Convention

Already at the beginning of the twentieth century the question whether the courts of the country in which the arrest is made should have jurisdiction to determine the case upon its merits was one of the most seriously discussed ones,¹⁵⁹ and the divided opinions did present a problem in the preparatory works pursuant to the 1952 Arrest Convention. The common law approach to jurisdiction has historically recognised arrest of ships as a means of obtaining jurisdiction, whilst civil law systems have not. However, the division was not a clear-cut one between common law and civil law, but between particular domestic legal systems. The legal systems of the United States, Scotland, the Netherlands, Belgium, and England contemplated arrest as a jurisdictional ground on the merits, while France and Italy clearly did not. The 'compromise'¹⁶⁰ solution was to allow jurisdiction based on arrest in a limited number of cases. These limited number of cases were chosen following two different methodological veins: first, the admittance of the *lex fori* so as to allow legal systems (such as the English and the Scottish ones) providing for jurisdiction based on arrest to keep it; and secondly, the identification of particular connecting factors¹⁶¹ which constituted the 'substantive' link between the forum and the dispute. The result is article 7.¹⁶² Article 7 identifies six different

¹⁵⁹ In the CMI International Sub-Committee Meeting in Antwerp in 1951 it created a position which would have meant the dropping of the Convention altogether; see *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 of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 10 May 1952 (CMI 1997) 414.

¹⁶⁰ This 'compromise' is criticised by P Chauveau, *Traité de Droit Maritime* (Librairies Techniques Paris, 1958) [246].

¹⁶¹ For a detailed analysis of the individual connecting factors in relation to the way they operate insofar as certain maritime claims see F Berlingieri (2006) 282-290.

¹⁶² Article 7 (1) 'The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits: If the domestic law of the country in which the arrest is made gives jurisdiction to such Courts or in any of the following cases namely: (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made; (b) if the claim arose in the country in which the

connecting factors. The first two are cumulative connecting factors, i.e. two factual circumstances need to be present in order to constitute a 'substantial' connection with the forum. These two are (a) the habitual residence or principal place of business of the claimant¹⁶³ and (b) the place where the claim arose, if –and this condition is applicable to both- in the country in which the arrest was made. The third jurisdictional link is constituted by a connecting factor peculiar to the arrest of ships: (c) if the claim has arisen during the voyage of the ship during which the

arrest was made; (c) if the claim concerns the voyage of the ship during which the arrest was made; (d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910; (e) if the claim is for salvage; (f) if the claim is upon a mortgage or hypothecation of the ship arrested. (2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction. (3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings. (4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security. (5) This Article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17 October 1868'.

¹⁶³ Connecting factors related to the claimant rather than the defendant, are in modern times excluded from the 'white list' of acceptable jurisdictional bases. 'Black list' was the name given to exorbitant bases of jurisdiction in the ambitious Judgments Projected of the Hague Conference of Private International Law that finally resulted in the adoption of the Choice of Court Agreements Convention in 2005. In the EC sphere, Schlosser says that *'the list is so to speak the confessions of sins made by the member states'* (P Schlosser, 'Jurisdiction in International Litigation –The Issue of Human Rights in Relation to National Law and to the Brussels Convention' (1991) *Rivista di diritto internazionale* (RivDirInt) 5). However, there is no intrinsic reason why a relational theory should focus only on the defendant (A T von Mehren (2002) 188). During the preliminary work to the 1952 Arrest Convention, the Italian and the Yugoslavian delegations strongly opposed to the inclusion of such jurisdictional basis, alleging that it does not represent a close connection between the claim and the *forum* (International Maritime Committee (CMI) Conferences (1947-1951) (CMI Amberes 1951) 190). It could be easily labelled as exorbitant. It is the only connecting factor of a personal nature as opposed to the other relevant connecting factors that are related to the dispute -rather than related to the parties of the dispute-. J J Alvarez Rubio finds no justification for it (1999) 103.

arrest was made. Finally, the last three 'substantial' connections are related to the nature of the claim (d) collision; (e) salvage; (f) mortgage or hypothecation.

The jurisdiction of the courts of the State where the ship is arrested is not exclusive, therefore, opening the door to concurrent jurisdiction. Yet, the Convention itself does not provide a solution for the case of parallel litigation.

In practice, the results of this 'compromise' solution have not provided the degree of harmonisation intended when it was adopted. Since common law countries (notably England) retained their system and civil law countries could only avail themselves of arrest as a ground for acquiring jurisdiction in respect of certain claims with no specific reason, the solution has furthered the imbalance between the different countries.¹⁶⁴ Furthermore, it is here submitted, from a technical point of view, that the particular connecting factors chosen add unnecessary complexity to the determination of jurisdictional grounds in the field. As most of these links provided for in article 7 are factual circumstances combined with legal concepts such as, for example, habitual residence or principal place of business, the process of establishing jurisdiction on the merits gets cumbersome; and, as the CMI recognised in 1994, there are no reasons to justify such added difficulty.¹⁶⁵

6.5.2. The 1999 Arrest Convention

In this sphere there are several modifications in the new Convention that is not yet in force.¹⁶⁶ The new regime moves forward to a plain recognition of the

¹⁶⁴ The CMI evaluated the results of the 'compromise' solution as non satisfactory, JIGE Seventh Session, 5-9 December 1994, Report-Anex I; JIGE Ninth Session, 2-6 December 1996, Report- Anex II (F Berlingieri (2006) 635).

¹⁶⁵ *Ibid*, JIGE Seventh Session, 5-9 December 1994, Report-Anex I.

¹⁶⁶ Article 7 sets out '1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of a ship shall have jurisdiction to determine the case

jurisdictional power of the *forum arresti*, without any conditions, and not subject to its recognition by national laws. Moreover, the new Convention recognises party autonomy (choice of forum agreements or arbitration agreements), as the main jurisdictional basis taking priority over the jurisdiction of the *forum arresti*.¹⁶⁷

The plain recognition of the *forum arresti* could be seen as advancement of its theoretical legitimacy as a jurisdictional basis. However, the reasons for such a recognition eliminating the conditions set out in the 1952 Arrest Convention had to do with practicalities rather than abstract considerations. It was perceived as a drawback to uniformity to allow for different jurisdictional systems depending on the different national laws of the contracting parties.¹⁶⁸ Bearing in mind that eliminating the *forum arresti* was not acceptable as a way of unification during the preliminary work pursuant to the 1952 Arrest Convention, the only possibility was to recognise it in general terms. Theoretically it does not represent any evolution of juridical thinking in this regard; it just reflects the importance that practicality has in admiralty jurisdiction.

Another novelty of the new Convention is the acceptance of the doctrine of *forum non conveniens* if permitted by national law.¹⁶⁹ In fact, this represents the

upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration. 2. Nonetheless, the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction. 3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship (a) does not have jurisdiction to determine the case upon its merits; or (b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal'.

¹⁶⁷ Compare this with the decision in *The Bergen* and in *Erich Gasser v Missat*. Doubtless the 1999 Arrest Convention is in line with the latest trends.

¹⁶⁸ F Berlingieri, opinion shared with the Ph.D. Candidate at interview held in Genoa, Italy on the 22nd of May 2006.

¹⁶⁹ It has been said that *forum non conveniens*, as many other PIL devices, is not good or bad in itself but it depends of the context where, and the way how, it is used.

adoption of the Scottish dual formula of *forum arresti-forum non conveniens* in the field of arrest of ships. This home-grown Scottish doctrine crafted and named by Judges and practitioners:¹⁷⁰ *forum non conveniens*, arose to contain a broad general jurisdictional basis available in Scots law at the time, namely, arrestment *ad fundandam jurisdictionem*.¹⁷¹ If this potentially excessive jurisdictional ground would have not existed in Scots law the doctrine of *forum non conveniens* might not have ever emerged.¹⁷² Following that, it may be argued that it is indeed the incorporation of this dual formula in the 1999 Arrest Convention that represents advancement at the international level; not because it has been taken from Scots law as a system of genius¹⁷³ but because a far-reaching jurisdictional ground such as *forum arresti* has been combined with its natural correlative.¹⁷⁴

States parties of the EC are prevented from ratifying individually the 1999 Arrest Convention due to the fact that it contains jurisdictional provisions which would affect the rules contained in EC Regulation 44/2001. Ratification hence stays with the EC as a whole.¹⁷⁵ That is a consequence of PIL issues being moved from the third pillar to the first pillar; and explains why the *lex specialis* provision in the Regulation, differently from the Brussels Convention, is limited to Conventions entered into by the member States prior to the entry into force of the Regulation. In this context, the adoption of the home-grown Scottish dual formula *forum arresti-*

¹⁷⁰ Lord Hope of Craighead (HL), 'Forum non conveniens: where next?' Conference Paper, Journal of Private International Law Conference 2007, Birmingham 26 June 2007.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ R Evan-Jones (2001) 44; 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law' (1998) 114 Law Quarterly Review 228.

¹⁷⁴ See Lord Hope of Craighead (HL), 'Forum non conveniens: where next?' Conference Paper, Journal of Private International Law Conference 2007, Birmingham 26 June 2007.

¹⁷⁵ The ECJ has established the principle that where common rules have been adopted the Member States no longer have the right acting individually, or even collectively, to undertake obligations with non-member countries to affect those rules. In such case the Community also has exclusive competence to conclude international agreements (ECJ opinion issued on 7 February 2006 <http://curia.eu.int>). That is the reason why since April 2007 the EC is a member of the Hague Conference on Private International Law.

forum non conveniens by the 1999 Arrest Convention could be seen as contrary to the European paradigm of jurisdiction, since *forum non conveniens* has been repeatedly, and arguably definitely, strike out of the European regime. However, article 7 (2) of the 1999 Arrest Convention authorises States parties to decline jurisdiction only 'where that refusal is permitted by the law of that State' therefore the issue is left to the *lex fori arresti*. The problem here would be – as it is currently in the case of the 1952 Arrest Convention – the scope of application of the *lex specialis* provision of the European regime. It is here submitted that, in the field of arrest of ships, as *forum non conveniens* should be seen as the natural correlative to *forum arresti*, the remission to the *lex fori* in the 1999 Arrest Convention should, *de lege ferenda*, be interpreted with a view to consolidate the dual formula. Yet, the fear is that even in this context, the deeply rooted civilian reluctance to decline jurisdiction would prevent this from happening. Nevertheless, it is to be hoped that the dual formula follows the fostering path that *forum arresti* has taken via the *lex specialis* provision thus helping to consolidate a well-balanced specific jurisdictional scheme for maritime claims in the European regime.

6.6. THE AFTERMATH OF ARREST OF SHIPS AS A JURISDICTIONAL BASIS

English and Scottish practitioners, Judges and commentators might well be surprised that at the beginning of the 21st century somebody has considered that a theoretical justification of the *forum arresti* in the case of ships was necessary. However, if the one making that assessment is originally formed in a civil law system, the surprise disappears. A good example of the general 'distaste' of civil lawyers for jurisdictional rules based on the arrest/arrestment of the ship may be found in the opinion of the Advocate-General in the ECJ decision in *The Tatro*.¹⁷⁶ He

¹⁷⁶ Maciej Rataj (*The Tatro*) (Case C-406/92) [1995] 1 Lloyd's Rep 302 (ECJ) (Advocate General Mr. G. Tesauro, opinion of 13 July 1994).

expressed that the jurisdiction available under the 1952 Arrest Convention was 'fortuitous', 'a matter of chance' and certainly encouraging 'forum shopping'. 'An unexpected assessment, one may think, of the provisions of an international Convention'.¹⁷⁷ Yet, it is not an uncommon opinion amongst civil lawyers. Hence, where would one look for such theoretical support as to be able to rebut such disapproval, if as such cannot be found in the preliminary work to the international Conventions, but in a PIL analysis of English and Scots law on the arrest of ships?

6.6.1. Forum Arresti: A PIL Device

The formulation of jurisdictional bases should not be an end in itself. One of the purposes of jurisdiction rules is to facilitate the recognition and enforcement of judgments in countries other than the country of origin.¹⁷⁸ Put it in the words of HERBERT¹⁷⁹ the aim is to recognise juridical continuity to legal relations. Doubtless, the downside of *forum arresti* is the augmentation of the possibility of parallel proceedings which in turn is a huge threat against that continuity since if two or more courts exercise jurisdiction over the same dispute there is the risk of them rendering irreconcilable judgments.¹⁸⁰ However, nowadays, the majority of States recognise –either by self limitation or by limitations assumed according to international obligations- that there are some cases where they should not intervene, or that in some other cases, other countries could assume competence as much as they could.¹⁸¹ That is why it is here seen as advancement that the dual formula of *forum arresti-forum non conveniens* has been adopted by the 1999 Arrest Convention, allowing its States party to achieve that goal.

¹⁷⁷ A Briggs, 'The Brussels Convention Tames the Arrest Convention' Case and Comment *The Taty* [1995] LMCLQ 161, 163 fn. 23.

¹⁷⁸ J Hill (2003) 61.

¹⁷⁹ R Herbert Herbert in D Operti Badáan et al, *Objeto y Método en el Derecho Internacional Privado* (2nd ed FCU Montevideo 1990).

¹⁸⁰ J Hill (2003) 61.

¹⁸¹ D P Fernández Arroyo (2004) 141.

6.6.2. *Forum Arresti*: A Special Jurisdictional Basis

In terms of legal technique, determining the more convenient jurisdiction in cases of concurrent jurisdiction is a difficult task at the present state of evolution of PIL. In most cases the courts involved will be internationally competent to hear the merits due to a close connection between the forum and the parties or the dispute. Which one should prevail requires a horizontal comparison between those connections. Doubtless, this is a field where no definite answers have been found yet, and further research in this sphere would go far beyond the scope of analysis of this thesis. Notwithstanding, it may be argued that the distinction between general and specific jurisdiction coined by the professors of Harvard more than forty years ago, that has been so influential in the development of jurisdictional theory in PIL in the United States, should be advanced further in Europe.

It has been repeatedly recommended that specific basis of jurisdiction must be construed narrowly and should be justified by the close connection between the forum and the dispute.¹⁸² Yet, the survival of *forum arresti* for maritime claims in the crusade against exorbitant jurisdiction can be seen, not only as a victory of English law, but as development of a specific jurisdictional ground particularly suit to meet the needs of maritime commerce. Maybe it is time to overcome the myth of general jurisdiction and give a little bit more credit to specific jurisdictional grounds.¹⁸³

Upon this background, it is possible to say that *forum arresti* in the case of arrest of ships is suitable as a specific basis of jurisdiction. As such, its practical advantage is blatant: the presence of the defendant's asset (generally its only or

¹⁸² Jenard Report (1979) 22.

¹⁸³ On this line see M Twitchell, 'The Myth of General Jurisdiction' (1988) 101 Harvard Law Review (3) 610.

main asset¹⁸⁴) in the forum makes the enforcement of the eventual judgment a lot easier. At this stage of evolution of international judicial cooperation where recognition and enforcement of foreign judgments –especially *ad extra* integrated areas- is not as straightforward as might be desired, this obvious advantage should not be underestimated. By contrast, it is difficult to find technical arguments in favor of the *forum arresti* as a general jurisdictional basis; not only in the preliminary work to the international Arrest Conventions but in legal literature in general. A forum that has jurisdiction based upon arrest/arrestment of the defendant's asset within a certain territory (such as jurisdiction based on arrestment of movables under Scottish rules of jurisdiction) is a forum that does not necessarily have an objective link to the parties, hence, as a general jurisdictional basis, it has been considered exorbitant.

The reason for arguing in favour of fostering specific jurisdictions over general ones is supportable from a PIL perspective: a forum seized because it is related to the subject matter of the case has a closer link to the dispute than a forum that it has been seized because the defendant is domiciled or habitually resident within its territory. Jurisdiction should be based on the proximity between the forum and the case;¹⁸⁵ as ascertained by FERNÁNDEZ ARROYO '*the general acceptance of a certain jurisdictional basis has a lot to do with the essential or principal character that the elements taken into account hold in the legal relationship*'.¹⁸⁶ In this sense, it may be argued that when jurisdiction is linked to the dispute (specific) instead of to the parties (general), the elements taken into account are germane to the particular legal relation and not only to one of the parties. Indeed, specificity in terms of jurisdiction is recognised in several international instruments and certainly is the

¹⁸⁴ As mentioned in Chapter 1, very often a shipping company sets up a separate subsidiary company to own each ship.

¹⁸⁵ P Lagarde (1986) 131-132.

¹⁸⁶ D P Fernández Arroyo (2004) 170.

raison de être of the *lex specialis* provision of article 71 of EC Regulation 44/2001 (former article 57 of the Brussels Convention).¹⁸⁷

6.6.3. Forum Arrest: A Cooperative Forum

A ship is elusive and the shipping chain makes her more so.¹⁸⁸ The power to arrest in any port and consequentially, found jurisdiction therein, is as important in modern times with ships being owned singly and flying flags of convenience as it has always been due to the speed with which the defendant's asset can leave the jurisdiction. Many times there will be no other connection between the forum and the case than the ship being fixed by arrest in its territory; however, in many cases this *prima facie* not so strong connection is the strongest connection that the ship will ever have with any forum.

¹⁸⁷ On 27 September 1968 the Member States of the European Communities acting under what is now art 293 EC concluded the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The Brussels Convention was amended on a number of occasions so as to provide for the accession of new Member States and to make other amendments. It was amended in 1978 on the accession of the United Kingdom. The Convention, as so amended, was given effect in the law of the United Kingdom by the Civil Jurisdiction and Judgments Act 1982. The 1952 Arrest Convention has been recognised as being a 'convention on a particular matter' in terms of article 57 of the Brussels Convention (See P Schlosser, Report [1979] O.J. C59/71 [238] n 59).

¹⁸⁸ The commercial management of ships places peculiar problems to those faced with an unpaid debt incurred in the course of shipping. In addition to the inherent mobility of ships as the main (and so frequently unique) asset of the debtor, there is the unawareness from the point of view of the creditor, to some extent, of whom he is doing business with and where the counterparty can be reached. The arrest of ships with the several functions discussed throughout this thesis attempts to make sure that some particular maritime claims can be secured by the accessibility to a provisional and protective measure while awaiting judgement, at the same time making sure that this security does not slip away. This is achieved through physical and legal obstacles being placed on the owner's or user's right to employ the ship. If the procedure simultaneously serves the purpose of establishing jurisdiction on the merits, better though.

The frequent allegation that arrest of ships increases the chances of 'forum shopping' deserves consideration in this context. It is submitted that the comments of Lord Reid in *The Atlantic Star*¹⁸⁹ are sound. He said '*I would not regard a foreigner who arrests a ship in England as necessarily forum shopping. The right to arrest a ship is an ancient and often necessary right. Not only may there be difficulty otherwise in establishing jurisdiction in an appropriate forum, but the arrest gives to the arrester what may be a very necessary security.*'

Following the discussion in this chapter, it is possible to affirm that *forum arresti*¹⁹⁰ based on the arrest/arrestment of a ship as a jurisdictional basis is not exorbitant but cooperative. It does not jeopardize the balance between the parties; it does not favour one party particularly linked with the forum. The element taken into account to determine competence is essential to the legal relation; is not merely accidental¹⁹¹ (and in that sense arrest/arrestment of a ship differs from the arrestment of movables as a general jurisdictional basis in Scots traditional law). Its recognition in the international Conventions guarantees that the reasonableness standard has been passed, i.e. agreement has been achieved on the convenience of the criterion. This feature is not enough by itself but it is to be considered as one of the tests to determine the legitimacy of a jurisdictional basis. Arguably, a forum selection criterion that could be regarded as exorbitant if exercised only by a limited number of States, it ceases to be excessive if exercised by all the States parties to an international Convention, since all of them would stand equally in

¹⁸⁹ *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes)* [1973] 2 Lloyd's Rep 197 (HL) 201.

¹⁹⁰ Probably English lawyers would be surprised by the lack of novelty of such conclusions. It has for long been held in English case law that the Admiralty jurisdiction *in rem* founded by arrestment of a ship or substituted bail is not exorbitant. It is widely recognised and is accepted in international agreements (*The Atlantic Star* (Lord Kilbrandon)). Yet, as it has been explained in this Chapter, the fact that it has international acceptance does not justify it in theory; in fact it is a consequence of the aspiration of other maritime nations to 'share the pie with England'.

¹⁹¹ The lack of such link between the element taken into account and the legal relationship has been taken as a criterion for defining an exorbitant forum, see D P Fernández Arroyo (2004) 171.

relation to that particular criterion. Nevertheless, this argument is only to be considered if the cooperativeness of a certain forum is to be analysed from the perspective of States. What about the parties to the case? It is submitted that it is from the perspective of the parties, and not the States, that the assessment should be conducted.

The adoption of the 1999 Arrest Convention would represent therefore the availability of such a cooperative device to every State or Community of States that is willing to ratify the Convention regardless of the different domestic laws of the contracting Parties.

6.7. CONCLUSIONS

The main task of this chapter was to provide a theoretical assessment of the exercise of jurisdiction as a consequence of the arrest of ships. And the main question to be answered was whether arrest constituted a sufficient connection with the forum so as to justify the assumption of competence by that forum in the absence of any other relevant connections. The answer is negative when it comes to general jurisdiction and positive when analyzed as a specific jurisdictional ground. It follows from the discussion in the body of this chapter that the widest held opinion is that in terms of general jurisdiction the domicile or habitual residence of the defendant is 'the rule'. No arguments can be found to justify arrest of a ship as a general jurisdictional ground (or in Sir Phillimore words '*treating a ship as domiciled where it can be found*') and to maintain *forum arresti* as a general jurisdictional basis denotes a non-balanced system. However, combining a general jurisdictional basis such as the defendant's domicile as an alternative to party autonomy with a

thoughtful scheme of specific jurisdictions should avoid a clash between the interests of the claimant and those of the defendant.¹⁹²

The paradigms of jurisdiction in which arrest of ships has developed its jurisdictional function have different standards to be considered when determining the legitimacy of a particular jurisdictional basis. Nevertheless, with its survival as a specific jurisdictional ground for maritime claims in the European regime, a further merger has taken place in its long chain of amalgamations, somehow building up a bridge among them.

The ideal would be to envisage and create an internationally acceptable Convention that would find a middle point between the common law and the civilian approach; one in which a hybrid system which mixes hard-and-fast rules and discretion would work for the benefit of all. Unfortunately the Hague Conference on Private International Law after several years of fighting for the emergence of such a model has failed.¹⁹³ In the international sphere the issues are yet in a state as to find universally accepted answers to what is an ideal jurisdictional system in international litigation.

Therefore, smaller steps towards further achievements in this area need to be taken to prepare the arena for the future. One of these smaller steps that seem to be already consolidated in international Conventional law¹⁹⁴ is the distinction

¹⁹² Already forty years ago it was suggested that what was paramount for a real solution of the problem of exorbitant jurisdictions in international litigation was '*...a well thought out and well balanced system of specific jurisdictions: jurisdictions which are closely linked with the legal relationship from which the action arises...*' (L I de Winter (1968) 719).

¹⁹³ C Kessedjian (1998); P Nygh and F Pocar, 'Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters' (2000) Prel Doc 11 HccH.

¹⁹⁴ The Convention on Choice of Court Agreements adopted on 30 June 2005, which derives from the more ambitious 'Judgments Project' of the Hague Conference on Private International Law, does not actually itself regulate the topic of interim measures of protection; yet, it appears to espouse detachment of jurisdiction for interim relief from jurisdiction on the merits since parties remain free to seize any court provided it has jurisdiction under its

between, on the one hand, ancillary jurisdiction for the purposes of interim relief and, on the other hand, jurisdiction on the merits. The 1952 Arrest Convention has been a pioneer in fostering that distinction. The study turns to its analysis in the following Chapter.

and the Recognition and Enforcement of Foreign Judgments

7.1. INTRODUCTION

Let us not forget that this chapter is concerned with the 1952 Convention primarily in relation to the recognition and enforcement of foreign judgments. Although this has been well highlighted from the very first chapter of this thesis, the subject of this chapter can be said to be a truly PIL initiative. Its main objective is to provide a model dealing with cross-judicial issues related to compensation for the difficulty of enforcing judgments abroad. Therefore, the relation with the enforcement of foreign judgments is oriented by the legal initiative itself. In fact, the recognition and enforcement of foreign judgments should be the result of the cooperation of international judicial cooperation. It is at this broader scope where the subject of this chapter is addressed and the author wishes to play a key role in this initiative.

The definition of interim jurisdiction of the court and jurisdiction by the law of the place of interim relief (interim jurisdiction) is also one of the main objectives of this chapter. It is at this broader scope where the subject of this chapter is addressed and the author wishes to play a key role in this initiative.

national law ((2003) Prel Doc 22 HcCh 23). Article 7 (*Interim measures of protection*) provides 'Interim measures of protection are not governed by this Convention This Convention neither requires nor precludes the grant refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant refuse or terminate such measures'.

CHAPTER SEVEN

Arrest of Ships, Judicial Cooperation and the Recognition and Enforcement of Foreign Judgments

7.1. INTRODUCTION

Last but not least, this chapter is concerned with the third domain germane to PIL, the recognition and enforcement of foreign judgments. As it has been acknowledged from the very first chapter of this thesis, the arrest of ships can be said to be a truly PIL institution. Its main rationale is to provide a useful device for international commerce and to compensate for the difficulty of enforcing judgments abroad. Therefore, the relation with the enforcement of foreign judgments is inherent to the legal institution itself. In turn, the recognition and enforcement of foreign judgments should be looked at from the standpoint of international judicial cooperation. It is in this broader sphere where the arrest of ships as a provisional and protective measure plays a key role in maritime litigation.

The distinction between jurisdiction on the merits and jurisdiction for the sole purpose of interim relief (ancillary jurisdiction) becomes paramount in this sphere. International judicial cooperation in this field is two-fold.

On the one hand, there is ancillary jurisdiction and the possibility of a court that has no jurisdiction to hear the merits to grant provisional and protective measures in support of foreign proceedings. The 1952 Arrest Convention has been a

pioneer in fostering this possibility in the field of arrest of ships (article 7 (2));¹ arguably, as to confirm arrest of ships as a truly PIL institution, and in turn, maritime law as a fertile field for the development of this distinctive branch of the law. The Europeanization of PIL has brought further advancement of the distinction more generally into English and Scots law. There is a clear distinction between jurisdiction on the merits and jurisdiction for the purposes of interim relief in the European jurisdictional scheme, introduced first by the Brussels and Lugano Conventions, and currently established in the EC Regulation 44/2001.

On the other hand, there is the recognition and enforcement of foreign judgments rendered in connection with the provisional and protective measures granted to support the foreign proceedings on the merits. Such supportive character is effective in the case of arrest of ships only if the eventual foreign judgment is going to be enforceable against the ship or the security given to release the ship from arrest.

To put it another way, arrest of ships is essentially a territorial provisional and protective measure; in the context of the 1952 Arrest Convention and according to the European jurisdictional scheme, a court has jurisdiction to arrest a ship regardless of its international jurisdiction to hear the merits of the case, solely grounded on the principle of territorial proximity. Therefore, the core question in practice is not whether the arrest itself is going to be recognised abroad (one aspect theoretically important);² or whether the decision on the merits of a court that has

¹ 'If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.'

² In the sphere of interim measures of protection the stumbling block for consensus in the ambitious Hague Project of International Jurisdiction was their extraterritorial recognition and enforcement.

grounded its jurisdiction on the *forum arresti* is going to be recognised abroad (another aspect generally important);³ but whether the judgment on the merits of the maritime claim would be recognised and enforced in the legal system where the ship has been arrested or alternative security provided to prevent or release the arrest (this is practically the most important aspect of the problem). If the answer to this third question is negative the effectiveness of arrest as an interim measure of protection in support of foreign proceedings is severely jeopardised. Certainly, in the field of provisional and protective measures, international judicial cooperation is vital.

The issue was at the centre of the discussion in the *travaux préparatoires* of the 1999 Arrest Convention, and the results clearly reinforce the protective function of arrest and its provisional character. As this Convention is not yet in force, and the decision on its adoption by the European countries does not depend on the will of individual member States but rest with the European Community (EC), the issue is examined in the light of the relevant provisions of the European regime.

This Chapter starts by continuing to examine the protective function of arrest of ships. The effectiveness of such function depends on the availability of jurisdiction for the sole purpose of interim relief (ancillary jurisdiction) in a certain legal system. 'Ancillary jurisdiction' is therefore defined and examined in this chapter in connection with the arrest of ships, in national, international and regional law. The consideration of the proximity principle as the foundation of the departure

³ It has been suggested by F A P Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years* (1984) 186 RdC 9, 55 that the test for the international validity of a jurisdictional basis should be to ask whether the court applying such a criterion would give effect to a foreign judgment based on a corresponding type of jurisdiction, being the ideal rule the complete congruity between both sides of the same problem. On the same token, D P Fernández Arroyo 'Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will They Ever Survive' in *Festschrift für Erik Jayme* (Sellier Munich 2004) 169, 186 stresses that European countries should not be proud of keeping in their legislation certain criteria against which they have clearly objected. With a fundamental right such as the access to justice double standards are completely unacceptable.

from general principles of international jurisdiction in the sphere of interim relief is looked at. Finally, the specific problems connected to indirect jurisdiction, i.e. the recognition and enforcement of foreign judgments, is also looked at in the national, international and regional frameworks. Bearing in mind the Europeanization of PIL, and the benefits that the 1999 Arrest Convention could bring to the European countries, in terms of legal certainty and further harmonization in the field, what is interesting in this sphere is to discuss the consistency between the current European regime and the enforcement and recognition provision of the 1999 Arrest Convention, in view of the possible adoption of the latter by the EC.

7.2. THE PROTECTIVE FUNCTION OF ARREST OF SHIPS

In the first chapter it was submitted that it is the speed with which the defendant's main asset –the ship- could leave the jurisdiction that arrest of ships is primarily trying to counteract. It should be added that in the current state of affairs of international judicial cooperation this protective function is not limited to one forum particularly connected to the dispute but could be exercised by any jurisdiction that provides for the arrest of ships in its legal system, at least in Europe. This is a direct consequence of characterizing arrest of ships as a provisional and protective measure.

In English law, however, the protective function of arrest of ships does not appear so straightforward, even though, in general, ancillary jurisdiction is dealt with in a far-reaching manner. By and large, the most recent reforms in English civil procedure reveal a remarkable convergence between the common law and the civil law.⁴ It is regrettable that such convergence has left arrest of ships aside and another

⁴ R Stürner, 'Anglo-American and Continental Civil Procedure: The English Reform as a Model for Further Harmonization?' in M Andenas, N Andrews and R Nazzini (eds) *The Future of Transnational Civil Litigation, English Responses to the ALI/UNIDROIT Draft Principles and*

opportunity⁵ has been missed to bring arrest of ships in line with the latest trends in the field of provisional and protective measures. This calls out for reform.

In Scots law, there is little authority on whether or how far ancillary proceedings connected with maritime claims should be treated as admiralty actions.⁶ Yet, it is clear in Scots law that ancillary jurisdiction can be exercised without the need to initiate an action on the merits when the arrest of the ship is sought in Scotland for the sole purpose of interim relief.

7.3. ANCILLARY JURISDICTION

7.3.1. The Concept of Ancillary Jurisdiction⁷

Ancillary jurisdiction in this context could be defined as the jurisdictional basis upon which interim relief is granted to support proceedings on the merits sought in another jurisdiction. A court exercising ancillary jurisdiction is not in the same position as the court hearing the merits.⁸ The former court's function is a

Rules of Transnational Civil Procedure (British Institute of International and Comparative Law London 2004) 11.

⁵ Jackson shows chronologically how English law has missed several opportunities to bring Admiralty jurisdiction into line with the 1952 Arrest Convention (D C Jackson, *Enforcement of Maritime Claims* (LLP London 2005) 5-7). In his opinion, in the significant latest developments of civil procedure in English law 'nothing has changed in relation to the various fundamental and confused aspects of the approach to enforcement of maritime claims in English law', 7. He stresses that the 1999 Arrest Convention (not yet in force) represents a further opportunity for a comprehensive framework change.

⁶ The Scottish Law Commission Report on *Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com Report No 164 (1998)) [7.42].

⁷ The ideas formulated in this regard have been previously published by the Ph.D. Candidate with authorization from the School of Law in V Ruiz Abou-Nigm, 'Ancillary Jurisdiction for Interim Measures of Protection in Support of Cross-Border Litigation' (2005) 4 *Uniform Law Review* 759-784.

⁸ A good example on this distinction in recent international conventional law is the UNIDROIT Convention on Mobile Equipment (Cape Town Convention) in force since the 30th of March 2006 (Chapter XII ruling on Jurisdiction establishes (art 42 – choice of forum) 'Subject to arts 43 and 44 the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention whether

limited one, and is intended to be supportive only⁹. Legal systems, whether national, regional or international provide for ancillary jurisdiction based on the location of the assets or the person affected by the order. Regardless of the fact that a given court might not have jurisdiction to hear the merits of the case, that court is still empowered to grant provisional and protective measures in relation to property or persons located within its territorial jurisdiction. The granting of the measure is in itself a way of cooperating with proceedings abroad, and no issue of recognition or enforcement of the provisional measures arises in principle,¹⁰ since the measure is ordered where it is meant to take effect. It has been submitted that this competence is a matter of sheer practical necessity.¹¹

In some legal instruments, namely, the Inter-American Convention on Execution of Preventive Measures,¹² this kind of international judicial cooperation is

or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties (art 43 – jurisdiction under art 13 (1)). ‘The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have jurisdiction to grant relief under Article 13 (1)(a), (b), (c) and Article 13 (4) in respect of that object. 2. Jurisdiction to grant relief under Article 13 (1) (d) or other interim relief by virtue of Article 13 (4) may be exercised either (a) by the courts chosen by the parties or (b) by the courts of a Contracting State on the territory of which the debtor is situated being relief which by the terms of the order granting it is enforceable only in the territory of that Contracting State. 3. A court has jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 13 (1) will or may take place in a court of another Contracting State or by arbitration’.

⁹ A Johnson, ‘Interim Measures under the Draft Principles and Rules of Transnational Civil Procedure: Some Reflections from the English Perspective’ in BIICL (ed), *The Future of Transnational Litigation, English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure* (British Institute of International and Comparative Law London 2004) 112-113.

¹⁰ The issues related to the extraterritorial effect of interim relief are complex. They usually do not arise in the case of arrest of ships since the latter is essentially a territorial measure.

¹¹ B Hess, Study No. JAI/A3/2002/02 on European Enforcement prepared for the EU Commission by the Institute of Foreign Private International and Comparative Law of the University of Heidelberg, *General Report* December 2003, available at <http://eur-lex.europa.eu/en/index.htm> last accessed 14th August 2007.

¹² Inter-American Convention on Execution of Preventive Measures (Montevideo, 1979) adopted under the auspices of the Organization of American States (OAS), available on

meant to be exceptional and is justified by territorial proximity in matters of urgency.¹³ In this Convention, the main ground for justifying the departure from the general principles of international jurisdiction is the maximum efficiency of the protective measure. The arrest of ships is generally taken as the most obvious example: if the ship is in a certain port of a jurisdiction that is not internationally competent (to explain it in terms of Inter-American legal parlance) to hear the merits, for just a few days or hours, it would be useless to request its arrest before the court internationally competent, because the entire proceedings (requesting the measure from the court deciding on the merits and waiting for that court to forward it – complying with all the formalities – to the court of enforcement) would take too long, and the ship would take off before the measure could be enforced against her. In those cases ‘urgent competence’ is justified. In this conception, therefore, this jurisdictional basis is exceptional; the court seized on the merits retains absolute control of the case management; a certain time is usually allowed to initiate the case if it has not already been initiated; and last but not least, measures taken are always territorial in nature.

7.3.2. The Regional Framework (Europe)

Interestingly enough, the European regime takes a radically different approach from that of the Inter-American Convention to the subject-matter of ancillary jurisdiction. It provides for completely detached-from-merits jurisdiction in the case of provisional or protective measures, without further conditions. Provisional measures in the European regime can be ordered either by the court having jurisdiction on the merits or by any other court exercising ancillary jurisdiction. And no urgency requirement is imposed by the scheme for a court to

line in English at www.oas.org/juridico/English/treaties/b-42.html last accessed on 14th August 2007.

¹³ Urgency has been considered relevant in this sphere also by the English Arbitration Act 1996, s. 44 (1) (2) (e); see L Collins (ed) (2006) [8-034, 8-035] 221.

assume jurisdiction for the sole purpose of interim relief. The availability and the requirements concerning such measures are left entirely to the *lex fori* of the court granting the provisional and protective measure.¹⁴ This is provided for in Article 31 of EC Regulation 44/2001 (formerly Article 24 of the 1968 Brussels and Lugano Conventions) stating:

‘Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.’

The question that arises with regard to this provision is whether the provision itself provides a jurisdictional basis for ancillary jurisdiction or if, even though the possibility as such is allowed, jurisdictional grounds are left to national law.¹⁵ In other words, what is at stake is whether ancillary jurisdiction is imposed on Member States by the Regulation or if the provision merely constitutes permission for Member States to exercise ancillary jurisdiction in accordance with their own national laws. As far as legal doctrine is concerned, the most widely accepted opinion is that this provision leaves the question to national law, and that it is not by itself a basis of ancillary jurisdiction. In this context, it follows that, where national law does not provide for ancillary jurisdiction in support of foreign proceedings in the field of interim measures of protection, there are no bases on which to grant it. Therefore, as there is no jurisdictional ground specially mentioned in terms of ancillary jurisdiction,¹⁶ all heads of jurisdiction could theoretically be used in this regard, even, for example, the head of jurisdiction based on the locality of property

¹⁴ This is also different in the above-mentioned Inter-American Convention on Execution of Preventive Measures (CIDIP II Montevideo 1979) where the final word as regards the appropriateness or inappropriateness of the measure lies exclusively with the court of the main proceedings which must be informed promptly of any such measure granted by the court exercising ancillary jurisdiction (art 10).

¹⁵ G Maher and B J Rodger, ‘Provisional and Protective Remedies: The British Experience of the Brussels Convention’ (1999) 48 ICLQ 306.

¹⁶ Here there is another difference with the model used by the Inter-American Convention since territorial proximity is therein the only jurisdictional ground that justifies the departure from general principles of international jurisdiction.

belonging to the debtor that is banned in the scheme for the purposes of merits jurisdiction. In the opinion of MANN this is perfectly compatible with a well balanced jurisdictional system. General principles of public and private international law 'have never had any objection against protective measures in the country in which the debtor's property is located, even if neither party has any other connection with it.'¹⁷

This interpretation has been criticised, since it makes easier for Member States to resort to exorbitant bases of jurisdiction for the sake of interim measures of protection. This has been seen as a circumstance that jeopardises coordination and makes international judicial cooperation more difficult.¹⁸ Furthermore, it has been submitted that this position enables the requested court to decline jurisdiction on the grounds of the 'inexpediency' of the measure to safeguard the rights it purports to protect.¹⁹ Following that, there is another school of thought sustaining that Article 31 itself provides a direct jurisdictional rule enabling Member States courts to order interim measures of protection in support of foreign proceedings regardless of their national procedural laws.²⁰ Spanish authors in particular have argued in favour of this position.²¹ Their arguments are based in the consideration of the better position in terms of territorial proximity of the requested forum to adopt such measures.

Arguably, in the case of the arrest of ships in the States parties to the international Arrest Convention, the basis for granting the arrest exercising ancillary jurisdiction does not need to be found in national law since it is expressly provided for in the convention. In that sense it could be claimed that the effect of former article 57 of the Brussels and Lugano Conventions and current article 71 of the EC

¹⁷ F A P Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years* 186 RdC 9 (1984) 58.

¹⁸ Hess (2003) General Report 132-133.

¹⁹ F J Garcimartin Alferez, *El régimen de las medidas cautelares en el comercio internacional* (McGraw-Hill Madrid 1996) 109.

²⁰ *Ibid.*

²¹ *Ibid.*

Regulation 44/2001 covers not only direct jurisdiction to hear the merits, but also, the exercise of ancillary jurisdiction if so provided by a specialised convention since it does not go against the European scheme in any sense. The only limitation in this regard set by the jurisprudence of the ECJ in the *Van Udem*²² case is the need of a 'real connecting link'²³ between the subject-matter of the provisional and protective measures sought and the territorial jurisdiction of the requested court.

The *Van Udem* decision suggests different aspects that are relevant to our analysis. First and foremost, it reconfirms the distinction between jurisdiction on the merits and jurisdiction for the purposes of interim measures of protection. Secondly, it could lead to the affirmation that the Brussels system itself provides a basis of ancillary jurisdiction (supporting the 'Spanish' position), in so far as this 'real connecting link' would be a criterion derived from the Brussels system itself, and not left to national law. Interestingly enough, the ECJ held that the courts of the place where the assets subject to the measures sought were located, were those best able to assess the circumstances that might lead to the granting or refusal of these measures, or to the laying down of procedures and conditions for the claimant to observe in order to guarantee the provisional and protective character of the measures authorised. This could lead Member States courts, in cases falling under Article 31 of the Regulation, to restrict the exercise of ancillary jurisdiction to territorial orders to be enforced against assets in the territory of the granting State only.²⁴ Indeed this approach is more restrictive than that of the provision taken on its own. Even though it does not affect ancillary jurisdiction in the case of arrest of ships where such 'real connecting link' is as clear as it could get, and the measure is necessarily of a

²² *Van Uden Maritime BV v. Kommanditgesellschaft (Deco-Line)* Case C-391/95 (ECJ) [1998] ECR I-7091.

²³ In England it has been signalled that when it comes to testing the practical meaning of 'real connecting link' in certain cases, such as freezing injunctions, the criterion is not really helpful, see A Briggs and P Rees, *Civil Jurisdiction and Judgements* (3rd edn LLP London 2002) 409.

²⁴ A Johnson (2004) 115.

territorial character, such restrictive conclusion is not possible in general terms. The European Court of Justice itself refrains from going as far as this.²⁵

The European regime was introduced into English and Scots law in this area through the Civil Jurisdiction and Judgments Act 1982.

7.3.2.1. England (Sections 25 and 26 of the Civil Jurisdiction and Judgments Act 1982)

Section 25 (1) was enacted in order to give effect to article 24 of the Brussels Convention, but it has been amended²⁶ and since 1997²⁷ it has applied in relation to proceedings world-wide; with these provisions a serious gap in English procedural law was filled.²⁸ The scope of application of section 25 is very broad and the statute itself provides for a discretion allowance in order to contain it, via the so called 'expediency test'. According to the latter, the court may refuse to grant the relief if, in the opinion of the court, the fact that the court has no jurisdiction to hear the merits of the case makes it inexpedient for the court to grant it.²⁹ Yet, as examined in Chapter 4, arrest of maritime property is expressly excluded from the scope of application of section 25 (s 25 (7)) and it is regulated by section 26 of the same Act³⁰

²⁵ C Kessedjian, 'Note on Provisional and Protective Measures in Private International Law and Comparative Law' (1998) Prel Doc 10 HccH 52.

²⁶ Civil Jurisdiction and Judgments Act 1991, s.3, Sch.2, [12]; SI 2001/3929, Sch.2, Pt IV, [10].

²⁷ SI 1997/302.

²⁸ L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn Sweet & Maxwell London 2006) 215.

²⁹ *Ibid*, 218; for an application of the test with a 'passed' result (the Court of Appeal held that it was not 'inexpedient' to grant the interim relief in that case) see *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA).

³⁰ S 26 (1) 'Where in England and Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom or of an overseas country, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest – (a) order that the property arrested be retained as security for the satisfaction of any award or

and section 11 of the Arbitration Act 1996. In turn, these provisions are similar to article 7 (2) of the 1952 Arrest Convention.³¹ Section 26 of the Civil Jurisdiction and Judgments Act 1982 authorises the starting of proceedings *in rem* for the sole purpose of obtaining security in support of substantive proceedings to be heard in a foreign court or in arbitration. A claimant who successfully uses the *in rem* procedure to secure its claim is not thereby obliged to have the substantive claim heard by the Admiralty Court. It may apply to stay the substantive proceedings, in the same manner as this possibility is open to the defendant. Where a stay is ordered, the relevant procedural rules³² provide for the continuance of any arrest or the maintenance of any security, unless the court orders otherwise. The Court should follow one of two options when faced with this kind of cases. Under sub-s (1) (a) it can order the retention of the arrested property as security; alternatively, under sub-s (1) (b) the court can make the stay conditional on the provision of alternative security. The latter option is not available to the Court when the defendant is entitled to a mandatory stay.³³

This provision is a partial, fallacious, and intricate solution to the issue of ancillary jurisdiction in the field of arrest of ships.³⁴ It undermines the distinction

judgment which – (i) is given in respect of the dispute in the arbitration of legal proceedings in favour of which those proceedings are stayed or dismissed; and –(ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or –(b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award of judgment’.

³¹ In *The Nordglimt* [1987] 2 Lloyd’s Rep 470 (QBD (Admlty)) it was held that s 26 of the 1982 Act should be construed in accordance to the provisions of the 1952 Arrest Convention; it was also held that s 26 applied where the foreign proceedings or arbitration had already been commenced at the time of the institution of the proceedings in England. See also *The Jalamatsya* [1987] 2 Lloyd’s Rep 164 (QBD (Admlty)).

³² Civil Procedure Rules Pt 61.12.

³³ The defendant is entitled to a mandatory stay where the parties have agreed to submit their disputes to arbitration (Arbitration Act 1996, s 9) or where they have concluded a choice-of-court agreement in favour of the courts of a member State of the European regime. The same would apply if the English court is under a duty to decline jurisdiction, where proceedings have first been commenced in another State of such scheme.

³⁴ As Jackson criticises (D C Jackson (2005) 3) it is indeed surprising that English law has not been able to make arrest of ships available to arbitration without the cumbersome need to start proceedings *in rem* and afterwards apply for them to be stayed.

between ancillary jurisdiction and jurisdiction on the merits, making arrest available only after initiating the substantive claim. Consequently, the jurisdictional and the protective functions of arrest get intermingled, and most importantly, English law neither clearly complies with the international obligations assumed under the 1952 Arrest Convention, nor provides a basis for ancillary jurisdiction in the case of arrest of ships. Particularly in the case of choice-of-court agreements or arbitration agreements, that clearly provide for a jurisdiction different from that where the arrest is being pursued, the procedure for the claimant should be distinctive enough so as not to be understood as an infringement of the agreements, not only according to English law but elsewhere. Furthermore, this mechanism might not achieve the speed and secrecy which is often necessary to make protective remedies effective. To be forced to initiate proceedings on the merits against such clauses, followed by the need to apply for them to be stayed afterwards, confirms what JACKSON has called the 'schizophrenic'³⁵ approach to maritime claims in English law. To put it in the words of Lord Reid, '*... [w]hy should we tell lies when the truth will serve our purpose equally well if only we give a little care to the formulation of our principles?*'³⁶ It may be argued that the problem is indeed the lack of such principles in English law in this regard.

Noteworthy is the important difference in so far as to the discretion of the English courts in the case of the arrest of ships in the frame of ancillary jurisdiction. If arrest of the ship is requested for the sole purpose of interim relief the court is empowered with discretion not to grant the measure; whereas, as it was examined in Chapter 4, in a different context, that of arrest in the 'truly' framework of the action *in rem*, the mainstream considers that the entitlement of the maritime claimant is a matter of right.

³⁵ D C Jackson (2005) 240.

³⁶ '*...During early stages of the development of a legal system legal fictions have been invaluable...But in this day and age I dislike them intensely. Why should we tell lies when the truth will serve our purpose equally well if only we give a little care to the formulation of our principles...*' ((1968) 54 Proceedings of the British Academy 189, 200 as quoted by Scot Law Com No. 164 (1998) 186).

The legitimacy of ancillary jurisdiction was recognised in English law even before the 1982 Act entered into force. In *The Lisboa*³⁷ a bill of lading included a choice of court agreement designating London as the competent jurisdiction. The claimant's ship, *Lisboa*, was on a voyage from Buenos Aires (Argentina) to Chioggia (Italy), with a cargo of wheat owned by the defendant. During the voyage the vessel broke down off Tunisia and was towed to Chioggia, and the cargo-owners claimed a large amount for towage expenses. They raised legal proceedings in Venice in breach of the jurisdiction clause in the bill of lading, and the court of Venice authorised the arrest of the ship. The ship-owners then sued in England for damages for the unlawful arrest of the vessel in breach of the exclusive jurisdiction clause, and furthermore, the cargo-owners raised proceedings in England on the merits of the case claiming that the vessel was unseaworthy. The ship-owners applied for an injunction to restrain the cargo-owners from proceeding with the arrest of the ship. The Court of Appeal reached a unanimous decision rejecting the grant of an injunction. Lord Denning MR invoked the 'maritime law of the world' in order to reach a fair and just result in this case. He expressed: *'It seems to me that, by the maritime law of the world, the power of arrest should be, and is, available to a creditor – exercising it in good faith in respect of a maritime claim-wherever the ship is found-even though the merits of the dispute have to be decided by a Court in another country or by an arbitration tribunal in another country...'*³⁸ In this case the main argument raised up by the three members of the court was that no injunction should be granted for otherwise the cargo-owners would be deprived of their security. It is regrettable then that being ancillary jurisdiction so settled in English law in the field of arrest of ships at common law and also at present statutory provisions, the latter have not provided for a straight-forward mechanism for the Courts to so exercise it. Scots law, arguably due to the fact that arrest of ships as a provisional and protective

³⁷ [1980] 2 Lloyd's Rep 546 (CA).

³⁸ At 549-550.

measure pertains to the broader category of arrestment, provides a better solution for the issue of ancillary jurisdiction in this sphere.

7.3.2.2. Scotland (Sections 27 and 28 of the Civil Jurisdiction and Judgments Act 1982)

Article 24 of the Brussels Convention was given effect as to Scots law by sections 27 and 28 of the 1982 Act. According to section 27 the Court of Session may grant a warrant for the arrestment of any assets situated in Scotland where proceedings have been commenced elsewhere. Originally this jurisdiction was limited in that the foreign proceedings must have been in the United Kingdom or in another Member State of the European Community;³⁹ however, by virtue of the Civil Jurisdiction and Judgments Act 1982 (Provisional and Protective Measures) (Scotland) Order 1997⁴⁰ this jurisdiction is currently exercisable in relation to proceedings world-wide.

It has been explained that under these provisions the Court of Session can grant warrant of arrestment only where the foreign proceedings have already been commenced.⁴¹ It may be argued that in the case of arrest of ships these provisions should be read together with article 7 (2) of the 1952 Arrest Convention, therefore, ancillary jurisdiction extends to the cases where the foreign proceedings or the arbitration proceedings are yet to be started.

³⁹ G Maher and D J Cusine, *The Law and Practice of Diligence* (Butterworths Edinburgh 1990) 87; G Maher, 'Provisional and Protective Measures in Respect of Foreign Proceedings' (1998) 29 S.L.T. (News) 225.

⁴⁰ SI 1997/2780.

⁴¹ G Maher (1998) 226; H Raulus, 'Questionnaire on Provisional Measures: Scottish Report' in B Hess, *Study No. JAI/A3/2002/02 on European Enforcement*, prepared for the EU Commission by the Institute of Foreign, Private International and Comparative Law of the University of Heidelberg, available at www.ipr.uni-heidelberg.de last accessed September 11, 2007. Professor Maher expresses that it is not clear why Scots law is so restrictive in this area; the limitation is not present either in the European regime or in the way that it has been introduced in English law.

An area of concern highlighted by MAHER is the role that the European Court of Justice would have in relation to the exercise of ancillary jurisdiction of the Scottish courts. The underlying principles of any decision of the European Court must be given effect whenever the Scottish courts are interpreting a provision of the Brussels regime⁴², and this duty applies to questions of interpreting sections 27 and 28 of the 1982 Act. The issue is whether Scottish courts would or should apply the European case law to actions involving these provisions but which are outwith the scope of the European regime either because the action involves a non-contracting state or because its subject matter is beyond the scope of the regime. MAHER argues that the courts should as far as possible apply the principles advanced by ECJ decisions even in these types of case with a view to achieving general consistency of approach to these provisions.⁴³ His submission is to be supported.

Pursuers under section 27 are not entitled to arrestment as of right.⁴⁴ In *Clipper Shipping Co v San Vicente Partners*⁴⁵ it was held that the court had power to refuse to grant a warrant under that section on the ground that granting it would be oppressive.⁴⁶ At present this is consistent with what was examined in Chapter 4, in so far as in Scots law the competency of arrestment of a ship on the dependence depends upon there being a colourable case set out in the pleadings, and this applies also in the context of ancillary jurisdiction.⁴⁷ In *Motordrift A/S v Trachem*⁴⁸ arrestment was used on the dependence of an action related to a contract providing for the case to be subject to arbitration in England. It was correctly held that the arbitration agreement did not oust the jurisdiction of the Scottish courts for the purposes of interim relief.

⁴² Civil Jurisdiction and Judgments Act 1982, s 3 (1).

⁴³ G Maher (1998) 227.

⁴⁴ *Stancroft Securities Ltd v McDowall* 1990 SC 274 (IH (2 Div)).

⁴⁵ 1989 SLT 204 (OH).

⁴⁶ G Maher and D J Cusine (1990) 88.

⁴⁷ G Maher and D J Cusine (1990) 88.

⁴⁸ 1982 SLT 127 (OH); see also *Svenska Petroleum AB v HOR Ltd* 1986 SLT 513 (IH (1 Div)); *Mendok BV v Cumberland Maritime Corp* 1989 SLT 192 (OH).

The considerable advantage of Scots law as compared to English law is that in the case of arrestment of ships it is not necessary to initiate substantive proceedings if the arrestment is sought as a provisional and protective measure in support of foreign proceedings or arbitration. Certainly, Scots law represents in this regard a better balanced system.

7.3.3. The International Arrest Conventions

It is evident from the discussions during the preliminary work pursuant to the 1952 Arrest Convention, that the issue of ancillary jurisdiction for interim measures of protection was far from as developed as it is in present times. The mere convenience of the distinction between ancillary jurisdiction and jurisdiction for the sole purpose of interim relief was at stake in those days.⁴⁹ Nevertheless, article 7 of the Convention clearly distinguishes between direct jurisdiction on the merits (in its paragraph 1), and arrest as a provisional and protective measure in support of foreign proceedings or arbitration (paragraphs 2 to 4). Reflecting the legal development in the field of interim relief, ancillary jurisdiction is furthered in the 1999 Arrest Convention in article 2 (3).⁵⁰

⁴⁹ M Clunet, *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 of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 10 May 1952 (CMI 1997) 400-401.

⁵⁰ 'A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.'

7.3.4. The Principle of Territorial Proximity Revisited

Already MCMILLAN in 1926 considered that where there was reason to believe that the ship will have sailed before the measure could be enforced against her, it might '*be expeditious to proceed in the Sheriff Court of the sheriffdom within which the vessel is situated*'.⁵¹ Even though this reasoning concerned the distribution of domestic Scottish jurisdiction, rather than international one, it is clear that the rationale is sound also internationally in present times. Indeed, it has brought about the adoption of the principle of territorial proximity in the field of interim relief more generally. Such principle has been adopted in the international arena by the Inter-American Convention on Execution of Preventive Measures.⁵² As such is known in Inter-American Spanish legal parlance as '*principio de jurisdicción más próxima*', referring to its underlying rationale: it is manifest that territorial proximity in cases of urgency constitutes the only ground for the exception to the general rule on international competence based on a substantial connection between the case and the forum.

The underpinnings of the principle of *jurisdicción más próxima* can be found in the earliest work of OPERTTI BADÁN, who outlined his ideas on the issue in 1965.⁵³

⁵¹ A R G McMillan, *Scottish Maritime Practice* (Hodge Edinburgh 1926) 12.

⁵² CIDIP II (Montevideo 1979) art 10 authorizes the courts of the State Parties to 'order and execute all preventive or urgent measures of a territorial nature whose purpose is to guarantee the result of a pending or potential suit' regardless of which is the court competent as to the merits if the asset or the person to whom the measure is addressed is located within the territory of the court granting the order And '[i]f the case is pending the court that ordered the measure shall immediately inform the judge or court of the principal proceedings If proceedings have not been instituted the judge or court that ordered the measure shall set a date by which the petitioner must appear in court to assert his rights: he must abide by the final judgment on them rendered by the judge competent in the international sphere in any of the States Parties'.

⁵³ Analysing, in particular, the case of an embargo on foreign assets, he suggested that to submit the enforcement of embargoes (when granted as interim measures of protection) to prior verification as to international competence on the merits by the court

Already then, he submitted that times would come where the regulation of ancillary jurisdiction would be completely autonomous. He predicted that when that happened, it would be important, in order to secure the balance required in regulating ancillary jurisdiction, to ensure that policy considerations with regard to the *lex rei sitae* did not impair the effectiveness of interim measures of protection.⁵⁴ Doubtless, empowering courts to adopt urgent territorial measures of protection regardless of international jurisdictional rules as to the merits of the case is very important as a device in international judicial cooperation, and it does not adversely affect the general principles on international jurisdiction.⁵⁵

7.4. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

In international litigation, the analysis of provisional and protective measures such as the arrest of ships, intended to ensure that the final award⁵⁶ or judgment can be enforced by preserving the defendant's property, could not be disassociated from the examination of recognition and enforcement mechanisms in connection with the final award or judgment they are meant to protect. This type of consideration led the international community to introduce a new paragraph on recognition and enforcement of foreign judgments into article 7 of the 1999 Arrest Convention, in the case where an arrest has been granted to secure such judgment in a different

enforcing the measure on its territory would be not only a technical error but a mistake in practical terms.

⁵⁴ D Operti Badán, *Exhortos y Embargo de Bienes Extranjeros. Medios de Cooperación Judicial Internacional* (Amalio Fernández Montevideo 1976); Operti explains in the Foreword that the volume largely corresponds to his thesis submitted in 1965.

⁵⁵ D Operti Badán, *Actas y Documentos Segunda Conferencia Especializada Interamericana sobre DIP-CIDIP II-* (vol 2 OAS Washington) 52.

⁵⁶ Enforcement of arbitration awards is outwith the scope of this thesis; it is governed principally by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 as applicable in English law (Arbitration Act 1996) and in Scots law (Arbitration Act 1975).

country from the country dealing with the merits. This inclusion is perfectly consistent with the express recognition of ancillary jurisdiction by the Convention in article 2 (3) mentioned above, and shows the intimate connection between, on the one hand, ancillary jurisdiction and, on the other hand, the recognition and enforcement of foreign judgments, in the field of arrest of ships -as well as in PIL cases more generally-. PIL, as built on the foundations of international judicial cooperation, implies the need to implement worldwide expeditious mechanisms for the recognition and enforcement of foreign judgments.⁵⁷

Not infrequently, 'international comity' or 'judicial comity',⁵⁸ are resorted to in order to justify international judicial cooperation. These concepts are deeply rooted in sovereignty-related ideas and therefore, outdated. Even as long as thirty years ago, the sovereignty concept was rejected as an argument for disallowing extraterritorial enforcement of the attachment of assets.⁵⁹ Today, rather than resting on comity, some judicial cooperation instruments rest on reciprocity.⁶⁰ Yet, reciprocity has also been criticised in this area.⁶¹ It is found to reduce the scope for cooperation and to be devoid of meaning as a criterion, since litigants rather than countries are the ones concerned, and, taken to extremes, reciprocity could amount

⁵⁷ D P Fernández Arroyo, 'Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will They Ever Survive' in *Festschrift für Erik Jayme* (Sellier Munich 2004) 169, 183.

⁵⁸ See eg A Johnson, 'Interim Measures under the Draft Principles and Rules of Transnational Civil Procedure: Some Reflections from the English Perspective' in *The Future of Transnational Litigation, English Responses to the ALI/Unidroit Draft Principles and Rules of Transnational Civil Procedure* (BIICL London 2004) 112-113. Under principles of comity, courts of one jurisdiction give effect to the judicial decisions of other jurisdictions, not as a matter of obligation but, out of deference and respect.

⁵⁹ D Operti Badán (1976) 322; F K Juenger, *Selected Essays on the Conflict of Laws* (Transnational Publishers New York 2001) 319.

⁶⁰ Eg Foreign Judgments (Reciprocal Enforcement) Act 1933, s 9; Civil Jurisdiction and Judgments Act 1982; arguably the Brussels regime also rests on reciprocity; see N Andrews, 'Provisional and Protective Measures: Towards a Uniform Protective Order in Civil Matters' [2001] *Unif. L. Rev.* 932.

⁶¹ In Uruguay, reciprocity has been eliminated as a criterion in the case of enforcement and recognition of foreign judgments (E Tellechea Bergman, *La dimension judicial del caso privado internacional en el ambito regional* (Montevideo FCU 2002) 67).

to a denial of justice, just what international judicial cooperation is trying to avoid.⁶² It is submitted that neither comity nor reciprocity should be indispensable *prima facie* to the recognition and enforcement of foreign judgments.⁶³ Both concepts, by establishing a territorial limit to justice, would only protect the evasive defendant rather than the national sovereignty they seemingly purport to advance. Judicial cooperation is an autonomous concept *per se* and there is no need to justify it by having recourse to any other concept. It is an 'imperative factual concept' which does not need further underpinnings.⁶⁴

7.4.1. The United Kingdom Framework

Recognition and enforcement of foreign judgments in this field in the United Kingdom are based on statutes, rules of Admiralty and common law, and the level of assistance needed from the courts of the place of enforcement depends on the country where the judgment originated. Two concentric circles need to be drawn; the first to govern the recognition and enforcement of English, Scottish and Northern Ireland judgments; the second to govern the recognition and enforcement of judgments within the EC.⁶⁵ Out with these two circles, common law rules and particular statutory schemes apply in England and in Scotland.

⁶² D Operti Badán (1976) 55.

⁶³ Reciprocity could only be justified, for example, in the battle against exorbitant *fora*. Fernández Arroyo suggests that States should avail themselves of certain 'protection' in terms of reciprocity i.e. in addition to prohibit its own exorbitant *fora* adopt a common legal regime about it, in which it would be clearly stated that legal decisions from any State in the world based on exorbitant jurisdiction shall not be recognised nor executed therein (D P Fernández Arroyo 'Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will They Ever Survive' in *Festschrift für Erik Jayme* (Sellier Munich 2004) 169, 186).

⁶⁴ D Operti Badán (1976) 56-57.

⁶⁵ EC Regulation 44/2001 and the Brussels and Lugano Convention where appropriate.

7.4.1.1. Intra-UK Judgments

In the case of judgments within the United Kingdom, the rules are to be found in section 18 and schedules 6 and 7 to the 1982 Act. As a general rule, a judgment of a court in civil proceedings given in one part of the United Kingdom may be recognised or enforced in another part on registration of a certified copy of the judgment. Registration gives the judgment for the purpose of its enforcement the same force and effect as if the judgment had originally been given by the registering court.⁶⁶ This rule excludes recognition and enforcement of provisional measures other than an order for interim payment,⁶⁷ and foreign judgments registered for enforcement.⁶⁸ One important reform introduced in this sphere by the 1982 Act⁶⁹ is the place of an inquiry into the jurisdiction of the original court. Prior to the Act, review of jurisdictional competence was permitted in connection with foreign UK judgments (as any other foreign judgments, since it was the principal criterion for recognition and enforcement under common law), and foreign UK judgments were only recognised if the foreign court had jurisdiction according to the PIL rules of the enforcement court. Yet, the 1982 Act following the Brussels regime, allows review of jurisdictional competence up to a very limited extent. Indeed, in the latter, *'absence of a right to query the jurisdiction of the court of origin is a leitmotif'*.⁷⁰

⁶⁶ Sch 6 [6]; sch 7 [6].

⁶⁷ S 18 (5) (b) (d).

⁶⁸ S 18 (7).

⁶⁹ S 19 (1).

⁷⁰ E B Crawford and J M Carruthers, *International Private Law in Scotland* (Green Edinburgh 2006) 209.

7.4.1.2. Extra-communitarian Judgments

In the case of judgments of other states, enforcement is available through two different mechanisms: (a) by an action on the foreign judgment; (b) through registration, in the case of judgments *in personam* directing the payment of a sum of money, according to various statutory frameworks applicable to judgments of courts of countries parties to various conventions to which the United Kingdom is a party. The second mechanism is based on reciprocal arrangements with the United Kingdom as a whole, therefore, applicable in English and Scots law generally in the same fashion.⁷¹ The first mechanism is common law based, therefore the differences between English and Scots law in this sphere are not very profound.⁷²

English or Scottish courts may be asked to enforce a foreign judgment against a ship under arrest within their respective jurisdictions. In English law, to recognise and enforce such judgment they will take into account the nature of the foreign proceedings and decide whether in common law terms they were *in rem* or *in personam*.⁷³ Prerequisites for and the defences against recognition and enforcement are in principle the same as the general principles in the recognition and enforcement of any other civil judgment, and are equally applicable to judgments in connection with actions *in rem* and *in personam*.⁷⁴ The prerequisites are,

(a) The foreign court had jurisdiction to hear the claim as recognised by English PIL rules as far as English courts; and Scots IPL rules as far as Scottish

⁷¹ Administration of Justice Act 1920; Foreign Judgments (Reciprocal Enforcement) Act 1933.

⁷² An important difference disappeared when the non-merger rule of English law was abolished by the Civil Jurisdiction and Judgments Act 1982 s 34.

⁷³ D C Jackson (2005) 728.

⁷⁴ D C Jackson (2005) 728. Jackson argues that the application of the label 'judgment *in rem*' to Admiralty actions is erroneous since in his opinion 'a judgment declaring a lien to exist is no more a judgment *in rem* than is a judgment recognising a proprietary interest in any asset' [27.31].

courts.⁷⁵ Yet, in Scotland the criterion to judge the jurisdiction of the adjudicating court seems to be more internationally-minded since what it is required is compliance with a 'broad international standard of justice'.⁷⁶

(b) The judgment must be final according to the law of the court where it was given.

(c) If *in personam*, the judgment must be for a fixed sum;

(d) The judgment must not be for tax or a penalty.

Only in as far as the requirement of the foreign court jurisdiction there is a distinction between actions *in rem* and *in personam*. In the case of judgments *in personam*, a court will be recognised as having jurisdiction if the defendant is either present in the jurisdiction of the adjudicating court or submitted to the jurisdiction of the court (English law); 'broad international standard of justice' (Scots law);⁷⁷ whereas in the case of judgments *in rem*,⁷⁸ both in English and Scots law, jurisdiction depends on the foreign court having physical control of the *res* at the time of the judgment.⁷⁹

Interestingly enough, since neither an English nor a Scottish court will enquire into the substance of the foreign judgment, foreign liens will be (indirectly) recognised in England and in Scotland.⁸⁰

In English law, '...subject to any jurisdiction requirements and where the subject matter falls within the Admiralty jurisdiction, an English court will enforce a judgment *in rem* through an action *in rem*'. '... [A]s it is now recognised that an action *in rem* is against

⁷⁵ See G Maher, 'Recognition and Enforcement of Non-Scottish Judgments' *The Laws of Scotland, Stair Memorial Encyclopaedia* (SME) (8)153 [405].

⁷⁶ E B Crawford and J M Carruthers (2006) 212.

⁷⁷ Nonetheless, this internationally-minded criterion see *Wendel v Moran* 1993 SLT 44 (OH) where Lord Cullen disregarded the place of occurrence of delict as a sufficient jurisdictional basis for the courts of New York (adjudicating court) since the defendant was neither present in the jurisdiction nor submitted to it. He stressed also that in so far recognition and enforcement there was no significant difference between Scots and English law (48).

⁷⁸ 'Decrees *in rem* stands unaided contra mundum' (E B Crawford and J M Carruthers (2006) 205).

⁷⁹ D C Jackson (2005) 730-732.

⁸⁰ *Minna Craig Steamship Co and James Laing v Chartered Mercantile Bank of India London and China* [1897] 1 QB 55.

a person, any judgment must be focused on that person. The bringing of an action *in rem* to enforce the judgment must be against the owner of the ship at that time'.⁸¹ Indeed, the only *in rem* aspect of a judgment in an action *in rem* is the title conferred by sale by the court. A judgment conferring title by such sale is 'good against the world'. The enforcement of a sale ordered by a foreign court will be through the recognition of the effect of that sale. In English law there is uncertainty about the jurisdiction to accomplish this by an action *in rem*. In *The Despina GK*⁸² jurisdiction was founded on the 'sweeping up' clause in the Supreme Court Act 1982. Yet, it has been doubted whether the jurisdiction maintained by the Act in respect of pre-Act jurisdiction includes jurisdiction *in rem*;⁸³ if jurisdiction *in rem* is not available to enforce foreign judgments of an *in rem* nature, the main disadvantage lies in the inaccessibility of arrest. Arguably though, arrest of the ship in such context would no longer be an interim measure of protection since there is already a judgment.

7.4.2. The Regional Framework (Europe)

The European Council in October 1999 established that enhanced mutual recognition of judicial decisions and judgments would facilitate cooperation between authorities and the judicial protection of individual rights, and agreed that the principle of mutual recognition should become 'the cornerstone of judicial cooperation in both civil and criminal matters within the Union'.⁸⁴ One of the first EU regulatory measures to result from this effort was EC Regulation 44/2001, which covers all areas of civil and commercial law except for those that are expressly excluded from its scope,⁸⁵ adopted on 22 December 2000.

⁸¹ D C Jackson (2005) 732-733.

⁸² [1982] 1 Lloyd's Rep 553 (Sheen J.)

⁸³ D C Jackson (2005) 728.

⁸⁴ Paragraph 33 of the Presidency Conclusions of the European Council, 16 October 1999 (Press: Nr: 200/1/99).

⁸⁵ H Ringbom, 'EU Regulation 44/2001 and its Implications for the International Maritime Liability Conventions' (2004) 35 JMLC (1).

While an order for the arrest of a ship is in principle within the scope of application of the European framework, since the definition of judgment is wide enough to cover interim measures of protection, recognition and enforcement of an arrest order is an obligation only if defendant have had the opportunity to put his case before the court made the order (therefore *ex parte* orders are excluded).

The underlying principles of the European regime are that, save for specified exceptions, jurisdictional enquiry is for the adjudicating court only. Subject to specific and limited exceptions, once a judgment is given on a civil and commercial matter by a court of a contracting State, and is enforceable there, it is to be recognised and enforced in each contracting State. Recognition and enforcement may be refused only (i) if such recognition and/or enforcement is manifestly contrary to public policy in the Member State in which recognition is sought; (ii) in the case of default of appearance or lack of 'due process' in the adjudicating court; (iii) in the case of irreconcilability of judgments.⁸⁶ The paradigmatic English distinction between actions *in rem* and actions *in personam* is irrelevant in this context, a point made clear in the decision of the ECJ in *The Maciej Rataj*.⁸⁷

7.4.2.1. The *Lex Specialis* Provision Revisited

The *lex specialis* provision of the European regime examined in Chapter 6 is not limited to direct jurisdictional rules but includes indirect jurisdictional rules, i.e. provisions on recognition and enforcement of foreign judgments. In this context is where the 1999 Arrest Convention, and the possibility of its adoption by the EC, becomes relevant.

⁸⁶ Art 34 Regulation 44/2001.

⁸⁷ *Maciej Rataj (The Tatry)* (Case C 406/92) [1995] 1 Lloyd's Rep 302 (ECJ).

7.4.3. The 1999 Arrest Convention

The 1999 Arrest Convention has introduced in its article 7 new paragraphs dealing with recognition and enforcement of foreign judgments in relation to the cases where an arrest has been granted to secure such judgment in a different country from the country dealing with the merits. As mentioned above this inclusion adds to the coherency amongst the Convention's provisions. Differently from the provision dealing with ancillary jurisdiction (article 2 (3)) which was adopted without considerable discussion,⁸⁸ the provision relating to recognition and enforcement of foreign judgments was debated extensively. It may be argued that these different reactions on the part of States representatives evidences that ancillary jurisdiction, on the one hand, and, the recognition and enforcement of foreign judgments, on the other hand, represent different stages of judicial cooperation between States.

The central issue was the need for such a provision to fill a gap left by the 1952 Arrest Convention. It was argued that without a provision of this nature arrest as a provisional and protective measure seemed meaningless.⁸⁹ Proposals were made to leave the matter to the *lex fori* of the country where the ship was arrested (*lex fori arresti*). Fortunately, this 'disruptive' temptation was overcome, and recognition and enforcement were finally provided for in article 7 paragraphs 5 and 6.

Paragraph 5: 'If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting there from shall be recognised and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that: a. the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and b. such recognition is not against public policy (*ordre public*).'

⁸⁸ *The Travaux Préparatoires*, see F Berlingieri (2006) 536-537.

⁸⁹ *The Travaux Préparatoires*, see F Berlingieri (2006) 644-647.

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

It is interesting to note that the approach taken by the 1999 Arrest Convention towards recognition and enforcement, even when it is fully consistent with the purpose of the Convention, is not the only possible approach to the matter. It denotes quite a high standard of international judicial cooperation. A different example is given by the aforementioned 1979 Inter-American Convention on Execution of Preventive Measures. In the latter, the judge adopting the 'urgent measure' exercising ancillary jurisdiction is not obliged to recognise or enforce the final judgment. It is understood that recognition and enforcement of foreign judgments 'is a different stage of international judicial cooperation' (different from the adoption of preventive measures), therefore, ruled by its own provisions and not necessarily connected.⁹⁰ Notwithstanding the different phases of international judicial cooperation, it is here submitted that the approach taken by the 1999 Arrest Convention is to be preferred, particularly in Europe, where the predictions of OPERTTI BADÁN, who in 1965 submitted that times would come where the regulation of ancillary jurisdiction would be completely autonomous, have become black letter in the European jurisdictional scheme.

7.5. FINAL REMARKS

Ancillary jurisdiction in the field of interim measures of protection should be regarded as a paramount instrument of judicial cooperation. The bases of jurisdiction to grant measures intended to ensure that the final award or foreign judgement can be enforced by preserving the defendant's assets or property, could be of a more far-

⁹⁰ See R Herbert and C Fresnedo de Aguirre, 'El Arresto de Buques y el Principio de Jurisdicción Mas Próxima' [1993] *Revista de Transporte y Seguros* 165.

reaching nature than jurisdictional grounds to sustain jurisdiction on the merits of the case in the international arena. As mentioned above MANN assessed that this was perfectly compatible with a well balanced jurisdictional system.⁹¹ Yet, it is here submitted that this is so if the distribution of competences amongst the different jurisdictions involved were so conceived as to serve proportionality, expediency, supportiveness and a good overall management of the case on the merits.

Moreover, and with a view to furthering international uniformity in questions relating to the enforceability of security interests in ships, it should be stressed that comparative case law related to the arrest of ships in this sphere shows that ancillary jurisdiction as examined in this chapter is a fertile field for procedural harmonization.⁹² It is here submitted that English and Scots law would both benefit if a foreign claimant/pursuer would face similar conditions in order to arrest a ship in England or in Scotland for the sole purpose of interim relief. The current need to start proceedings on the merits in English law, and the fact that ancillary jurisdiction in Scotland seems to be limited to foreign proceedings or arbitral proceedings that have already been commenced, do not but jeopardise the protective function of arrest of ships in the international arena.

In the eventuality that the 1999 Arrest Convention is adopted by the EC, its recognition and enforcement regime would overlap with the EC Regulation 44/2001, but they would not collide, since both instruments approach the issue of recognition and enforcement at the same level of commitment between States. Thus, in the European context, the 1999 Arrest Convention would advance international judicial cooperation in the field. In turn, this would enhance maximum efficiency in case management as the recognition and enforcement of the judgment on the merits by the courts adopting the provisional and protective measure is indeed the necessary

⁹¹ F A P Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years* 186 RdC 9 (1984) 58.

⁹² See V Ruiz Abou-Nigm, 'Ancillary Jurisdiction for Interim Measures of Protection in Support of Cross-Border Litigation' (2005) 4 *Uniform Law Review* 759-784.

CHAPTER EIGHT

Conclusions

This study started from the postulate¹ that arrest of ships can be said to be a truly PIL institution. The international community has taken this view since the 1930s, therefore, harmonisation efforts have been put forward in this sphere, and international Conventions have been agreed. The 1952 Arrest Convention is currently in force in most of the shipping countries. Yet, the success of this Convention, despite its more than eighty ratifications, is debatable. Procedure is a culture-bound matter, reflecting the fundamental values, sensibilities and beliefs of a certain society.² And this affirmation gets even stronger when it comes to Admiralty jurisdiction in Great Britain. However, this research has been conducted on the premise that different systems are becoming increasingly harmonised in the procedural mores. The study shows that arrest of ships, and its evolution over the centuries, represents an excellent example of the characteristics of a harmonization process. Yet, the choice-of-law methodology still has a paramount role to play in this context.

8.1. The arrest of ships is a very distinctive institution. It is not

treated along with interim measures of protection in English law, and it does not

¹ 'Any argument in defence or support of a given proposition, however good or bad the argument may be, makes conscious or unconscious use of other propositions, and the status of these in the argument, because they are there consciously or unconsciously taken for granted, is the status of postulates', CJ Keyser quoted in W W Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press Cambridge Mass. 1942) 48.

² O G Chase, 'American "Exceptionalism" and Comparative Procedure' (2002) 50 AJCL 277.

adjust perfectly to the law of diligence in Scots law. Its functions, namely, its protective, security and jurisdictional functions, as examined in this thesis, go beyond interim relief. Yet, this thesis stresses that the characterization of arrest of ships as a provisional and protective measure is a necessary part of the substantive unification sought by the international community in this field. The international Arrest Conventions, rather than creating an organised concept of arrest of ships, have put together distinct causes of action linked by common factors. That is the reason why characterization problems arise, and the need to delineate the scope of arrest of ships as a PIL category becomes clear. In the Conventions, arrest of ships includes arrest as a protective measure 'to secure payment of a maritime claim'; arrest as a preventive measure to enforce maritime liens; and arrest as a provisional measure 'to secure the *res*'. After studying these three different types of measure and their different functions, the research shows that it is the provisional character of arrest of ships and not its functions that provides the scope of arrest of ships as a PIL category in the Conventions.

Notwithstanding the different functions of arrest of ships as examined in this thesis, the research shows they are very much interconnected; these functions are best understood if looked at in terms of one another. The protective function is the most obvious one and without it arrest of ships could not display the other two functions. Arguably that is the reason why arrestment *ad fundandam jurisdictionem* is not technically diligence in Scots law. In turn, the jurisdictional function is, from a PIL perspective, its central one, yet it would not be as effective in the international sphere as a cooperative device if arrest of ships would not give the claimant/pursuer a certain kind of security for his claim; that is the reason why the security function of arrest of ships has been considered as its most relevant.

8.2.

While it is often assumed that Scots law will always follow English law in admiralty matters³ this thesis shows that this statement is not necessarily correct; indeed, in the sphere of arrest of ships, it is particularly inaccurate. The differences are not only historical but conceptual. The main difference is that admiralty arrestment in Scots law forms part of the general law of diligence, which has no English counterpart. This has, in turn, advantages and disadvantages on both sides of the borders. Having a conceptual framework helps to understand the different functions and effects of the measure; however, these general concepts – with a clear Romanist mark – were not crafted to meet the needs of maritime commerce; whereas that, indeed, can be said about arrest of ships as developed in English law.

Most of the differences, however, have been harmonised by the 1952 Arrest Convention as enacted in the United Kingdom by the Administration of Justice Act 1956, now in England consolidated in the Supreme Court Act 1981. The remaining differences are not so much between English law and Scots law but between arrest of ships to enforce a maritime lien or a mortgage, hypothecation or other charge of the same nature; arrest of ships to protect the *status quo* in the case of claims related to possession, title or forfeiture of the ship herself; and arrest of ships as a true provisional and protective measure, i.e. a measure to secure a maritime claim. The study shows that such differences are hidden within the international Conventions and within English law; arguably in the former due to the influence of the latter. It is the action *in rem* that gives arrest of ships to enforce maritime liens distinctive features which, it is here submitted, should not be extended to cases where such 'real' linkage between the *res* and the dispute does not exist. It is also submitted that the indiscriminate approach of English law in this regard is the reason why the main

³ *Boettcher v Carron Co* 1861 23 D 322; *Currie v McKnight* [1897] AC 97 (HL); *SS Blaimore Co Ltd v Macredie* (1898) 25 R (HL) 57, 59; *Clydesdale Bank Ltd v Walker & Bain* 1926 SC 72, 82; *The Goring* [1988] 1 AC 831 (HL) 853.

functions of arrest of ships as identified in this thesis are attributed to the *in rem* claim rather than to arrest in English law.⁴

In Scots law, the distinction between the different functions of arrestment of ships is clearer. Furthermore, recent law reform has brought the arrestment of ships in Scotland into line with the latest international trends in the sphere of provisional and protective measures.

8.3. One of the questions considered in this thesis, *de lege ferenda*, is whether it is more convenient to approach the arrest of ships as pertaining to a broader category (interim relief/diligence/provisional and protective measures) or if it is preferable, for the sake of adjustment to the particular needs of maritime commerce, to treat it as a category of its own – as it is done in English law. The research shows that the modern Scottish approach that treats admiralty arrestment within the general law of diligence but as a separate category seems to be the best option. It is here submitted that arrest of ships as an institution in the international sphere would be advanced by meeting the minimum standards of provisional and protective measures. The advantages would be twofold. (i) For the purposes of interpretation, in the case of questions concerning matters governed by the international Arrest Conventions which are not expressly settled in them, recourse could be taken to general principles of transnational civil procedure. (This approach is not against an *in ordinem* interpretation in as far as those general principles do not go against anything that has been specifically agreed in the particular Convention). (ii) To bring arrest of ships in line with the referred international standards would advance the ultimate aim of the international Conventions: uniformity in application.

⁴ To put it another way, in English law arrest as such only displays the protective function; it is for the *in rem* claim as a distinctive Admiralty procedure to display the three, in this order: the security function (issuance of the *in rem* claim form), the protective function (arrest) and the jurisdictional function (service of the *in rem* claim).

On the one hand, this thesis shows that the *ex facie* conceptualization of arrest of ships as an interim measure of protection in the Conventions, has not been as effective as it could have been, since it was not applied with consistency. Furthermore, the lack of a broader conceptual framework in which arrest of ships could develop (arguably as a provisional and protective measure), has represented a setback to uniformity, and more importantly, has left arrest of ships far behind the most accepted international standards with regard to provisional and protective measures. The research suggests that these drawbacks could be overcome if the transnational origin of arrest of ships as an institution, and its 'mixed legal' nature, were borne in mind whenever the Conventions are to be applied.

On the other hand, treated as a category of its own, its distinctive features become its defining features, and in this sense the unimportant role of *fumus boni iuris* and *periculum in mora* in English law could maybe find justification in the pressing needs of maritime commerce. Yet, there is not even such justification for the absence of a cross-undertaking in damages in the case of arrest of ships in English and in Scots law; that represents a needless imbalance between the parties to the dispute. The study shows that this feature is a result of the confusion between arrest of ships, maritime liens and the action *in rem*. If it was possible to look at the three as separable legal concepts, a cross-undertaking in damages by the claimant could be required in the ordering of an arrest of ships as an interim measure of protection; whereas if arrest is sought to enforce a maritime lien through an action *in rem*, it would no longer be treated as an interim measure of protection but as an inherent part (as the preventive phase) of an enforcement procedure. Thus, no cross-undertaking in damages would be required in those cases.

It is regrettable that Scots law has not taken the opportunity of the recent law reform to enhance this possibility. Having done so would have been consistent with the latest trends in the sphere of provisional and protective measures established by

the international community as of late. Surely the decision is grounded in the fear that having done so would have made Scotland a less favourable place to arrest a ship as compared to England. Certainly, policy considerations in this matter outweigh technical ones.

8.4. English law requires a distinction between arrest as an interim measure of protection, and arrest of ships to enforce a maritime lien. The linkage between arrest and the *in rem* claim has fewer advantages than disadvantages. This linkage has undermined the correct application of the 1952 Arrest Convention in English law. This dysfunctional approach to maritime claims severely jeopardises harmonisation. JACKSON is of the opinion that the civil law approach is preferable in this regard, i.e. to abandon the fallacious distinction between *in rem* and *in personam* claims; to recognise the real targets as those interested in the ship; and to confer priority to certain kind of maritime claims.⁵ His analysis has been pivotal to this thesis. Certainly, the decision of the House of Lords in *The Indian Grace No.2*⁶ shows that the system evolves in that direction. However, the research suggests that it would certainly take much more for English Admiralty jurisdiction to depart from its most deeply rooted traditions and to allow for the arrest of ships, in certain cases, to be a truly provisional and protective measure characteristic of maritime commerce, but first and foremost a provisional and protective measure. This thesis emphasises the importance of such distinction in the international sphere with a view to enhancing the protective function of arrest of ships in the context of international judicial cooperation.

⁵ D C Jackson, *Enforcement of Maritime Claims* (4th edn LLP London 2005) 240.

⁶ [1998] 1 Lloyd's Rep 1 (HL).

8.5. In Scots law arrestment of ships as part of diligence on the dependence has moved towards a new system of judicial authorisation of the diligence, thus following emerging international standards on the field. When the research for this thesis was being undertaken no steps had been taken in Scotland to give legislative effect to the Scottish Law Commission's Report on Diligence on the Dependence and Admiralty Arrestments. Fortunately such steps were eventually taken and the Bankruptcy and Diligence etc. (Scotland) Act 2007, which improves diligence on the dependence in Scotland and brings it into line with the most accepted international trends in the field, has emerged. Schedule 4 introduced by section 213 of the Act modifies various enactments relating to admiralty actions and the arrestment of ships. However, so far as concerns the requirements of arrest of ships in the 1952 Arrest Convention, Scots law seems to be departing from it rather than aligning to it; this thesis shows that the 1952 Arrest Convention is the one that is not in line with international trends of provisional and protective measures more generally.

8.6. Most of the inconsistencies of the current law of arrest of ships in England and in Scotland are owed to the lack of attempt to recognise that the institution has been constantly changing since its very origins. The arrest of ships, as a mixture of ancient doctrines and new developments, national, international, supranational and a-national, belongs to the *lex maritima* of all times. This characteristic of the institution has encouraged the backward-looking approach that has historically dominated Admiralty decisions in this field, and that has sometimes generated less evolution than confusion. The research shows that changes over the centuries have been in the way of transposition and cross-fertilisation. Consequently, lack of historical accuracy was a common drawback found in many dicta in the nineteenth century in England and in Scotland that created perplexity and inconsistency. And from then until present times Admiralty

jurisprudence has been trying to reshape, to describe and to understand the arrest of ships. It is here submitted that at present arrest of ships as a PIL category in the international sphere has the characteristics of a mixed-legal institution. It does not derive wholly from any principle borrowed from any particular legal family and it is not capable of analogy to any other institution providing for similar functions. It is the creature of the amalgamation of different legal systems, policies, theories and practices throughout the centuries. It could be argued that every institution crafted in the international sphere, and particularly for international commerce, is inherently mixed due to the fact that it has been created as a compromise amongst the different legal systems of its creators. However, it is not the mixture but the degree of mixture and the degree to which the influences from the different traditions remain readily identifiable that makes arrest of ships a mixed legal institution.

8.7. Arrest of ships is a means of obtaining security for a claim.

This thesis examines that assertion from a PIL perspective as the effects of the security function of arrest of ships are left to the *lex fori arresti* whereas the security-related effects in the adjacent field of maritime liens present applicable law problems that do not have a definite answer yet. The inconsistencies in this sphere cannot be overestimated. One of the arguments advanced in this thesis is that in modern PIL, where principles rather than legal fictions are necessary, the line between substance and procedure, and right and remedy, should not be drawn arbitrarily as to evade the application of foreign law. Hence, there is no place to consider maritime liens as procedural; moreover, there is no place either to consider the priorities they imply as remedial. Consequently, neither the right nor the priorities intrinsically adjudged to the right should be treated as meriting a knee-jerk reference to the *lex fori*. Both right and priority are inherently substantive and should coherently be governed by the *lex causae*. That is, a fragmented approach to the characterization of maritime liens in PIL, either through the distinction between substance and procedure or right and remedy, should be resisted; it enhances the

undesirable consequences of 'forum shopping'. In the 21st century a maritime lienee should not be in a position of having his claim substantially satisfied or entirely shut out, depending upon the legal system of the jurisdiction in which the ship is arrested and sold. Against this background, the far-reaching concept of 'procedure' in English law as to cover the existence of maritime liens should be seen as a thing of the past. Furthermore, this thesis submits that it is inconvenient to refer the connected issues of existence and ranking of maritime liens to different laws; it could lead to incoherencies that would not advance the policies underlying neither the *lex causae* nor the *lex fori*. The thesis shows that time is ripe for the re-examination of PIL rules in this sphere, and it is suggested that the fact that in Scots law the functions of arrest of ships are easier to separate could, *de lege ferenda*, make a difference in its 'IPL' rule in this regard. It should lead to the adoption of a conflicts solution more consistent with the international approach that has distinguished IPL in Scotland.

8.8. Notwithstanding the foregoing, the research shows that, particularly in the sphere of ranking of maritime claims, the choice-of-law methodology hardly attains the most appropriate solution to the conflict of laws in that sphere with a view to the juridical continuity of legal relations. The 'internationalist' methodological approach to the conflict of laws is that whenever unanimity is not attainable in the international sphere insofar as to achieve a uniform solution in a certain field, the choice-of-law methodology remains the only solution. In the field of ranking of maritime claims, this thesis shows that the relationship between the two main methods of PIL works also in the contrary sense. The research demonstrates that in this sphere the choice-of-law methodology points at the law of the flag as the only possible option to provide foresee-ability and decisional harmony. That is why, following the internationally accepted link between a ship and the country of her flag for registered securities, it has been strongly argued that all issues of property in a ship should be referred to the law of the flag. Nevertheless, one of the arguments advanced in this thesis is that looking

at the reality of ship registration systems, and bearing in mind that most ships nowadays fly flags of convenience, adopting such a connecting factor could be regarded as anachronistic. Moreover, applicable law issues connected to maritime liens could end up being governed by the law of a legal system totally unconnected to the case. The 'uniformist' method imposes itself as the only mechanism to achieve not only foresee-ability and decisional harmony but, arguably, also a more equilibrate final outcome obtained via a legal instrument especially created to strike the difficult balance between the interests of all types of organizations concerned with shipping, namely, financing, construction, ownership and supplying of ships. Furthering uniformity in this sphere, however, has proved to be a difficult endeavour; the entry into force of the 1993 MLM Convention in 2004 is a first step.

8.9. Arrest of ships is a typical jurisdictional basis in the maritime sphere. Despite it has for long been part of the *lex maritima* it has not been free from criticism. One of the aims of this thesis was to provide the theoretical underpinnings of the exercise of jurisdiction as a consequence of the arrest of ships, and to assess the convenience of its survival in the process of Europeanization of PIL. The main question to be answered was whether arrest constituted a sufficient connection with the forum so as to justify the assumption of 'competence' by that forum in the absence of any other relevant connections. This thesis submits that the survival of *forum arresti* as a specific jurisdictional basis for maritime claims, in the context of the Europeanization of PIL, is positive. By contrast, the assessment is negative when it comes to general jurisdiction in any context (i.e. the assessment is not limited to the European framework). No arguments can be found to justify the arrest of a ship as a general jurisdictional ground in any case; to put it another way, for the purpose of establishing general jurisdiction there is no room in modern PIL 'to treat a ship as domiciled where it can be found'⁷. Therefore, to maintain *forum arresti* as a general jurisdictional basis denotes a non-balanced system. However, international

⁷ See W Phillimore, The *travaux préparatoires* of the 1952 Arrest Convention (CMI 1997) 400.

adjudication of jurisdiction is not an aim of its own, but a way of assuring juridical continuity to international legal relations. Combining a general jurisdictional basis such as the defendant's domicile as an alternative to party autonomy with a thoughtful scheme of specific jurisdictions should avoid a clash between the interests of the claimant and those of the defendant. This is exactly what the European regime has attempted to do. In that context, it is submitted that *forum arresti* in the case of arrest of ships is a specific cooperative forum. A ship is elusive hence the power to arrest in any port and consequentially ground jurisdiction therein is as important in modern times with ships being owned singly, and flying flags of convenience, as it has always been, due to the speed with which the defendant's main asset could leave the jurisdiction. Many times there will be no connection between the forum and the dispute other than the ship being fixed by arrest in its territory i.e. in most cases this *prima facie* not so strong connection is the strongest connection that the ship will ever have with any forum.

8.10.

To make that assessment the thesis examines the proximity principle as it operates in the law of jurisdiction in this context. The role of the proximity principle in this sphere is two-sided: to justify jurisdiction on the merits following the arrest of the ship (direct jurisdiction) and to justify the adoption of arrest as a provisional and protective measure, regardless of a court's lack of jurisdiction on the merits (ancillary jurisdiction). The thesis examines these two applications of this principle and concludes that the rationale in each situation is completely different. In the context of ancillary jurisdiction, territorial proximity is used to tackle urgency; in the sphere of direct jurisdiction, territorial proximity constitutes the connection between the dispute and the forum. The 1999 Arrest Convention takes account of both sides of the question.

8.11.

As for the counter-argument that *forum arresti* enhances 'forum shopping', this thesis shows that such a practice is encouraged the

most by the *lex fori* approach to the conflict of laws rather than by a specific jurisdictional ground such as *forum arresti* in the case of ships. Arguably, in the process of Europeanization of PIL, where the room for considerations as to the appropriateness of the forum in relative terms (as opposed to the abstract rules of jurisdiction prescribed by the regime) is getting tighter, the *lex fori* approach to applicable law issues represents a very real incentive to 'forum shopping'. The role of the *lex fori arresti* has been visited and revisited throughout this thesis. Outwith the natural domain of procedure, and, except for the times when it is truly applied qua *lex causae*, its influence is unhelpful. The research shows that as applied in the context of the 'uniformist' methodology via *lex fori* characterization it poses a drawback to the uniformity sought by the international community. Moreover, as a choice-of-law methodology of its own, it benefits only those litigants who are in the position to take the best out of 'forum shopping' opportunities.

8.12.

Judicial cooperation in the sphere of interim measures of protection in the international mores is paramount. The thesis examines the doctrinal underpinnings of the distinction between jurisdiction on the merits and jurisdiction for the sole purpose of interim relief. It names the latter as 'ancillary jurisdiction' since its main rationale is to be supportive of a good case management on the merits. The 1952 Arrest Convention has been a pioneer in fostering this distinction in the field of arrest of ships; arguably to confirm arrest of ships as a PIL institution, and in turn, maritime law as a fertile field for the development of this distinctive branch of the law. The Europeanization of PIL has brought further advancement of the distinction more generally into English and Scots law. The thesis suggests that this has the potential to enhance the protective function of arrest of ships. For that actually to happen, arrest of ships should be provided for as a true provisional and protective measure in support of foreign proceedings or arbitration in English and Scots law, without the limits currently imposed by the Civil Jurisdiction and Judgments 1982 Act; the need to start proceedings on the merits in English law, and the fact that arrestment in the context of ancillary jurisdiction in

Scotland seems to be limited to foreign proceedings or arbitral proceedings that have already been commenced, jeopardise the protective function of arrest of ships in the international arena.

8.13.

What does the future hold for the arrest of ships in the European context? If the EC was to adopt the 1999 Arrest Convention advancement would be brought to the enforcement of maritime claims within Europe. First and foremost, the new scheme moves forward to a plain recognition of the *forum arresti* as a specific jurisdictional ground, thus allowing all State parties to be on an equal footing to try to 'share the pie with England'. Furthermore, it would represent the adoption at the international level of the way Scots law has historically dealt with arrestment as a jurisdictional ground. This thesis suggests that the dual formula *forum arresti-forum non conveniens* in the case of arrest of ships could help to consolidate a well-balanced specific jurisdictional scheme for maritime claims in the European regime.⁸ In a nutshell, this thesis suggests that the adoption of the 1999 Arrest Convention would represent the availability of a cooperative PIL device, *forum arresti*, to all member States regardless of their different domestic laws. Moreover, it would represent also the availability in this sphere of *forum non conveniens*, 'as distilled and matured in Scotland... one of the country's best known exports'.⁹ Hence, it would mean fitting the European admiralty scheme into English and Scottish traditions. The result would have a very recognisable British taste; a good one, though.

⁸ The problem that this thesis envisages is that, even if the 1999 Arrest Convention is adopted by the EC, the deeply rooted civilian reluctance to decline jurisdiction would advance a restrictive interpretation of the *forum non conveniens* allowance of the 1999 Arrest Convention in its application via the *lex specialis* provision of the European regime, so as to prevent *forum non conveniens* to end up winning a battle (even if it is only a battle, not the war). Notwithstanding this fear, the wishful thinking is that as present times are times of integration rather than battles or wars there will be no winners or losers but only Europeans for the ECJ to think of when deciding on the interpretation of these provisions.

⁹ Lord Hope of Craighead (HL), 'Forum non conveniens: where next?' Conference Paper, Journal of Private International Law Conference 2007, Birmingham 26 June 2007, 1.

Postscript

Modern times require a smooth blend between common law and civil law. As examined in this thesis, the arrest of ships as a mixed legal institution is an amalgamation that works in practice, even when the master blenders¹⁰ do not follow the same rules when deciding on the composition of the blend. Yet too often sight of the main objective, consistency, is lost. In the 'evolutionary process' of Europeanization of PIL, consistency is more important than ever before, not only within one national legal system, but within the European regime seen as a whole.

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¹⁰ A master blender is an individual who decides on the composition of blended spirits. For example in the Scottish whisky industry master blenders choose which single malts and grain whiskies are combined to make particular blended whisky.

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