

**INTERNATIONAL CONVENTION FOR THE UNIFICATION
OF CERTAIN RULES RELATING TO THE ARREST OF
SEA-GOING SHIPS, 1952 ("THE ARREST CONVENTION"):
REVIEW OF CERTAIN PROVISIONS**

Zoran Tasić,
Stephenson Harwood,
Solicitors, London

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This paper expresses the author's critical view on certain provisions of the Arrest Convention 1952 particularly in respect of lack of uniformity in application of the Convention's Rules by the Courts in member countries, inconsistency in implementation of the Rules into member countries' legislations, the position of shipbuilders who have been left out of the scope of the Convention and open questions regarding jurisdiction.

The author also suggests that further discussion on the subject should take place in Croatia in order to initiate necessary amendments to the Convention and encourage a review of Croatian law and practices of arrest of ships.

**CONSTRUCTION OF SHIPS - ARTICLE 1. PARAGRAPH 1,
SUB-PARAGRAPH (1) AND ARTICLE 3, PARAGRAPH (e)**

- (i) Pursuant to the provision of Article 1, paragraph 1, sub-paragraph (1) a claim which can be secured by the detention of a ship can be a claim arising out of "construction, repair or equipment of any ship...". Where the construction of a ship is concerned it is practically only the builder or the buyer of the ship under construction who can have such a claim which could be secured by detention of a ship. Normally, when the ship is under construction there are primarily two parties which might have a claim against each other in respect of such ship; it is the builder who construct and equip the vessel, pursuant to the terms of the shipbuilding contract, on one side and there is a buyer who has ordered the ship and who can have a

claim against the builder in respect of such ship. In addition, various suppliers of equipment and materials whose equipment and material have been installed in the vessel under construction may appear as potential claimants and applicants for arrest of the vessel. However, I would primarily talk here about the arrest of a vessel as a judicial process to secure the shipbuilders maritime claim against the buyer.

- (ii) The most common situation in worldwide shipbuilding practice is that the vessel during her construction until delivery is legally owned by the shipbuilder, unless it has been agreed that the vessel, although in the builders yard, is registered in the name of the buyer. If the builder, who owns the vessel under construction has a claim against the buyer arising out of construction of the vessel, he cannot arrest the particular vessel in respect of which the claim arose simply because the vessel is owned by him and not by the buyer.

The builder will be neither able to arrest any other vessel owned by the buyer, for two reasons; (a) pursuant to Article 3, paragraph 1 of the Arrest Convention "... no ship, other than the particular ship in respect of which the claim arose, may be arrested" in respect of claims arising out of construction of the vessel; and (b) such other ship would not be owned "by the person who was, at the time when the maritime claim arose, the owner of the particular ship".

Strictly interpreting the provision of the Arrest Convention the shipbuilder practically cannot enjoy the protection and security offered by the Arrest Convention.

I have recently had a case in which the vessel was tendered for delivery by the builder to the buyer, but the buyer has wrongfully refused to take delivery of the vessel. The vessel was during construction and at the time when the claim arose owned by the builder. Although the buyer was a substantial shipowner and had many other vessels registered in its name, the builder was not, for the above said reasons, in a position to take action against any other ships owned by the buyer in order to secure its claim which is presently in the court. The application for arrest was made to the court in the jurisdiction when another ship owned by the buyer was found taking cargo, but the court has refused to grant arrest of such a ship on the basis that the buyer, at the time when the shipbuilders claim arose, was not the owner of the particular vessel in respect of which the claim arose nor had it in its possession or control.

From this point of view, shipbuilders would be in a better position if the vessel under construction was owned by the buyer. The builder could then, when the claim from construction of that vessel arose, arrest either the particular vessel or any other vessel owned by the

buyer who was, at the time when the maritime claim arose, the owner of the particular ship. This other option, often called "sister ship arrest" would be available to the builder probably very rarely as normally the buyer of the new buildings are "single ship companies" which do not have other vessels in their ownership.

- (iii) If, however, the buyer has a claim against the builder which claim arose out of construction of the vessel and if such vessel is owned by the shipyard the question is whether the buyer could arrest the particular ship or any other ship owned by the builder at the time when the buyers claim arose. This is an open question because it is not yet clear whether the Arrest Convention, although in its title refers to "seagoing ships", applies to vessels under construction or not (see Dr Berlingieri on "Arrest of Ships"; Lloyds of London Press 1992).
- (iv) From the point of view of various suppliers of materials and equipment for the vessel under construction the situation is even more complicated. If the vessel in respect of which the supplier's claim arose is owned by the builder then the supplier will be faced with the question whether the provisions of the Arrest convention apply or not to the vessel under construction (which is not seagoing ship); on the other hand, if the vessel under construction is owned by the buyer the suppliers could not, strictly speaking, take any action against such a vessel because their claim normally arises out of a supply agreement with the builder and not with the buyer. The supplier should not be in a position to arrest the vessel which is not owned by the debtor.
- (v) The quoted provisions of the Arrest Convention were not created with the purpose to secure the buyers' claims against the builders in respect of the vessel under construction. In reality, the buyers always insist on other types of security for their claims under the shipbuilding contract such as refund guarantee or nondelivery risk insurance or similar.
- (vi) The idea behind the sub-paragraph (1) of the Article 1, paragraph 1 of the Arrest Convention was probably to secure the builders' and suppliers' claims in respect of the particular ship under construction, however for the reasons set out above the Convention has failed to meet this purpose.
- (vii) For the reasons given above I would suggest that the following amendment is made to the Arrest Convention:
 - (1) in the last sentence of Article 3, paragraph 1 reference to "(1)" to be deleted and the following paragraph be inserted after

paragraph 1;

"An associated ship (being a ship owned, at the time when the maritime claim arose, by the person who owned or ordered the ship concerned) other than the ship in respect of which the maritime claim arose, may be arrested in respect of maritime claims enumerated in Article 1, (1)."

DIFFERENCES IN APPLICATION AND INTERPRETATION OF CERTAIN PROVISIONS OF THE ARREST CONVENTION IN DIFFERENT MEMBER STATES

Maritime lawyers - practitioners are very often facing various problems and misunderstandings which appear almost at every action targeted to arrest of ships in various jurisdictions. The problems such as the nature of the claim itself, jurisdiction of the court to decide in merits, the ownership over the vessel in question i.e. the relationship between the debtor and the vessel the arrest of which is sought, countersecurity for possible damages caused by the wrongful arrest of the vessel, etc often appear primarily because certain provisions of the Arrest Convention have not been unified in the states which have ratified it.

The mere fact that certain states have ratified the Arrest Convention or adopted its provisions does not mean much in practice as whenever an application for arrest of the vessel is made to the relevant court the applicants are faced with the practice of lawyers and courts in the country concerned and such practice very often either defers or is in contradiction with the rules of the Arrest Convention. Now, a question arises whether the Arrest convention itself should be reviewed or its member states should actually review their own procedure, legislation and practice related to the arrest of ships and unify them in accordance with the provisions of the Arrest Convention.

I would like to mention only a few examples from practice:

- (a) Our clients had a claim under a ship repair contract (Article 1, paragraph 1, subparagraph (1)) and the particular ship in respect of which the claim arose was found in Germany. We instructed our correspondent lawyer in Hamburg to take the necessary steps in order to arrest the vessel while she was in Hamburg. However, when our German lawyer learnt that the shiprepair contract had an arbitration clause referring all disputes in merits between the parties to the arbitration in Moscow and not in Germany, she advised us that the German court would most likely refuse to arrest the vessel as it obviously does not have jurisdiction to decide in merits.

Although Germany has ratified the Arrest Convention the described

example of German court practice does not correspond with the provisions of the Convention, especially not with Article 7, paragraph 2.

- (b) The client had the mortgage on the vessel in respect of which the claim arose by the owners default in payment. On the clients request we arrested the vessel in Argentina, however only after we have deposited with the Argentinean competent court a counter security in the amount equal to 30 % of the amount of claim and that deposit was made as a condition for the court to consider our application for the arrest of the vessel. This deposit was required as a security for possible damages which might be caused to the owner and/or bareboat charterer by the wrongful arrest of the vessel.

The counter security is not required by the Arrest Convention and the quoted practice of the courts in Argentina is actually contrary to the provisions of the Arrest Convention.

- (c) When we have, on the clients instruction, intended to arrest a ship which was not the one in respect of which the mortgage claim arose, but another vessel owned by the same debtor, we have assumed that would be difficult bearing in mind the provisions of the Article 3, paragraph 1 of the Arrest Convention (pursuant to which claims arising out of shipbuilding contracts and mortgages cannot be secured by detention of any other vessel apart from the particular vessel in respect of which the claim arose) and that the court in Genoa would refuse to detain the vessel. However, Italian law does not make the distinctions referred to in the said Article 3, paragraph 1 of the Arrest Convention.
- (d) In the case of the "Barenbels" decided by the High Court in London (Queens Bench Division, Commercial Court) the port agent - creditor has arrested m.v. "Barenbels" in the court of Umm Said, Qatar for his claims against the previous owner of the vessel which claims have arisen at the time when the vessel was owned by the debtor before the title on the vessel was transferred to the new owner. The High Court in London (Mr Justice Sheen) had heard the case on appeal and decided that such a detention of the vessel would not be allowed in England as the creditor has failed to take an action in rem against the vessel whilst she was owned by the previous owner - debtor. Pursuant to English law (Section 22 (4) of the supreme court Act 1981) one of the conditions for arrest of a vessel, inter alia, is that the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship and that an action in rem may be brought in the High

court against that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship or the charterer of it under a charter by demise. In addition, any other ship of which, at the time when the action is brought, the relevant person (as defined above) is the beneficial owner, may be arrested.

The quoted provisions of the English law differ from the provisions of Article 3 of the Arrest Convention in that (a) in addition to the condition that "sister ship" can be arrested providing that she is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship in respect of which the claim arose, English law requires that an action in rem has been commenced against the particular ship at the time when she was owned by the person who would be liable in personam at the time when the maritime claim arose; and (b) English law widens the meaning of the word "debtor" or "the relevant person" by introducing, in addition to the owner, persons who chartered the vessel, have the vessel in their possession or in their control.

This is an obvious example how so called "unified" rules of the Arrest Convention are in practice far away from the unity.

- (e) On the other hand, in Turkey, which is not a member of the Arrest Convention, however which laws recognise the civil code institute of "Seize Conservatorie", every ship which is owned by the debtor can be detained or arrested providing that the existence of debt has been proved and that counter-security has been deposited with the local bank in the amount equivalent to 10-15 % of the amount of the claim. The counter security does not have to be actually deposited but the same has to be arranged with the local bank who has to undertake to the local court that on the request a letter of credit shall be provided.

ARTICLE 3 OF THE ARREST CONVENTION AND "CORPORATE VEIL"

The provision of Article 3 of the Arrest Convention pursuant to which "a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship" does not mean much in reality within the worldwide spread concept of "single ship companies", especially in Northern European jurisdictions and the United States of America. It is practically unrealistic to expect that "any other ship" shall be in the same ownership as the particular ship in respect of which the claim arose although often the

same interests lay behind the corporate bodies who appear as registered owners of the particular ship and other ships. The actual interests in a ship are covered by the corporate veil of limited liability and that veil is normally never pierced by the courts in Northern European countries, particularly in England.

The court practice of South Africa however is less reluctant to pierce the corporate veil in the manner and in the circumstances as provided for in South African Maritime Law 1983 (the Admiralty Jurisdiction Regulation Act No. 105) particularly in the amendments of the law which took place in 1992, especially in the Article 3, paragraph (7), subparagraph (a) which reads as follows:

"For the purposes of sub-section 6 an associated ship means a ship, other than the ship in respect of which the maritime claim arose (i) owned at the time when the action is commenced by the person who was the owner of the ship concerned at the time when the maritime claim arose, or (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose, or (iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose."

The law further defines that ships shall be deemed to be owned by the same persons if the majority in the number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons. A person shall be deemed to control a company if he has power to control the company.

I would recommend that the Article 3 of the Arrest Convention be amended so that the aspect of "corporate veil" be treated as shown above.

THE TIME BAR

The provision of the Article 3, paragraph 1 of the Arrest Convention, as it is worded, is probably not enforceable in many jurisdictions because if the ship, which was, at the time when the maritime claim arose, owned by the person who was at that time the owner of the particular ship in respect of which the claim arose, has been sold to a third party before the action in rem was commenced, such an action would be (in many, at least, European jurisdictions) time barred. Maritime claims, listed in Article 1, paragraph 1 of the Arrest Convention (if not all, then most of them) do not create maritime liens and they do not follow the vessel after her change of ownership. Many jurisdictions have adopted this additional condition for the arrest of ships, which condition does not appear within

the Rules of the Arrest Convention. The Rules do not require an action to be commenced against the ship whilst she is still owned by the same person who owns the particular ship in respect of which the maritime claim arose. In that respect, I would suggest that the actual practice of maritime courts in most jurisdictions be adopted by the Arrest Convention.

Accordingly, I would suggest that the said additional condition be incorporated in paragraph 1 and 4 of the Article 3 in a way that the ship to which the maritime claim relates can be arrested if an action has been commenced against such ship whilst she was in the ownership of the person who would be liable for the claim in personam.

JURISDICTION

The long term "battle" between two opposite approaches to the question on the jurisdiction in merits of the courts in the country where the arrest has taken place, between Anglo Saxon approach on one side (that arrest is a means of obtaining jurisdiction i.e. the courts of the country in which the arrest is made should always have jurisdiction to determine the case upon its merits) and the European Civil Code approach on the other side, (that the arrest of a ship could not have the effect of attributing jurisdiction to a court that did not have such jurisdiction on the basis of statutory links) has resulted in a compromise embodied in Article 7 of the Arrest Convention. Pursuant to that Article the courts of the country in which the arrest was made shall have jurisdiction to decide the case upon its merits if the domestic law of that country gives jurisdiction to such courts or in other events listed from (a) to (f) in paragraph 1 of Article 7.

This "compromise" causes in practice a lot of uncertainty as to whether the courts of the country in which the arrest was made will also have a jurisdiction to decide in merits or not. This issue is very important from the claimants point of view who might be in favour of certain jurisdiction as far as the arrest is concerned however not necessarily when in favour of the same jurisdiction the merits of the case is concerned.

Pursuant to sub-paragraph (f) paragraph 1 of Article 7, of the Arrest Convention, the courts of the country where the ship was arrested upon the claim which is secured by a mortgage of the ship concerned, would have jurisdiction to decide the case upon its merits. In practice, however, the claims secured by a mortgage on the ship are often evidenced by promissory notes or bills of exchange which, inter alia, usually specify the place of payment. The purpose of the debt being evidenced by a bill of exchange or promissory note is to enable the claimant to obtain the judgement in merits more easily and quickly upon presentation to the court of a protested bill. The other benefit for the claimant is to sue the

debtor in the country where the payment was to be effected (*lex loci solutionis*) as there would be a reason to believe that in such jurisdiction the defendant would have tangible assets. However the risk for the claimant who wants to arrest the ship for its claim upon a mortgage is that the country where the ship is arrested, and not where the payment under the bill was to be effected, will have jurisdiction in merits.

Pursuant to paragraph 3 of Article 7 it is possible that the court within whose jurisdiction the arrest was made would not have jurisdiction to decide the case upon its merits if the parties (to the contract) have agreed to submit the dispute to the jurisdiction of a particular court other than that within whose jurisdiction the arrest was made. However, as we have seen from our "German example" that is not necessarily always the case.

In summarising the "compromise" offered by Article 7 of the convention, the claimants who want to secure their claims by arrest of vessels, and where there is no contractual provision on jurisdiction, have a lot of problems in practice to make sure whether the court in the country in which they want to arrest the vessel will also have a jurisdiction to decide in merits and, if so, whether their determination of the case in merits will be of advantage or disadvantage for the claimants. The claimants, whose claims are secured by mortgages on the vessels, are especially facing uncertainty in respect of jurisdiction upon the merits of their claim. Furthermore, sub-paragraph (f) of paragraph 1 and provision of paragraph 3 of Article 7 collide with each other as the mortgage agreement might have a jurisdiction clause pursuant to which the parties have agreed to submit the dispute to the jurisdiction of a particular court other than the court within whose jurisdiction the arrest was made.

It is important to say that in practice all these problems are in one way or another dealt with by instructing local lawyers in relevant jurisdictions, obtaining their legal opinions up to the extent of reasonable certainty in respect of the possible outcome of the arrest of the ship and, together with the client, by deciding which steps and in which jurisdiction should be taken, however, that is not the purpose of the Arrest Convention. The purpose of the Arrest Convention is to unify all these practical differences arising among the countries which have ratified the Convention and to avoid such problems which are occurring in international maritime practice.

THE IMPLEMENTATION OF THE CONVENTION

One of the main reasons for the practical problems appearing in the international practice of arresting ships, as discussed above, is the implementation of the Convention into various, most relevant shipping jurisdictions. It is obvious that the Convention is not being implemented

in all jurisdictions in the same way and hence the problems in relation to interpretation of various provisions of the Convention, contradictions between local laws and regulations on one side and the provisions of the convention on the other different court practices in relevant jurisdictions, etc.

For example, under Italian law there is practically no difference between arresting a ship or arresting any other assets of the debtor, providing that the claimant can prove to the court that there is the danger that his claim when it becomes a judgement would not be enforceable without such a measure. Therefore, a general rule is that if the debtor, owner of the ship, is in good financial condition, arrest of the debtor's ship will not be granted. Such a condition obviously does not come from the Convention, however, it forms a part of Italian legal practice relating to arrest of ships. We had a case in which our client had a good shipbuilding claim against a very reputable European shipowner. When one of the ships owned by the shipowner/the debtor arrived Italy we were advised by Italian lawyers that our application for arrest of the ship would not be successful unless we proved (which in this case was extremely difficult) that the debtor was in serious financial difficulties and that without arrest of their ship our clients would be unable to enforce their judgement when it is made.

In the United Kingdom, however, the Convention has never been implemented as law although the language of the Convention was practically incorporated in the Supreme Court Act 1991 (Section 20-24). As we discussed above, the said Supreme Court Act reduces actions *in rem* and introduces some other additional conditions relating to the division between actions *in rem* and actions *in personam*.

Whilst under English law the claimant does not have any burden of proving that the enforceability of his judgement against the debtor would be questionable without the action *in rem* under German law a claimant has to prove to the court that the arrest is absolutely necessary in order to enforce the future judgement. Although it seems that the bad financial situation of the debtor is not efficient to persuade the court to grant the application, it is not, however, clear what are the requirements for "necessity of the arrest for the enforcement of future judgement".

At the end of this paper I would refer very briefly to the implementation of the Arrest Convention in Croatian law and practice.

Croatia is a member of the Arrest Convention and it has partly incorporated certain provisions of the Convention into its Maritime Code 1994, however, like in many other jurisdictions, there are certain aspects of Croatian law and practice which defer from the provisions of the Convention itself.

First example of this is contained in the Article 974 of the Maritime Code 1994 pursuant to which the arrest of ships, as an interlocktery order, is subject to conditions provided for in the general law on the enforcement proceedings. General law on enforcement proceedings obviously contain some conditions which do not form part of the Arrest Convention. This is probably in accordance with the provision of paragraph 2 of Article 6 of the Arrest Convention under which all matters of procedure which the arrest may entail shall be covered by the law of the State in which the arrest was made or applied for. However, croatian practice of arrest of ships goes much further beyond "matters of procedure" and impose some other conditions which give to the arrest procedure a very different dimension altogether.

I would refer to two judgements made by the Commercial Court of Croatia in Zagreb in 1992. The judgement number PZ-173-2 dated 14 February 1992 in respect of the vessel "KOPER" the Commercial court in Zagreb acting as a Court of Appeal has confirmed the ruling of the first degree Court refusing to grant the application for arrest of m.s. "KOPER" on the grounds that the claimant failed to provide the evidence of the existing debt and failed to persuade the court that there was a high risk that without such measure the enforcement of the claim would be seriously jeopardised and that such probability or risk must be subjective and proved. In addition, it was held that because the debtor has its place of business in the Republic of Croatia together with its bank accounts and other assets, the removal of the vessel "KOPER" from the port of Rijeka would not jeopardise the enforcement of the claimants judgement on the assets which are placed within the Republic of Croatia.

These conditions do not appear from the arrest Convention and they create dimension of "sisi conservatori" which is quite common in most civil law jurisdictions. Under the Arrest Convention the burden of proof of existence of debt is not on the claimant; the claimant has the right to believe that he has a good claim in respect of which he wants the debtor's ship arrested, however if he was wrong he would be liable for wrongful arrest and consequently damages caused to the owner of the ship arrested. (Article 3 "... may be arrested in respect of any of the maritime claims enumerated in Article 1...").

The aspect of high risk that without the arrest the enforcement of the claimants judgement would be seriously jeopardised does not form a part of the Arrest Convention either. The arrest under the Convention means the detention of a ship by judicial process to secure a maritime claim, regardless whether the future enforcement of the claimant's judgement is jeopardised by certain debtor's actions. Practically speaking, the claimant is not often in position to know whether the debtor is taking any actions

in order to "seriously jeopardise" the enforcement of the claimant's judgement.

Furthermore, the fact that the Croatian debtor has its seat, its bank accounts and other assets placed in the Republic of Croatia has nothing to do with the Arrest Convention. The Arrest Convention is not interested in any other assets owned by the debtor; it deals strictly with the detention of a ship in order to secure a maritime claim. If the claimant believes that he would better secure his maritime claim by taking action against other debtors assets in the Republic of Croatia he would do so and the provisions of the ship arrest legislation would obviously not apply.

The other judgement of the Commercial Court in Zagreb, acting as a Court of Appeal, (judgement number PZ-29741-91-2 of 10 March 1993) also gives different light to the implementation of the Arrest Convention in Croatian law and practice. The judgement is based, inter alia, on the principle that if the claimants are foreign persons the Arrest Convention 1952 shall apply, which implies that if the claimants are Croatian citizens then the Arrest Convention 1952 will not apply and, probably, only Maritime Code 1994 and general provisions of the Enforcement Proceedings Act will apply. This is a little bit strange as the Arrest Convention itself suggests that all matters of procedure shall be governed by the law of the State in which the arrest was made. I do not see how the foreigners will arrest a ship in Croatian waters in a different way and for different claims than Croatian applicants.

This judgement goes further from seeking an evidence of high risk of unsuccessful enforcement of the claimant's judgement: it assumes that if a maritime claim relates to a ship which is registered in the Croatian Ship Registry the risk of unsuccessful enforcement of claimant's judgements does not exist. I have tried in this paper to emphasize the differences in implementation of the Arrest Convention between several jurisdictions and consequently differences in legislations and practice of arrest of ships in several countries which are all members of the Arrest Convention. It is obvious that apart from the definition "maritime claim" there is very little in the Convention which has been uniformly accepted in its member states.

I am not, however, sure whether the Convention itself should be revised or the laws on arrest of ships in particular jurisdictions would need revision in order to accord with the rules of the Arrest Convention.

Sažetak

MEĐUNARODNA KONVENCIJA ZA IZJEDNAČAVAJE NEKIH PRAVILA O PRIVREMENOM ZAUSTAVLJANJU POMORSKIH BRODOVA IZ 1952. (KONVENCIJA O ZAUSTAVLJANJU): PREGLED POJEDINIH ODREDBA

Ovaj rad izražava autorov kritički pogled na određene odredbe Međunarodne konvencije za izjednačavanje nekih pravila o privremenom zaustavljanju pomorskih brodova iz 1952. (Konvencija o zaustavljanju). Posebnu pozornost pisac je obratio na nepostojanje jedinstvenosti u primjeni odredaba Konvencije od strane sudova zemalja članica, na nedosljednost u inkorporiranju odredaba u unutrašnje zakonodavstvo država članica, na položaj brodograditelja koji su ostali izvan primjene Konvencije te na neka nerazjašljena pitanja glede sudske nadležnosti.

Pisac predlaže da se rasprava o ovoj temi u Hrvatskoj usmjeri na predlaganje izmjena Konvencije i na poticanje pregleda hrvatskog prava i prakse o materiji zaustavljanja brodova.