

# The Brussels and Geneva Ship Arrest Conventions

## - A comparative analysis

## SHIP ARREST IN INDIA

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**Dr. Shrikant Pareshnath Hathi**, partner and **Ms. Vidya Rajan**, legal researcher, also reading for her Solicitor examination, both associated with Brus Chambers, Indian law firm, study a comparative analysis on International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 (the “Brussels Convention”) and International Convention on the Arrest of Ships signed in Geneva in 1999 (the “Geneva Convention”).



The arrest of ships for various claims are governed mainly by the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 (the “Brussels Convention”) and International Convention on the Arrest of Ships signed in Geneva in 1999 (the “Geneva Convention”).

Through this article, we seek to compare and analyse the similarities and differences between the two Conventions, the Geneva Convention, which came into force on 14 September, 2011, compared to the previous 1952 Brussels Convention that came into force on 24 February 1956. Although the basic approach to the principle of arrest of ships remained unchanged, The Geneva Convention increases the number of maritime claims as compared to Brussels Convention, that also introduced the right of re-arrest and multiple arrest of the ship, also clarifies the ambiguity of the Brussels Convention by stating that it applies to ‘any’ vessel. It is noteworthy that the Brussels Convention is unclear as to its effect on vessels which are not flying the flag of a contracting state. The Brussels Convention remains the dominant convention and is in force in 77 countries while only 10 states have chosen to ratify

the Geneva Convention and these are Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. However, Denmark and Norway have signed up to the new Arrest Convention. The Geneva Arrest Convention was designed to update and address the identified deficiencies of the Brussels Arrest Convention and aims to strike a fairer balance between the interests of the ship owner and claimant.

The Geneva Convention is a positive step towards a clearer and more all-encompassing approach to ship arrest for marine claims. But claimant’s application is limited to those ratified states to the convention. Countries not ratified to the conventions and have adopted the principles of arrest conventions there may be differences as to how the convention is applied. The Courts of the country in which the arrest is 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 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.

The additional types of claim for which arrest is permitted under the Geneva Convention (but not the Brussels Convention) include the following:

- a. outstanding insurance premiums (including P&I calls) commissions, brokerages and agency fees;
- b. damage, or threat of damage, to the environment (including the clean-up costs and reasonable steps taken to avoid damage);
- c. wreck removal;
- d. loss or damage in connection to goods (including luggage) and not just damage to the goods themselves;
- e. provisions, bunkers and equipment (including containers) which are supplied for the ship's operation or maintenance (these not being specifically provided for in the 1952 Convention);
- f. port, canal and pilotage dues (affirming that this convention applies to vessels that navigate inland waterways and not just sea-going vessels); and
- g. disputes arising from a contract for sale of a ship.

Arrest of seagoing ships is an issue of considerable importance to the international shipping and trading community. While the interests of owners of ships and cargo lie in ensuring that legitimate trading is not interrupted by unjustified arrest of a ship, the interest of claimant's lies in being able to obtain security for their claims. Arrest means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment. The main objective of the arrest is that the creditor who arrested the ship secures his claims. The final possibility, which stems from the arrest effected, consists of the right to sell the ship in the enforcement procedure.

A ship may be arrested for satisfying any maritime claims that a "claimant" has against the supplies made to the ship or the owners of the ships, the charterers of the ship, etc. and may be released on paying the security against the same. However, such a release does not affect the claimant's right to proceed against the owner of the ship or others as the case may be, for an action in personam.

Both the Conventions are unanimous on the concept of arrest of a ship that it is the detention of a ship or a restriction on removal of a ship, by order of the Court or by judicial process in order to secure a maritime claim, but not

the arrest of a ship in execution or satisfaction of a judgment. The Brussels and the Geneva Conventions both state that a "claimant" may arrest a ship in order to satisfy any maritime claims. Where the Brussels Convention states that a mere allegation by a claimant that a maritime claim exists in his favour is sufficient cause for an arrest, the Geneva Convention states that a person asserting a maritime claim may apply for an arrest. The scope of the Geneva Convention goes a step beyond the Brussels Convention in adding that, inter alia, a contract for sale of ship and a claim for unpaid insurance premium will also give rise to maritime claim.

Both the Conventions provide that the Courts of the state where the arrest of the ship was made have jurisdiction over the matter, unless the parties thereto submit or agree to submit to another court or arbitration. Further, the Geneva Convention provides that the ship may be arrested in order to obtain security irrespective of the fact that the maritime claim in respect of which the arrest was effected is to be adjudicated in a State other than the State where the ship was arrested by virtue of a jurisdiction clause or an arbitration clause. The Brussels Convention provides that a ship can be arrested if it is flying the flag of a party to the Convention, whereas the Geneva Convention gives the freedom to arrest a ship irrespective of whether it is flying a flag of a party to the Convention or not. Both Conventions, while allowing the arrest of a sister ship for a claim against the owner and a bareboat/ demise chartered vessel for a claim against the demise charterer, prohibit the arrest of a time or voyage chartered vessel for a claim against the charterer as well as the arrest of an associated ship or cargo or freight or bunkers in order to satisfy a maritime claim, unless it is so allowed by the local law. However, it is noteworthy to see that neither of the Conventions provide for the filing of a caveat against the arrest or release of a ship.

In terms of the arrest of a ship, the Brussels Convention does not favour a subsequent arrest of the same ship if security has already been paid to release it from a previous arrest for satisfying the same maritime claim. However, the Geneva Convention provides that a ship can be subsequently arrested for the same maritime claim if the security provided for the release of the ship was insufficient or if the release of the ship was on improper terms or if the claimant is of the opinion that the provider of security may not fulfill his obligations after the payment of such security. What is considered "sufficient security" is left unanswered except for laying down of the stipulation that the security provided for the release of the ship should not exceed the value of the ship itself. The Brussels Convention lacks in any relief to the owner of the ship in terms of any review of the amount of security already paid or to be paid whereas, the Geneva Convention steps up in the same and offers the owner the benefit of reviewing the amount of security in order to have it reduced, modified or cancelled at any time. Although there isn't any specific form of security prescribed for the release of an arrested ship, both Conventions give reasonable freedom by stating that bail or other security, in the case of the Brussels Convention and security in any satisfactory form in the case of the Geneva Convention may

be offered as security for the release of an arrested ship. The Geneva Convention goes a step further and provides for the Court to grant an order for counter security and where the arrest of the ship is wrongful or where excessive security is demanded, it also allows the court to award damages, which is otherwise left to the discretion of the local laws under the Brussels Convention.

Definition of arrest of a ship is stipulated in Article 1 of the Brussels Convention and is defined as the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment. This type of arrest of the ship, in theory, is known as a conservative ship arrest, while arrest of the ship on the basis of an enforceable court decision is known as a court arrest. Arrest of ship is related to maritime claims and can only be pronounced by a court having admiralty jurisdiction. This does not affect any rights or powers vested in any government, any public authority any dock or harbor authority under any international convention or under any domestic laws or regulations to detain or otherwise prevent the ship from sailing from their jurisdiction.

Arrest of a ship is a measure to secure the creditor having a maritime claim. The Convention provides to a creditor that for any claim that arises against the ship of the debtor, the creditor may arrest the offending ship or any ship owned by the debtor, considered to be the ship of the same debtor if all its parts belong to the same person. The exception to this broadly established right to arrest another ship belonging to the same owner is made in three cases: disputes as to the title to or ownership of any ship, joint ownership, possession and in relation to the rights of creditors under the mortgage or hypothecation of any ship. The creditor in such cases can arrest the ship (the offending ship) against which the specific claim arose.

Arresting another ship belonging to the same owner is known as a "sister ship arrest." This right to arrest another ship is recognised in almost all the states but approach towards the same may differ. Another issue that arises in connection with the "sister ship" is the issue of the identity of the ship owner and establishing that the ship is a sister ship

Arrest of a ship in accordance with the Conventions and the legislation of the countries that accept the Convention is of a temporary nature. The main objective of the arrest is that the creditor who arrested the ship secures his claims. The final possibility, which stems from the arrest effected, consists of the right to sell the ship in the enforcement procedure. However, the owner of the ship, or any interested person, may release the ship from the arrest effected, either by paying the debt or by providing an appropriate security to the court for creditors' claims.

The basic principle of the Brussels Convention is that ships may be arrested only in respect of securing maritime claims. The Brussels Convention explicitly lists in its first Article which claims are considered maritime claims. Further, the Convention emphasizes that maritime claims are only those that arise out of one of the following causes:

- a. damage caused by any ship either in collision or otherwise;
- b. loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- c. salvage;
- d. agreement relating to the use or hire of any ship whether by charterparty or otherwise;
- e. agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
- f. loss of or damage to goods including baggage carried in any ship;
- g. general average;
- h. bottomry;
- i. towage;
- j. pilotage;
- k. goods or materials wherever supplied to a ship for her operation or maintenance;
- l. construction, repair or equipment of any ship or dock charges and dues;
- m. wages of Masters, Officers or crew;
- n. Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- o. disputes as to the title to or ownership of any ship;
- p. disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- q. the mortgage or hypothecation of any ship.

In accordance with Article 1 of the Geneva Convention "Maritime claim" means a claim arising out of one or more of the following:

- a. loss or damage caused by the operation of the ship;
- b. loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- c. salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- d. damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);
- e. costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- f. any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

- g. any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- h. loss of or damage to or in connection with goods (including luggage) carried on board the ship;
- i. general average;
- j. towage;
- k. pilotage;
- l. goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- m. construction, reconstruction, repair, converting or equipping of the ship;
- n. port, canal, dock, harbour and other waterway dues and charges;
- o. wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- p. disbursements incurred on behalf of the ship or its owners;
- q. insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- r. any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- s. any dispute as to ownership or possession of the ship;
- t. any dispute between co-owners of the ship as to the employment or earnings of the ship;
- u. a mortgage or a "hypothque" or a charge of the same nature on the ship;
- v. any dispute arising out of a contract for the sale of the ship.

Geneva Convention omitted bottomry claim as against Brussels Convention and the following claims were added: claims for indemnification or other compensations in connection with elimination of perils or preventive actions, claims in connection with pollution of the marine environment or similar actions regardless of whether they arose in relation to international conventions or any other regulations or agreements. This obviously introduced compensation and rewards for prevention and elimination of damages caused by pollution of the marine environment as maritime claims.

The Geneva Convention fills in where the Brussels Convention lacks in foresight by including Costs associated with the lifting, removal or destruction of the remains of the ship and cargo as maritime claims.

The 1993 International Convention on Maritime Liens and Mortgages, supplements the rights of seamen for protected maritime claims, considering the right for costs of repatriation and social insurance contributions payable on their behalf as maritime claims.

Likewise port, canal, dock, harbor and other waterway dues and charges, as well as claims from insurance premiums including mutual insurance calls (contribution to P&I clubs), and agency fees in respect of the ship, payable by or on behalf of the shipowner or demise charterer are considered as maritime claims.

Unlike the Brussels Convention, the Geneva Convention allows claimants multiple opportunities to secure their claims. Under Article 5, a claimant can re-arrest a ship after it has been released, and has the option of arresting multiple ships, in order to top up the security for his claim. The right to re-arrest or to arrest multiple vessels arises only when:

- the security already provided is inadequate (in the case of re-arrests, the security can never exceed the value of the vessel in question);
- or the person who provides the security is not, or is unlikely to be able to, fulfill its obligations;
- or the ship or the original security was released either with the consent of the claimant acting on reasonable grounds
- or because he could not by taking reasonable steps prevent the release.

Even before Brussels Convention came into force there was no dispute in legislation and court practice of certain maritime countries that ships may be arrested only for maritime claims. However, to determine what constitutes a maritime claim, there are two approaches. One is that such claims are explicitly enumerated and there are no other claims, it is so-called closed list of maritime claims. Another approach is not to enumerate the claims, that is, in addition to possibly enumerated claims, courts can also recognise other claims as maritime claims. This approach is known as open-ended list of maritime claims. Brussels Convention provides a closed list and it may be concluded that it is about maritime claims acceptable to most countries.

Therefore, it is safe to say that, even though the Brussels Convention laid down the preliminary framework related to the arrest of ships worldwide, the Geneva Convention stepped up where the Brussels Convention lacked, by not only providing more factors which may give rise to a maritime claim, but also by providing respite to the otherwise remedy-less owners of the ship by adding provisions such as counter security and an award for damages under the Geneva Convention itself without applying to the jurisdiction or discretion of the local laws.

Comparative Chart

<b>BRUSSELS CONVENTION</b>	<b>GENEVA CONVENTION</b>
Damage caused by any ship either in collision or otherwise	Loss or damage caused by the operation of the ship
Loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship	Loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship
Salvage	Salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment
Agreement relating to the use or hire of any ship whether by charter party or otherwise	Any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise
Agreement relating to the carriage of goods in any ship whether by charter party or otherwise	Any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
Loss of or damage to goods including baggage carried in any ship	Loss of or damage to or in connection with goods (including luggage) carried on board the ship
General average	General average
Towage	Towage
Pilotage	Pilotage
Goods or materials wherever supplied to a ship for her operation or maintenance	Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance
Construction, repair or equipment of any ship or dock charges and dues	Construction, reconstruction, repair, converting or equipping of the ship
Wages of Masters, Officers, or crew	Wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf
Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner	Disbursements incurred on behalf of the ship or its owners
Disputes as to the title to or ownership of any ship	Any dispute as to ownership or possession of the ship
Disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship	Any dispute between co-owners of the ship as to the employment or earnings of the ship
The mortgage or hypothecation of any ship	A mortgage or a "hypothecation" or a charge of the same nature on the ship
Bottomry	Port, canal, dock, harbour and other waterway dues and charges
	Damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph
	Costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew
	Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer
	Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer
	Any dispute arising out of a contract for the sale of the ship

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