

ARREST OF SHIPS
ESTONIAN MARITIME LAW AND PRACTICE UNDER REVIEW

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In 2015, the Ministry of Economy and Communications commissioned an analysis of the necessary tasks for the codification of the existing Estonian maritime law (*de lege lata*) and the law firm Consolato del Mare OÜ was assigned the task. A report on the analysis on 265 pages was then compiled and delivered to the ministry by three experts: Indra Kaunis as owner of that law firm, Alexander Lott and the author of this article.¹ Based on this knowledge, the Ministry proceeded with the State procurement tender #176195 “Maritime Law Review” and a 3-year project (2017 – 2019) was launched. These three experts – Indra Kaunis, Indrek Nuut² and the author – agreed among themselves which maritime laws they will analyse as the primary experts, and who will be the secondary expert helping the first in certain specific questions.

This article is written solely by the author as the primary expert on the basic elements of the arrest of ships and is devoted to the general analysis of past and present international commitments and national legislation of Estonia concerning the arrest of ships. This has been conducted without thoroughly dealing with the contradictory and disputable court and bailiff practice in this century, which has been covered in detail by Indrek Nuut and Indra Kaunis. The analysis conducted on this important topic shows unequivocally that revision of the existing law is imminent and definitely necessary not only in order to meet the interests of the creditors of shipping but also to improve the image of Estonia as arrest issues have arisen with foreign flagged vessels. Therefore, the arrest of ships calling on Estonian ports or terminals is prevalent as an international commercial law problem, not a domestic one.

THE MEANING AND SOURCES OF LAW ON THE ARREST OF SHIPS FOR ESTONIA

“From world maritime practice a number of unique institutes in the field of maritime law have developed, such as general average, the limitation or release of the liability of the carrier, and salvage of property at sea, which make maritime law an interesting subject for lawyers. Among them, the *arrest of ships*³ on the basis of a maritime claim or maritime lien is an instrument which provides the possibility for a creditor to obtain an acceptable security for his or her valid claim through the detainment of a ship by the responsible Court. It could be a paradox but this institute of the arrest of ships has been elaborated not only in the interest of shipping service providers in order to get their bills paid but also in the interest of ship owners and operators who aim at sailing their ships without delays in ports because of unpaid invoices for the bunker, other supplies, port dues and so on. For this reason, ship owners have to accept this kind of conservatory arrest of ships aimed at

¹ This analysis is in Estonian only: <http://www.just.ee/et/oiguspoliitika/kodifitseerimine-ja-oigusloome-arendamine/tegevused/me-reoiguse-revisjonist>

² Owner of the law firm MALSCO AS.

³ “Arrest” means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument – Article 1 (2) of the International Convention on Arrest of Ships (adopted 12 March 1999 in Geneva, entered into force 14 September 2011; hereinafter – Geneva 1999 Convention), see: *Official Gazette* – RT II, 2001, 9, 51.

securing the claims of their creditors against debtors in default or *in rem* proceedings in the United Kingdom (UK)⁴ getting in return the possibility to effectively use their main assets – ships without any interruption.”⁵

As we have understood from the legal definition of the “*arrest of ships*” the main reason for that is to obtain security for the creditor’s maritime claim by detaining the ship usually in port by judicial procedure whether she is ready for sail or not. Usually, the owner or operator of the ship will put up the security requested by the Court and the ship will be released from arrest and if necessary the civil case will be decided later on the merits in the arresting Court or in any contracted (agreed) court or in arbitration. In legal literature, professionals bring up two other purposes for an arrest of a ship:

- a) arrest of the debtors vessel is a preliminary step to assist the creditor, which makes it reasonable to submit further a claim for the adjudication of the case on the merits to the competent court or arbitration together with payment of any fees. Quite often it is the only way to get the debtor into that court. In this respect Professor Robert Grimes states: “In some states, the idea of taking possession of the defendant’s property as a preliminary, so as to get him into court, “provisional security”, is well established.”⁶ The author has underlined himself the necessary secondary purpose of an arrest but with a critical remark that the legal definition of an arrest of a ship provides nothing about taking possession of that vessel but just prohibiting her removal during this detention.
- b) the third purpose could be the intention to determine the jurisdiction for the adjudication of this civil dispute on the merits if the parties have no agreement on that issue. For this situation where *forum shopping* is possible for the holder of a maritime claim Article 7 (1) of the Geneva 1999 Convention provides as follows: “*The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.*”

A court order for the arrest of a ship will be effected in Estonia by a bailiff by presenting it to the master of this ship and seizing the main documents of the ship. When the requested security has been provided, the Court will order the release of this vessel and bailiff will return those documents to the master.

Among the sources of law related to the arrest of ships in Estonia, we must conduct an analysis of the priority of different sources – international conventions and national laws – in order to fully understand the applicability of legal norms. To that end, the important provision in the Constitution of the Republic Estonia is § 123 (2), which provides that “*when laws or other legislation of Estonia are in conflict with an international treaty ratified by the Riigikogu,⁷ provisions of the international treaty apply.*” This confirms unequivocally that Estonia honours one of the basic principles in public international law – *pacta sunt servanda* (accepted obligations should be fulfilled in good faith), which is embodied in the UN Charter (Article 2 (2)) as well as in the Vienna 1969 Convention on the law of treaties (Article 26). Moreover, the second sentence of § 3 (1) states: “*Generally recognized principles and rules of international law are an inseparable part of the Estonian legal system.*” Conclusively, the named part of international law has priority over Estonian national law (except the Constitution) and should be analysed first.

The Republic of Estonia was first declared on the 24th of February 1918 and regained that, temporarily lost, (1940) independence on the 20th of August 1991. The restoration of independence took effect on the basis of the principle of the continuity of a State in public international law which has been accepted by the world community of States except Russia. Therefore, in identifying the historic development of international obligations related to the arrest of ships, one has

⁴ Robert Grime, *Shipping Law*, 2nd ed., London: Sweet & Maxwell, 1991, pp. 11–20.

⁵ Heiki Lindpere, Maritime Claims & Liens, Arrest of Vessels and Estonian Perspective – in: *China Oceans Law Review*, 2012, No 1, pp. 156–157.

⁶ Robert Grime, *ibid.*, p 15.

⁷ *Riigikogu* is the parliament of the Republic of Estonia.

to start with the Brussels 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (hereinafter – Brussels 1926 Convention)⁸ and which the *Riigikogu* ratified in 1928.⁹

The Government did not pay due attention to the Brussels 1926 Convention when the draft ships property law (hereinafter – SPL¹⁰) was being deliberated and preferred to incorporate into that law the list of internationally accepted maritime liens¹¹ from article 4 (1) of the modern Geneva 1993 International Convention on Maritime Liens and Mortgages¹² (hereinafter – Geneva 1993 Convention). It should be noted that the Brussels 1926 Convention has one additional maritime lien on its list – namely, “all debts according to the contracts or operations which the master of the vessel (whether owner of her or not) has made in order to preserve the vessel or continue the trip.” “Experts for the parliamentary Legal Commission, the author and Indra Kaunis recommended denouncing this old convention first, and then adopting this law together with Section 74.”¹³ “In fact, the *Riigikogu* deliberately created such a unique situation where the adopted law was not in full conformity with Estonia’s international commitments consented by the ratification of the Brussels 1926 Convention in 1928. It took more than two and a half years to denounce the convention of 1926 and liquidate the dispute. After all, Estonia has been a Party to the Geneva 1993 Convention since 5 September 2004.”¹⁴ This dispute was tested in Court in November 1998 when the author had to provide legal opinion in relation to the arrest of *M/V UNISELVA*, which will be discussed in more detail in the next subsection of the article.

There are two international conventions specifically regulating the arrest of ships today: 1) International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952 (entry into force 24 February 1956, around 85 State Parties; hereinafter – Brussels 1952 Convention) and 2) International Convention on the Arrest of Ships, 1999, Geneva, 12 March 1999 (entry into force 14 September 2011, 17 State Parties by 2014; hereinafter – Geneva 1999 Convention).¹⁵ When the Geneva 1999 Conference on the arrest of ships was announced, the Estonian Government decided not to become a Party to the Brussels 1952 Convention but the delegation participated at the Geneva conference, signed the text of the Geneva 1999 Convention on 12 March 1999 and later ratified it on 14 March 2001;¹⁶ nevertheless, the latter was not in force at that time and had achieved very few changes in the text in comparison to the Brussels Convention. The author found in his study the following changes:

- a) The list of maritime claims as the basis for the arrest of a ship in both conventions has been made as a closed list (only legal basis with no additions possible), and the lapsing of 47 years led to increasing the types of maritime claims from 17 to 22 different items;
- b) The two conventions have different rules concerning application. Namely, the Brussels 1952 Convention is applicable and arrest is only possible (limited) on the basis of all listed maritime claims in cases when the arresting State and the State the flag of which the ship is flying are both Contracting Parties. In other words, for non-contracting parties to the

⁸ Brussels 1926 Convention entered into force 2 June 1931, see: 120 *League of Nations Treaty Series* 187; according to the CMI there were 23 States only as Parties to that older convention, at: http://www.comitemaritime.org/status_of_ratifications_of_maritime_conventions, 20 December 2011.

⁹ *Official Gazette* – RT 1928, 42, 244.

¹⁰ SPL was adopted 11 March 1998, in force 1 July 1998 – RT I 1998, 30, 409.

¹¹ Maritime lien is a non-registrable pledge (charge) on a vessel which according to the law secures a certain preferred maritime claim and makes for the holder of such a maritime claim much easier to apply for the arrest of the vessel encumbered with.

¹² *Official Gazette* – RT II 2002, 37, 176.

¹³ See: Heiki Lindpere, Maritime Zones and Shipping Laws of the Republic of Estonia: Some Selected Critique – in: *Estonian Law Reform And Global Challenges*. Essays Celebrating the Tenth Anniversary of the Institute of Law, University of Tartu. Tartu University Press, 2005, pp. 13, 14.

¹⁴ Heiki Lindpere (2012), *op. cit*, p 158.

¹⁵ See in: Francesco Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions*, 5th ed., London/ New York: Lloyd’s Shipping Law Library, 2011.

¹⁶ *Official Gazette* – RT II 2001, 9, 51.

Brussels 1952 Convention, the basis of the arrest of a ship could be much wider and depend only on the civil law of the arresting State (Article 8 (1) and (2)). The Geneva 1999 Convention does not make such a difference and Article 8 (1) provides instead: *“This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.”*

- c) The Geneva 1999 Convention has incorporated Article 6. “Protection of owners and demise charterers of arrested ships” which was not present in the older convention. It starts as follows:

“1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

- (a) the arrest having been wrongful or unjustified; or
(b) excessive security having been demanded and provided.”*

We notice that this kind of counter-security could be imposed by the arresting Court but in Estonia the legislator has made this possible in another way. Paragraph 383 (1, 1¹ and 1²) of the Code of Civil Procedure¹⁷ (CCP) in the case of a monetary claim imposes on the applicant of the arrest to furnish for such a security 5% of the value of the maritime claim, not less than 32 and not more than 32,000 euros. The Court has liberty to allow some easements if the financial situation of the claimant makes it necessary as well as for other acceptable reasons. Coastal States of the world do not have any harmonised legislation in that respect;

- d) The Brussels 1952 Convention provides in matters of the settlement of disputes Article 11 as follows:

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

The Geneva 1999 Convention does not have such an arbitration clause, which was necessary in 1952 because in the meantime a large number of international conventions have been concluded covering possible disputes on almost all maritime claims listed on it. In particular, there should be mentioned the United Nations Convention on the Law of the Sea, 1982 (hereinafter – UNCLOS; in force for Estonia since 25 September 2005¹⁸), in which first, Article 28 regulates the rights of a coastal State in enforcing civil jurisdiction towards a foreign ship during her voyage through the waters of the coastal State. Second, the comprehensively elaborated Part XV “Settlement of Disputes” and Section 2 “Compulsory Procedures Entailing Binding Decisions” in UNCLOS, which differs from the statute of the ICJ and its Article 36 (2) in that Article 287 (1) provides compulsory jurisdiction in 4 different means for the settlement: the ICJ, the International Tribunal for the Law of the Sea (hereinafter - ITLOS), and two kinds of arbitration.¹⁹ This same Section 2 contains a novel item in the law of the sea, Article

¹⁷ *Official Gazette* – RT I 2005, 26, 197 (CCP has been in force since 01.01.2006).

¹⁸ *Official Gazette* – RT II 2005, 16, 48.

¹⁹ Referred to as “the Montreaux (Riphagen) Compromise” – see: the United Nations Convention on the Law of the Sea 1982. A Commentary. Vol. V. Myron H. Nordquist, editor-in-chief, Shabtai Rosenne and Louis B. Sohn, volume editors. Martinus Nijhoff Publishers. Dordrecht, 1989, p. 8; or what UK Professor Alan E. Boyle is calling “the cafeteria approach” – see Alan E. Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction,” (1997), 46 *International and Comparative Law Quarterly*, pp. 39, 40.

292, which provides the possibility that the flag State could provide diplomatic protection to ships registered there as a way of applying for the prompt release procedure of ships detained/arrested by the coastal State, presumably in the ITLOS.²⁰

It is also worth mentioning that Article 2 (4) “Powers of arrest” in the Geneva 1999 Convention provides as follows: “*Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.*” This is in conformity with the private international law principle that procedural law provisions are law of the forum – *lex loci*.

THE DEVELOPMENT OF ESTONIAN NATIONAL LAW AND FIRST PRACTICES ON THE ARREST OF SHIPS

“In December 1991, shortly after Estonia had regained its independence, the Merchant Shipping Code with 372 articles was adopted, which among other provisions accepted that ships could be detained in ports for a maximum of 72 hours by order of the Master of the port.²¹ These three days were provided to creditors for obtaining a court order for the arrest of the debtors vessel. The private law provisions of the Merchant Shipping Code were replaced in 2002 by the Merchant Shipping Act²² and the right of the masters of ports to detain vessels was abolished. At that time, article 139 of the Law of Civil Procedure, for instance, provided for the arrest of ships in order to secure claims for salvage rewards only.”²³ It should be noted also that if the author has on page 3 of this article described the adoption of the SPL by the *Riigikogu* on 11 March 1998 then at that time no articles on the arrest of ships had been incorporated in that law. It was the same day the Geneva 1999 Convention was ratified that the amendment of the SPL was passed to add Part IV “Securing maritime claims and civil claims with arresting the ship” (§§-s 78¹, 78² and 78³), where the first paragraph copied all the maritime claims from the list in Article 1 (1) of the Geneva 1999 Convention.²⁴ Nevertheless, this convention was not in force internationally, and it “promptly contributed to the fulfilment of the gap in the Estonian national law related to the arrest of ships by amending the SPL accordingly.”²⁵

“The first time the possibility of the arrest of a foreign debtor’s ship in Estonia was questioned was in 1998. She was the M/V “Uniselva” flying the flag of the Dutch Antilles and owned by the Peruvian company Uniselva Naviera S.A. The judge, Mrs. Mare Odakas of the Tallinn City Court arrested her by order dated 18 November 1998. The ship had arrived in Tallinn after repairs at a German shipyard with two invoices with a total value of 4.3 m DEM left unpaid. In reality, this shipyard gave away the security – possessory lien – by letting M/V “Uniselva” sail although the contract on the payment of debts was concluded in August 1998.”²⁶ Moreover, for a better understanding of the real complications in this case it is important to know that the ship had been mortgaged in favour of a German shipping bank for a couple of million USD and the owners’ financial situation did not promise the avoidance of a forced sale of the vessel. Consequently, if some of the costs of the repairs by the shipyard could qualify as secured by maritime lien, then the German shipping bank could be in danger of not having the mortgage satisfied in full because maritime liens have priority over mortgages.

“The Yard had approached solicitor Mr. Asko Pohla. A Member of the Estonian Bar, who succeeded in persuading the judge to arrest the ship on the basis of § 139 (3) and (10) of the Civil Procedure Law. Based on subsection 3 of the aforementioned article, the vessel was considered an economic unit of the debtor. Similarly, subsection 10 provided the right of arrest at the place of the debtor’s presence. ... This was a court case where the definition of a maritime lien could have been questioned because some of this debt to the Yard – masters disbursements – could be considered on the basis of the Brussels 1926

²⁰ See: Heiki Lindpere, Applicability of the prompt release procedure of the UN Convention on the Law of the Sea of 1982 in matters of prevention, reduction and control of pollution from vessels -in: *Scandinavian Institute of Maritime Law Yearbook 2004 (Simply 2004)*, Marius no. 321, Sjörettsfondet, University of Oslo, pp.209-265.

²¹ *Official Gazette* – RT 1991, 46/48, 578.

²² *Official Gazette* – RT I 2002, 55, 345.

²³ See: Heiki Lindpere (2012), *op. cit.*, pp. 157, 158.

²⁴ Law amending the SPL see: *Official Gazette* – RT I 2001, 34, 186.

²⁵ See: Heiki Lindpere (2012), *op. cit.*, p 159.

²⁶ See: Heiki Lindpere, *ibid.*, p 160.

Convention as a privileged maritime lien in favour of the Yard. Judgement on this legal issue was not made by the responsible court, which only had to accept the agreement of the German creditors about the distribution of the proceeds of a forced sale which took effect in Rotterdam.”²⁷

The author turns now to two of the many contradictory and disputable court orders, where judges have made mistakes in applying the law on the arrest of ships, which have been discovered by the aforesaid maritime law review on page one. This is presented only to show that some judges in applying the law are not making the necessary distinction between two procedures: a) arrest on the basis of a maritime claim according to the application of the holder, and b) adjudication of the case on the merits based on the submitted claim to the court or arbitration. The second reason for those mistakes in regard to refusing the arrest of a ship on the basis of an application of the holder of a maritime claim is related to the application of the CCP instead of giving priority to the Geneva 1999 Convention as the confirmed international commitment.

“For instance, in February 2003, the Malta flagged vessel “Megaluck” owned by Ballito Bay Ltd. called at the Port of Muuga in Tallinn and the Greek sailor Efstratios N. Leontaras had a maritime claim for unpaid wages in 1999 in the amount of 23,167 USD. It is worth noting that he applied for the arrest having lost maritime lien as a pledge on the vessel as the duration of one year had already lapsed. This shows that the only connection with that claim for an Estonian legal order was the presence of this vessel in Tallinn. The *lex fori arresti* applies to all vessels arrested in Estonia irrespective of their flag and consequently irrespective of the flag State’s participation in international conventions on the arrest of ships. The claimant always has the right to “forum shopping” because it is up to him or her to apply for the arrest of the vessel at the most responsible jurisdiction. But, assisted by AB Lawin, Leontaras had to apply to the Tallinn City Court twice because the first judge denied the arrest on the false grounds in the case. More specifically, the judge based her refusal on the grounds that first, the insolvency of the defendant had not been proven, and second, that nothing had prevented the submission of the claim. Obviously, she had only read the CCP provisions and had not paid any attention to the fact that submitting a claim together with the payment of state (court) fees is a useless action if the ship is not arrested and sails away. The next morning the same application was presented to another judge and she immediately issued a court order for the arrest.”²⁸

The judge refusing to arrest vessel “Megaluck” on 18 February 2003 was wrong on the first point of the refusal because both the Geneva 1999 Convention Article 2 (2) provides that “*a ship may only be arrested in respect of a maritime claim but in respect of no other claim*” and § 782 provides the same but without a direct denial of any other civil claims. On the second point, she was wrong because the analysis of the Geneva 1999 Convention shows clearly that it has nothing to do with the jurisdiction of the case on the merits aiming at the submission of a claim to the responsible court or arbitration – this is clearly recognisable from Article 7 (4), which provides as follows: “*If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.*” Even the word “claimant” is defined in Article 1 (4) – “*means any person asserting a maritime claim*” but not a person who has submitted a claim for a civil proceeding on merits. A procedure on the arrest of a ship is commenced with an application by the claimant. It is worth mentioning that Germany has recently reformed their maritime law effective from 25 April 2013 to modernise and simplify the maritime law. Hamburg law firm BlaumDettmersRabstein has commented in February 2014 that changes concerning the arrest of ships are as follows: “Finally, an important change was made in respect of the pre-requisites of a ship arrest. Contrary to the old law to successfully apply for a ship arrest order it is not necessary for the applicant to show a reason why an arrest be granted (Section 917 German Civil Procedure). This was understood as the creditor being at risk of recovering the claim if forced to wait for the enforcement of a judgement on merits. Under the new law, it is sufficient for the applicant to demonstrate a good *prima facie* claim only.”²⁹

Another case of a refusal to arrest a Russian flagged vessel “Petropavlovskaja Krepost” on 24 July 2006 in Tallinn while she was under repairs at the Baltic Ship repair yard quay, and the owners had not paid an invoice from the Klaipeda Ship repair

²⁷ See: Heiki Lindpere, *ibid.*, pp. 160, 161.

²⁸ See: Heiki Lindpere (2012), *op. cit.*, p 161.

²⁹ See: Christoph Horbach`i (Blaum Dettmers Rabstein) “New German Maritime Legislation” - www.bdr-legal.de .

yard for the modernisation of the fuel system of the ship. Among other comments, a judge of the Harju County Court presented the silly reason that the plain statement of the applicant about the unpaid invoice is not sufficient legal basis for such an arrest.³⁰ Therefore, it is necessary to figure out what are the real reasons why the application of civil law on the arrest of ships is so difficult for judges in Estonia and what are the main points for changes in order to succeed with the ongoing revision of maritime law.

“BOTTLENECKS” LEADING TO MISUNDERSTANDING THE LAW ON THE ARREST OF SHIPS IN ESTONIA

The analysis of Estonian law on the arrest of ships during this revision have revealed a considerable number of mistakes or insufficient regulation of the SPL or even odd provisions of the CCP, which all contributed to the improper understanding of how these sources should work together and have to be applied. Those are: the Geneva 1999 Convention original text translation into Estonian, where numerous substantial mistakes were made as *lapsus linguae*, which could be considered as mysterious for the Ministry of Justice to pass through to the executive and legislative branches of the government. Experts – the head of the Estonian government delegation, the author and member Indra Kaunis at the Geneva Conference in March 1999 were not asked to make any analysis to check the correctness of this translation as the drafted amendments in the SPL and the CCP in 2001. All three sources of Estonian law in this respect have contributed to the prevailing mistakes of courts and judges so the convention remains misunderstood or not applied at all and paying full attention to the CCP as an everyday source of law for civil judges. It is a clear cut case that those two procedures: a) the arrest of a ship in order to get sufficient security for the maritime claim, and b) the seizure of a ship (NB In Estonia also referred to as “arrest”) for the enforcement purposes of the judgment are different procedures, which should be better separated and understood.³¹ The first procedure (a) should be applied according to the Geneva 1999 Convention. The task for the CCP is not meant to regulate the arrest of ships to obtain a security for a maritime claim but it should deal with adjudicating the case on merits (whether a ship is still arrested or released because she has been exchanged for another sufficient security). Moreover, the SPL with its 3 provisions is today almost “next to nothing” in regulating the arrest of ships because it provides nothing additional to the Geneva 1999 Convention and repeats some *lapsus linguae* as mistakes from the abovementioned translated text of the convention.

Therefore, the author’s task in this article is to cease the analysis of all three sources of law in order that the reader will understand better the content of the above critique. The following will not pretend to provide a full analysis but is oriented to reveal the basic obstacles to a proper understanding of the international commitments of Estonia according to the Geneva 1999 Convention and the SPL as well as the CCP as may it call “subsidiary sources” in dealing with the arrest of Ships:

- 1) Some of the main substantial mistakes which the author has selected to be presented here in this short article are simply related to the translation of the original text of the Geneva 1999 Convention. Some of these mistakes are:
 - in the legal definition of “arrest” in Article 1 (2) (see footnote 3) in the Estonian version the phrase *order of the Court* has been translated as *judgement*, which makes the whole definition meaningless because if one has already made a judgement on the civil case he or she will proceed to the enforcement procedure, which is excluded from the definition by the second part of the sentence;
 - in Article 1 (4), which provides in the original that “*Claimant*” means *any person asserting a maritime claim*; this person is translated as “hageja” (who has submitted a claim to the Court for a proceeding on merits and has paid the requested state duty). This difference in translation shows the judges that the CCP should likely be applied;

³⁰ See: Heiki Lindpere, Merinõue ja merivõlg: nende erinevusest ning laeva arestimisest. - *Juridica* 2008/I, p 60.

³¹ As a matter of fact the same notion “arrest” should mean in procedure “a” *restriction on removal of a ship by order of a Court* but in procedure “b” the seizure or taking possession of the ship.

- in Article 2 “Powers of arrest” paragraph 3 have used the term “State” 3 times while in the translation we could find a substantially different term “State Party” used twice. This makes a big difference in terms of whether the convention is applicable to less than 20 State Parties or to all States in the world;
- in Article 3 “Exercise of right of arrest” paragraph (2) the “sister ship arrest doctrine” is provided, which means that “*arrest is also permissible of **any other** ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim ...*” The two words in bold are not produced in the translation, which could cause confusion in the application of that doctrine. In this case, paragraphs 1 and 2 give the right to arrest all the same ships but the second parts of those paragraphs provide different criteria for ownership or chartering of the vessel and how the certain maritime claims are secured – for example, any other ships could be arrested only if that person was:

*“(a) the owner of the ship in respect of which the maritime claim arose; or
(b) the demise charterer, time charterer or voyage charterer of that ship;”*

- Article 4 deals with the release of the arrested ship “*when sufficient security has been provided in a satisfactory form*” **shall be done** according to paragraph 1. But in the Estonian translation the term “may” has been used, which is completely inappropriate because the aim of an arrest has been achieved and the ship as security shall be substituted with another security of that maritime claim. The author concludes that “the Court has discretion only to assess whether the security provided is sufficient for the release but not whether to release” the vessel;³²
- Article 9 “Non-creation of maritime liens” provides that “*Nothing in this Convention shall be construed as creating a maritime lien.*” It is disappointing that in the Estonian text the translation says that “The Convention is not applicable to the maritime liens” which is a completely incorrect statement. For example, please look at Article 3 “Exercise of right of arrest” paragraph 1 (e)

*“1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
(e) the claim is against the owner, demise charterer, manager or operator of the ship and **is secured by a maritime lien** which is granted or arises under the law of the State where the arrest is applied for;*

The only correct solution which has been proposed to the respective ministries by experts in the revision of Estonian maritime law is to make a new legally sound translation into Estonian for approval by the *Riigikogu* and further publication in the *Official Gazette* as has been done with the text of the Vienna 1969 Convention on the Law of Treaties (see: New redaction of previously published document – in: RT II 2007, 15; first publication was: RT II 1993, 13/14).

2) The second basic problem this article must deal with is related to the unprofessional method of the incorporation of necessary substantial and procedural legal norms on the arrest of ships according to the Geneva 1999 Convention into the SPL (Chapter IV¹ “Securing maritime claims and civil claims with arresting the ship” (§§-s 78¹, 78² and 78³)” and Chapter 40 “To obtain security for a claim” in the CCP. The analysis showed that those drafting that incorporation have achieved and posed a very messy picture for the application of these national legal acts. The main problem seems to correspond to a lack of understanding, as we have already mentioned above, that the arrest of a ship based on a maritime claim commenced via an application by the holder of it to the Court is by nature a different specific procedure compared to that which commences by submitting a civil claim to the Court or arbitration by the claimant. Therefore, the author will try to present some thoughts about these problems.

First, the general provision on the scope of the SPL in sub-paragraph 4 provides: “*Arrest of a ship whether immovable or movable property in order to obtain a security for a maritime claim and a submitted civil claim will be effected according to the*

³² See: Heiki Lindpere (2012), *op. cit.*, p 159 and footnote 2.

present law and the international convention to which Estonia has acceded" (translated by the author).³³ What is really missing for clarity of the national law on the arrest of ships is the standard of appreciation for a maritime claim.

Second, the SPL has only 3 paragraphs and the first of them – 78¹ is just a copy of Article 1 (1) of the Geneva 1999 Convention as the list of different types of maritime claims. Paragraphs 78² "Arrest of a ship" and 78³ "Substitution of an arrest with another security" are randomly selected and copied from the Geneva 1999 Convention and it is not clear why precisely this minor incorporation has been included at all. Moreover, nothing new has been provided in the regulation compared to that which is already provided by the Geneva 1999 Convention. The author names here at least one criterion in the assessment of the value of the security, which the Court is entitled to establish while there is no agreement on the security between the holder of the maritime claim and the owner or charterer of that vessel. Article 4 (2) of the Geneva 1999 Convention provides as follows: "*In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.*" This provision is reproduced in the SPL in paragraph 78³ (2) but as we all know that in the carriage of goods or passengers the liability of the carrier is limited by law as well as in case of pollution damage to the marine environment, and therefore the maritime claim is also subject to such a limitation, except when the carrier or owner in question has deliberately acted in a way and lost his or her right to the limitation. This could be the second criteria in determining the value of the security for a maritime claim, which ought to be regulated in the SPL for the clarity of the law.

Third, the real problem – to clarify which provisions or law should be applied in principle – is made clear in the essence of paragraph 78 (1). It is provided there as follows: "*A ship may be arrested in respect of a maritime claim specified in § 781 of this Act.*"³⁴ *Provisions of the civil claim procedure concerning the securing actions apply to the arrest of ships for the purpose of securing an action, taking into consideration the norms especially established in this Act.*" The second sentence of this provision is likely trying to make the SPL *lex specialis* in relation to the CCP, which in practice has created some problems for judges who have been used to turning firstly to the CCP (which does not include a similar kind of reference to the SPL and moreover has not used the term *maritime claim* at all).³⁵ Therefore, the second sentence provided here actually nullifies this attempt (because nothing has been especially legislated in Chapter IV¹ of the SPL) and on the contrary leads the attention of all the judges, advocates and the business community to read the CCP instead of turning their attention to the Geneva 1999 Convention when an application for an arrest is presented to the respective Court by the holder of that maritime claim.

The content of Chapter 40 of the CCP on ordering the arrest or preservation of such an arrest of ships after a civil claim for the adjudication of the case on merits is submitted to the respective court will need special consideration and will be a topic for another article. Consequently, the author is hoping that with the present article he has convinced readers that the need for the revision of the Estonian maritime law is acute and necessary.

³³ The author feels it is a mistake first that the title of the Geneva 1999 Convention is not specified and second, that this convention is one of the rare multilateral agreements which Estonia has signed and ratified.

³⁴ Here the important word **only** is missing because Article 2 (2) of the Geneva 1999 Convention provides unequivocally that "*A ship may only be arrested in respect of a maritime claim but in respect of no other claim.*"

³⁵ See also: Heiki Lindpere (2012), *op. cit.*, p 159.