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DRAFTING PROJECT

**LAW OF GEORGIA ON ARREST OF SHIPS IN THE
TERRITORIAL WATERS OF GEORGIA**

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Explanatory Report

On the Law of Georgia on Arrest of Ships in the Territorial Waters of Georgia

The Maritime Administration of Georgia proposed to draft a Law on Arrest of Ships in Territorial Waters of Georgia. The reason of such a proposal was the fact that Georgia is not a party to either the International Convention Relating to the Arrest of Sea-Going Ships, 1952 (hereafter the 1952 Convention) or the International Convention on Arrest of Ships, 1999 (hereafter the 1999 Convention). Though the Civil Procedural Code of Georgia deals with conservatory measures, the Maritime Administration considered that the matter should be regulated by a special law taking into account the specific nature of maritime relations and ships.

Having made the decision to introduce the provisions about the arrest of ships several major decisions were to be made. The most important one was whether to implement the provisions of the 1952 Convention or the provisions of the 1999 Convention. Though the latter Convention is more comprehensive and better-drafted, the decision was made in favour of the 1952 Convention. The grounds of such a decision were the following:

- the reluctance of major maritime powers to implement the provisions of the 1999 Convention;
- the wide-spread support to the 1952 Convention by States;
- the necessity to promote navigation of foreign vessels within the territorial waters of Georgia and to that end to establish possible most favorable regime for foreign vessels.

Another important decision was to decide how to implement the 1952 Convention. Due to the complicated procedures for adoption of international treaties in Georgia, it was decided to incorporate the relevant provisions of the 1952 Convention into the national legislation.

The incorporation of the relevant provisions should be made via the law of Georgia. This approach is justified by the following reasoning: the Georgian normative acts are the following: the constitution, constitutional law, the constitutional agreement, international treaties, organic laws,

laws (codes) and by-laws (the latter itself consists of 17 types of different by-laws). These normative acts rank in the order listed. It is clear that arrest of ships does not fall within the ambit of necessary constitutional regulation. Paragraph 4 of article 9 of the Law of Georgia on Normative Acts provides that “organic law can only regulate relations that are prescribed by the Constitution of Georgia.” The Constitution of Georgia gives an exhaustive list of matters that should be regulated by the organic laws and among those the arrest of ships does not feature. As it was envisaged that newly adopted provisions could establish different rules from the existing statutory provisions and in some cases contradict the relevant provisions of the Civil Procedural Code, it is clear that the only appropriate normative act for the incorporation of the 1952 Convention into the Georgian legislation was the law of Georgia. Despite the fact that the Maritime Administration of Georgia is granted law-making powers (to adopt decrees and resolutions) based on the abovementioned reasoning, the only appropriate legal act for fully achieving the set purpose was the law.

It was decided to write a separate law on arrest of ships, though there was an option to write a Law of Georgia on Amendments to the Maritime Code of Georgia. The Maritime Code is itself a long and complicated document; due to its outdated wording and existing lacuna active work is being carried out to amend it or to adopt a new maritime code that will meet internationally recognized standards. The draft project of the Code envisages simplifying the document. Thus it did not seem reasonable to add a new chapter to the Code. Herewith it should be admitted that in the existing version of the Code only one article (article 43) deals with arrest of ships.

The full name of the law is “the Law of Georgia on Arrest of Ships in the Territorial Waters of Georgia” (hereafter – the Law). First of all the term “territorial waters” should be clarified. This term is often used by the Georgian legislation and encompasses internal waters and the territorial sea of Georgia.

Paragraph 1 of article 31 of the Law on Normative Acts establishes that the normative act should consist of at least basic and final provisions and in cases of necessity provisional provisions. The final provisions should repeal provisions, if any, that will be amended or repealed upon entry into force of the normative act. Article 32 of the Law of Georgia on Normative Acts provides that the normative act may be divided into parts and/or chapters. Taking into account these requirements, the Law consists of three chapters. Chapter I (articles 1-4) is an introductory chapter, setting out the scope of application of the law and giving the definitions. Chapter II (articles 5-12) is a substantive part of the Law (basic provisions). Chapter III (articles 13-14) encompasses provisions about the

entry into force of the Law and it also refers to relevant provisions which will be repealed upon the entry into force of the Law.

Article 1 sets the territorial scope of application of the Law: the law regulates the arrest of ships within the territory of Georgia. To the ends of definition of the territory the general rules are provided in article 3 of the Constitution of Georgia and article 2 of the Law of Georgia on the State Borders of Georgia that provide that the territory of Georgia includes the land and water territory within the borders of Georgia. The outer border of the maritime territory of Georgia is the outer limit of the territorial sea of Georgia, as provided by article 4 of the Law of Georgia on the State Borders of Georgia.

Article 2 clarifies to what vessels the Law applies. The Law covers all foreign ships within the territory of Georgia and ships flying the Georgian flag. Of course, ships covered with sovereign immunity are excluded from the scope of application of the Law.

Paragraph 1 of Article 3 reiterates the general principle of Georgian legislation that international treaties adhered to by Georgia prevail over other national legislation. Though this principle is enshrined in the Constitution of Georgia (article 6) and other relevant legislation (Law of Georgia on Normative acts, Law of Georgia on International Treaties of Georgia), there is a widespread practice to include such a provision in laws to emphasize the principle.

Paragraph 2 of Article 3 is based on practice in Georgia Legislation referring to the possible sources for the arrest of ships in Georgia. The term “legislative acts of Georgia” means “the constitution, constitutional law, the constitutional agreement, international treaties, organic laws and laws, decree of the president” as provided in article 5 of the Law of Georgia on Normative acts. Such provision is usually made to clarify that the subject matter of a law can be regulated only by the legislative acts and not by the by-laws. Accordingly, this provision excludes the possibility to enact any additional provisions on the subject-matter of the Law by the by-laws, including legal acts adopted by the Maritime Administration.

Article 4 provides the definitions. Paragraph 1 of article 4 gives the definition of “maritime claims” that basically follows Article 1.1 of the 1952 Convention with minor changes: the draft does not refer to “Bottomry” as provided by article 1.1.h of the Convention. The reason for omitting “Bottomry” from the list was the fact that this institute is outdated and never used any more.

Another deviation from the wording of the 1952 convention is subparagraph “n” of paragraph 1 of article 4 that reads as follows: “Disputes related to proprietary rights on ship”. The Convention refers to “title to or ownership of” a ship. As was already admitted Georgia is a civil law country and term “title” is unknown to it. It was considered that the wording provided in subparagraph “n” could achieve the purpose of the Convention provision.

Paragraph 2 of article 4 (definition of “arrest”) repeats wording article 1.2 of the 1952 Convention. It is important hereby to admit that arrest in the context of this Law is a conservatory measure.¹

Paragraph 3 of article 4 defines a “person”. The wording of this subparagraph diverges from the one of the relevant provision of the 1952 Convention. The definition is based on paragraph 2 of article 8 of the Civil Code of Georgia that provides that in private law relations legal entities owned by a State and State bodies act as legal persons created under private law unless these relations, due to the State or public interests, are governed by public law.

Paragraph 4 of article 4 again follows the wording of the 1952 Convention (article 1.4)

For the purposes of simplicity, paragraph 5 of article 4 provides the definition of a “sister ship”. This article is based on paragraphs 1 and 4 of article 2 of the 1952 Convention though the Convention does not provide the definition of a sister ship independently. Subparagraph “a” of paragraph 5 defines sister ship for the cases when the owner of the ship is liable for the maritime claim; subparagraph “b” of paragraph 5 refers to cases when charterer is liable for the maritime claim.

Paragraph 6 of this article gives the definition of a “person” specifically for the purposes of paragraph 4 of article 7. Paragraph 3 of article 7 provides for the possibility to arrest a sister ship when the demise charterer is liable for a maritime claim. Under paragraph 4 of article 7 such rule is applicable to other cases when a person other than an owner or demise-charterer is liable for the maritime claim. To avoid very extensive interpretation of paragraph 4 of article 7, the definition of a “person” for its purposes is introduced.

¹ Under the Civil Law tradition word arrest has two meanings: (i) “saisie conservatoire” a conservatory measure aiming at preventing reduction of the assets of the debtor before the claim can be enforced on such assets through their forced sale; (ii) “saisie execution” the seizure of the assets of the debtor for the satisfaction of a claim through forced sale.

Chapter II begins with article 5 that sets the basic principle of the law: a ship may be arrested only in respect of a maritime claim. Though the article seems to be quite straightforward it needs some further elaboration.

In Civil Law countries debtor's any type of assets, movable or immovable may be the subject of arrest and any type of claim may entitle the claimant to seek such an arrest. This general rule also applies to ships and therefore a ship may be arrested as a security for any kind of claim, be a maritime claim or not. Since a ship is a movable registered in a public register, dispossession would not be actually required and the owner will be usually appointed as a custodian. Thus the ship can even sail. Considering that the ship on voyage is subject to perils, many countries adopted rules that "saisie conservatoire" prevents the ship from sailing.

Article 5 restricts possibility of the arrest of ship to the maritime claim. This restriction is very important as the maritime claims list is closed. Thus any vessel in the territorial waters of Georgia whether flying Georgian or foreign flag can be arrested only with regards to the claims listed in paragraph 1 of article 4 of the Law. However the prohibition of arrest to secure claims other than maritime claims, does not apply to claims of Governments, or Departments thereof, Public Authorities or Dock or Harbor Authorities within their jurisdiction. Their right to arrest, to detain or otherwise prevent the sailing of vessels, both to secure claims and for reason of safety or other public reasons is not affected by the Law.

Paragraph 1 of article 6 provides that "the only competent authority to order the arrest of ship within the territory of Georgia is the Court of Georgia". Though the provision itself is straightforward, some explanation seems to be necessary about the court system of Georgia.

Paragraph 2 of the Constitution of Georgia establishes that "justice shall be administered by courts of general jurisdiction. Their system and legal proceedings shall be determined by law." Paragraph 4 of the same article prohibits the creation of either extraordinary or special courts. Law of Georgia on Courts of General Jurisdiction (adopted June 13, 1997), Law of Georgia on the Supreme Court of Georgia (adopted on May 12 1999) established the judicial system of Georgia. Under the law of Georgia on Courts of General Jurisdiction the common courts have jurisdiction in civil, criminal and administrative cases (paragraph 2 of article 1). Paragraph 1 of article 2 provides that the system of common courts consists of the following: the district (town) courts, the Circuit Courts, (in Tbilisi and in Kutaisi), the High Courts of Autonomous Republic of Adjara and of Autonomous Republic

Abkhazia, and the Supreme Court. The Civil Procedural Code of Georgia provides that the district courts will hear all civil cases subject to jurisdiction save for the following cases: (i) disputes of an economical character between juridical persons if the value of the claim is more than 100000 Georgian Lari; (ii) disputes arising from state law and administrative law; (iii) disputes related to intellectual property. These cases are heard by the Circuit Courts as by the courts of the first instance. The Circuit Court is also the Court of Appeal for civil cases. The Supreme Court may only be the cassation court for civil cases.

Paragraph 2 of article 6 provides that “The Court shall have jurisdiction to order the arrest of a ship even when it has no jurisdiction to hear the case on the merits. In this case the jurisdiction of the Court shall be established in accordance with the principles of jurisdiction as provided in the Civil Procedural Code of Georgia.” The first sentence of the paragraph establishes a different rule from article 193 of the Civil Procedural Code of Georgia that stipulates that the court is entitled to order conservatory measure only in cases when it has the jurisdiction to hear the case on the merits. The second sentence refers to Chapter III (articles 13-24) of the Civil Procedural Code establishing the general rules of jurisdiction of the courts of Georgia.

Paragraph 3 of article 6 contemplates that in cases of conflict between the Law and the Civil Procedural Code the former will prevail. This provision is justified by paragraph 2 of article 2 of the Civil Code of Georgia that provides that special provisions override general provisions.

Article 7 is based on paragraph 1, 2 and 4 of article 3 of the 1952 Convention. The provisions of the Law are more simplified due to the fact that definition of a “sister ship” is provided in article 4 of the Law that allowed the wording to be easier to read and understand. In other respects these provisions follow the provisions of the 1952 Convention.

Article 8 provides the possibility to change and/or avoid the arrest of a ship by furnishing security. This article is based on article 5 of the 1952 Convention.

Paragraph 1 of article 8 refers to the Civil Procedural Code of Georgia. The relevant provisions in the code are enshrined in article 196 that provides that: “1. On the motion of the parties the court shall change one measure with another measure of securing the claim. 2. The measures may be changed at any stage of the proceedings...”

Paragraph 1 of article 9 contemplates that arrest of ship, or bail or other security may be given only once in respect of the same maritime claim. This rule is also based on the conventional rules, namely article 3.2 of the 1952 Convention.

Paragraph 2 of article 9 provides an exception to the rule specified in paragraph 1 of the same article: a ship may be only rearrested if the claimant can show that the security ceased to be effective or that there is otherwise special cause for arrest. The provision establishes the burden of proof of the claimant.

Article 10 establishes the principles of the jurisdiction on the merits of the Georgian courts. Paragraph 1 provides that “[a]part from cases provided by Georgian legislation, the courts of Georgia may determine the case on the merits also in following cases”. This provision needs some clarification: implied reference is made to Chapter II of the Civil Procedural Code of Georgia, as well as Law of Georgia on the International Private Law, that establish basic rules concerning the jurisdiction of Georgian Courts. As for those provisions of 7 of the 1952 Convention that are omitted, the cases envisaged therein are provided for in the aforementioned laws.

Subparagraphs a-d are based on article 7.1 of the 1952 Convention with minor alterations:

- Subparagraph “b” of paragraph 1 of article 10 uses territorial approach when establishing the possibility to order the arrest of a ship – arrest is allowed if the collision took place within the territorial waters of Georgia.
- Subparagraph ‘c’ of paragraph 1 of article 10 specifies article 7.1.d of the 1952 Convention by confining the possibility to arrest a ship if (i) the salvage operation took place within the territorial waters of Georgia; or (ii) the ship saved or the salvor ship is flying the flag of Georgia.

Subparagraph “e” of paragraph 1 of article 10 is not a reflection of the Convention provisions. In fact, it emphasises paragraph 1 of Article 3 of the Law. Though by interpretation of article 3 the same conclusion may be drawn it is the practice in Georgian legislation to refer to international treaties when the latter are likely to influence the relevant relations.

Paragraph 2 of article 10, based on article 7.3 of the 1952 Convention, gives discretion to parties to a dispute to agree on a jurisdiction of a court in another State or that of a tribunal either in Georgia

or in another State. Article 12 of the Civil Code of Georgia provides for the possibility to transfer a civil case to an arbitral tribunal by agreement of the parties.

Article 11 also derives from article 7 of the 1952 Convention. Under paragraph 1 of this article the court has to establish a time bar within which a claimant has to bring an action on the merits after the arrest of a ship. The provision defines the maximum time limit for bringing an action, though the court has to take into consideration the relevant circumstances of the case. If the claimant is not successful in bringing an action on the merits within the fixed time, the defendant may apply for the release of the ship or the bail or other security as provided by paragraph 2 of article 11 of the Law.

Article 12 establishes protection of interests of the defendant. Under paragraph 1 of article 12 the defendant is entitled to claim damages in the specified circumstances.

Paragraph 2 of article 12 secures the right of the defendant to security furnished by the claimant. This requirement is also provided in article 199 of the Civil Procedural Code of Georgia though the latter leaves to the discretion of the judges to decide whether the security is to be furnished or not. As for paragraph 2 of article 11 it establishes that (i) the judges have discretion to ask security to be furnished when they consider reasonable; (ii) the court has to ask security to be furnished if there is a reasonable doubt that the claimant or his property may not be available for the purposes of paragraph 1 of article 12.

Chapter III includes articles 13 and 14.

Article 13 provides that article 43 of the Maritime Code of Georgia will be repealed upon the entry into force of the Law. Article 43 of the Code is the only article regulating the possibility of arrest of ships with regards to maritime claims in Georgian legislation. This article establishes a short list of maritime claims that allows arresting a ship and does not refer to procedural issues. Besides this, article 43 of the Code provides different rules from the Law. Thus, on the basis of article 29 of the Law of Georgia on Normative Acts, the Law declares article 43 to be repealed.

Article 14 regulates the entry into force of the Law. Usually the normal procedure is to publish a normative act in “Sakartvelos Sakanonmdeblo Matsne” (official gazette) as provided by article 41 of the Law of Georgia on Normative Acts. Though the Maritime Code of Georgia stipulates that all laws related to maritime relations should be also published in “Zrvaosanta Utskebebi” (official gazette for maritime issues). That is why paragraph 1 of article 14 provides that the Law should “be published in accordance with the law of Georgia on Normative Acts and with the Maritime Code of

Georgia”. The decisive publication for the entry into force will be the one in “Sakartvelos Sakanonmdeblo Matsne”.

Herewith it will be important to admit that the Civil Procedural Code of Georgia specifies all procedural rules, *inter alia*, rules for filing a request for a conservatory measure; procedure for making decisions over such a request; enforcement of a decision on a conservatory measure; appealing a decision on a conservatory measure. Accordingly, there was no necessity to create new procedural rules or copy the existing ones in the Law.

Law of Georgia on Arrest of Ships in the Territorial Waters of Georgia

Chapter I

General Provisions

Article 1

This law sets out rules regulating arrest of ships within the territory of Georgia.

Article 2

- 1.The provisions of this Law shall apply to vessels flying any flag within the territory of Georgia.
- 2.Notwithstanding the abovementioned, warships and ships on government service used for non-commercial purposes are excluded from the sphere of application of this law.

Article 3

- 1.In case of conflict between the norms of this Law and norms of any international treaty adhered to by Georgia, the norms of such an international treaty shall prevail.
- 2.Legislation of Georgia on arrest of ships consists of this law and other legislative acts of Georgia.

Article 4

For the purposes of this Law:

1. "Maritime Claim" means a claim arising out of one or more of the following:
 - (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 connexion with the operation of any ship;
 - (c) Salvage;
 - (d) Agreement relating to the use or hire of any ship whether by charter party 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) Towage;
- (i) Pilotage;
- (j) Goods or materials wherever supplied to a ship for her operation or maintenance;
- (k) Construction, repair or equipment of any ship or dock charges and dues;
- (l) Wages of masters, officers, or crew;
- (m) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- (n) Disputes related to proprietary rights on ship;
- (o) Disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- (p) The mortgage or hypothecation of any ship.

2. "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.

3. "Person" means a physical and/or a legal person, including any legal entity owned by a State and a State body.

4. "Claimant" means a person who alleges that a maritime claim exists in his favour.

5. "Sister ship" means a ship:

- a) all the shares in which are, at the time of arrest, owned by the person or persons who were, at the time when the maritime claim arose, the owner or owners of all the shares of the ship in respect of which the maritime claim arose; or
- b) all the shares of which are, at the time of arrest, owned by the person who was, at the time when the maritime claim arose, the demise-charterer of the ship in respect of which the maritime claim arose.

6. For the purposes of paragraph 4 of article 7 "person" means time-charterer, voyage charterer, manager, operator, agent of the ship in respect of which the maritime claim arose.

Chapter II

Article 5

A ship may be arrested within the jurisdiction of Georgia only in respect of a maritime claim.

Article 6

1. The only competent authority to order the arrest of ship within the territory of Georgia is the Court of Georgia.
2. The Court shall have jurisdiction to order the arrest of a ship even when it has no jurisdiction to hear the case on the merits under the Georgian Legislation. In this case the jurisdiction of the Court shall be established in accordance with the principles of jurisdiction as provided in the Civil Procedural Code of Georgia.
3. The Court will act in accordance with the Civil Procedural Code of Georgia, unless this Law provides otherwise.

Article 7

1. Only the ship in respect of which the maritime claim arose or a sister ship shall be arrested.
2. Notwithstanding paragraph 1 of this article, only the particular ship in respect of which the maritime claim arose may be arrested in respect of any maritime claim enshrined in subparagraphs “n”, “o” and “p” of paragraph 1 of article 4.
3. If a demise-charterer of a ship and not a registered owner is liable for a maritime claim relating to that ship, the claimant may ask for the arrest of such a ship or any other ship in the

ownership of the demise-charterer, provided the requirements of this Law are fulfilled. No other ship in the ownership of the registered owner shall be liable to arrest in respect of such a maritime claim.

4. The provisions of paragraph 3 of this Article shall apply to any case in which a person other than a registered owner of a ship is liable in respect of a maritime claim relating to the ship.

Article 8

1. Upon the motion of a party (parties) the competent authority may release the ship provided sufficient bail or other security is furnished in accordance with the Civil Procedural Code of Georgia.

2. The arrested ship shall be released when sufficient bail or other security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enshrined in subparagraphs “n” and “o” of paragraph 1 of Article 4. In such cases, the court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

3. In default of agreement between the parties as to the sufficiency of the bail or other security, the Court shall determine the nature and amount thereof not exceeding the value of the arrested ship..

4. The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitations of liability of the owner of the ship.

Article 9

1. A vessel shall not be rearrested, nor shall bail or other security be given more than once in respect of the same maritime claim.

2. If bail or other security is given to release a vessel from arrest, arrest cannot be granted for the same maritime claim. Such arrest may however be granted if the claimant can show that the security has ceased to be affective or that there is otherwise special cause for arrest.

Article 10

1. Apart from cases provided by the Georgian legislation, the courts of Georgia may determine the case on the merits also in following cases:

- a. if the claim concerns the voyage of the ship during which the arrest was made;
- b. if the claim arose out of a collision within the territory of Georgia;
- c. if the claim is for salvage provided:
 - (i) salvage operation took place within the territorial waters of Georgia; or
 - (ii) a ship saved or salvor ship is flying the flag of Georgia;
- d. if the claim is upon a mortgage or hypothecation of the ship arrested;
- e. if so provided by an international treaty adhered to by Georgia.

2. Nothing in paragraph 1 of this Article prejudices the right of parties to a dispute to agree on jurisdiction of a court other than that within whose jurisdiction the arrest was made or arbitration.

Article 11

1. The Court will fix the time within which the claimant *has to* bring an action on the merits before a competent court. In fixing time the court will take into consideration all circumstances of the case, but such period of time should not be more than 20 days.

2. If within the fixed time the claimant does not bring an action the *defendant* may apply for the release of the ship or the bail or other security.

Article 12

1. The defendant is entitled to claim damages against the claimant if:
 - a) the claimant fails to submit the claim on the merits within the fixed time;
 - b) the Court where the claim on the merits is submitted declares the case inadmissible;
 - c) the case on the merits is for the defendant (if the claimant loses the case).

2. To secure the aforementioned right of the defendant, the court shall define the amount of appropriate security that should be furnished by the claimant if (i) there is reasonable doubt that should the need arise the claimant and/or his property will not be available for compensating the defendant or (ii) the court considers it reasonable due to other relevant circumstances of the case.

Chapter III

Article 13

On the entry into force of this Law article 43 of the Maritime Code of Georgia will be repealed.

Article 14

1. The Law shall be published in accordance with the law of Georgia on Normative Acts and with the Maritime Code of Georgia.
2. This Law shall enter into force on the 30th day after publication in “SakarTvelos Sakanonmdeblo Matsne” (Official Gazette).

President of Georgia

Mikheil Saakashvili

