



**LEGISLATION INCORPORATING THE CONVENTION RELATING TO
THE ARREST OF SEA-GOING SHIPS OF 1952
AND THE CONVENTION ON MARITIME LIENS AND MORTGAGES OF 1993
AS PART OF THE MERCHANT SHIPPING CODE**

**A MARITIME LEGISLATION DRAFTING PROJECT SUBMITTED
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DRAFTING INSTRUCTIONS.

BACKGROUND

Although the arrest of ships was a procedural remedy known in all maritime countries, the purpose of this remedy differed. In England arrest gave rise to the action *in rem*, and was a means of invoking the Admiralty jurisdiction of the High Court. Such jurisdiction could be invoked by an action *in rem* with respect to certain claims, and in any case in which there was a maritime lien or other charge on a ship. The action *in rem* was, however, confined to the ship in respect of which the claim arose. This rule is generalised in the United States, where in addition to the arrest in a suit *in rem* in respect of any claim secured by a maritime lien, there is a right of attachment in a personal action when the defendant may not be found in the jurisdiction. In civil law countries arrest was a general procedural remedy, aiming at obtaining security for the subsequent enforcement of a claim (*saisie conservatoire*), and any property of the debtor could be subject of arrest. It could also be a specific maritime remedy in respect of claims secured by a maritime liens, when it became a means of enforcement of the lien on the ship in respect of which the claim secured by the maritime lien arose.

The security can arise by operation of law or by the will of the parties. In maritime law securities on ships are generally clearly distinguished by regard to their source.

Any type of property may be the subject of maritime claims. As regards maritime liens the position is that although ships are the principal object of maritime liens, under the 1926 Brussels Convention on Maritime Liens and Mortgages the freight and so-called "accessories" of the vessel, viz.

compensation due to the owner for material damage suffered by the ship, general average contributions and salvage remuneration due to the owner, could also be the object of a maritime lien. In fact, these sums which either represent part of the value of the ship or the salvage reward are treated in the same manner as the freight. It should be noted that the 1993 International Convention on Maritime Liens and Mortgages makes no reference to freight and "accessories" is no longer included.

Normally, maritime liens, are concealed charges, which remain totally unknown to third parties. That is not the rule with the possessory liens. They are made known to third parties through the physical location of the subject matter of the security, which must remain in the control of the creditor, i.e. within its premises, its factory, yard, etc.

In maritime law, possessory liens on ships are granted in many jurisdictions to the ship builder, the ship repairer, the person who removes a wreck and also to the owner or the carrier of the cargo carried on board as security for their claims for freight, demurrage, general contributions, etc.

Ownership of the property is not required in respect of maritime and possessory liens. Article 7 of the 1993 Convention provides that the maritime liens listed in the Convention arise whether the claims secured by such liens are against the owner or against the demise or other charterer, manager or operator of the ship. This may be explained in various ways, viz. on the one hand by the fact that the claims arise against the ship, irrespective of the ownership, and on the other hand that the owner, by allowing other persons to use his ship, impliedly consents that such persons also use the ship as security in respect of claims which may arise during her employment and as consequence thereof. The principle whereby maritime (and also possessory) liens arise irrespective of the debtor being the owner is well entrenched in maritime law and is confirmed

in Article 7/1/ of the 1993 International Convention.

The enforcement of the security may differ according to the type of security.

The various types of security are also distinguishable in respect of the priority with which the secured claims are satisfied out of the proceeds of sale of the property which is the subject of the security.

Securities belonging to a certain class all rank before or after those of another type. A system of ranking also obtains within the same class among securities of that class according to specified criteria.

The general rule is that maritime liens rank ahead of hypothèques and mortgages on ships whilst claims other than maritime liens come after them. That is not necessarily the case in respect of possessory liens and rights of retention, for in some jurisdictions they rank ahead of all other securities, including maritime liens, whilst in other jurisdictions they rank after maritime liens and even after hypothèques and "mortgages".

One fundamental policy choice is that relating to which vessels may be the subject of maritime claims. It is generally accepted that state-owned ships used or intended to be used in a public non-commercial service may not be the subject of any type of security.

After the collapse of the USSR in 1990, Azerbaijan recovered its long lost right of self determination and independence. Fifteen ex-soviet republics from one day to another had to harmonise and update their legal systems. The case of Azerbaijan is not an exception; its legal system is still mainly based upon the soviet style.

Prior to attaining independence, Azerbaijan as a member of the USSR applied soviet law. As one of the world's superpowers the Soviet Union was present in all the negotiations held by the Comité Maritime International and

IMO, where the Conventions relating to the liens and arrest of ships were drafted. One of the important characteristics of the USSR was that due to its economic organisation, all the property (including the shipping industry) was state-owned. For this reason the Soviet Union did not become a party to the Convention Relating to the Arrest of Sea-going Ships, 1952 since it did not want to have its ships arrested in another country.

Today Azerbaijan as a newly independent state is not a party to any international Convention. However, the policy of the Government is to strengthen the shipping industry in the Caspian Sea, as well as in the ports of Odessa, Istanbul and Hamburg. The Government decided to become a party to the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Maritime Liens and Mortgages, 1993, for the purpose of creating a logical system of law that gives on the one hand security for the investors, and on the other hand the uniformity of our law in the international sphere.

As a means of giving effect to this policy the Caspian Shipping Company will be privatised in the near future. As a result of this state-owned ships will no longer receive the privileged treatment that the Soviet Merchant Shipping Code gave to them. In addition, from the interpretation of Articles 30 and 31 of the United Nations Convention on the Law of the Sea, which will be ratified by the Republic of Azerbaijan soon, the privileged treatment given to state-owned ships operated for commercial purposes will be discontinued. For these reasons it is of the utmost importance to update our laws in time for our project of privatisation and accession to the major international Conventions relating to shipping.

INSTRUCTIONS

1. Article 1 of the 1952 Convention provides a list of so-called "maritime claims" which give rise to a right of arrest. The terminology used in Article 1 does not follow that of the 1993 Convention in respect of maritime claims listed. It seems essential to ensure that all claims which have been granted maritime lien status under the 1993 Convention are covered by the Arrest Convention, particularly bearing in mind the present pattern of the Arrest Convention under which arrest of ships is permitted only in relation to the claims enumerated in it. The terminology used in the Arrest Convention in respect of maritime liens should, as far as possible, be closely followed, or even be identical to, that of the 1993 Convention. The outdated concept of "bottomry" can be deleted.

2. It is advisable to distinguish from the general list of the maritime claims those which are secured by maritime liens. The order and wording of the list of the maritime liens *must* reflect as close as possible paragraph 1 of Article 4 of the 1993 Convention.

3. It is essential to establish the concept of the possessory lien. A possessory lien will be regarded as existing only if the ship is in the possession of the claimant and such possession is related to the claim. Examples are the claims of shipbuilders and ship repairers. It is advisable, in order to protect other claimants, such as the holder of a hypothèque or mortgage, or ordinary claimants, to put the holders of the possessory liens last in a rank of priorities. Preferential rights can be granted to the ship builders and ship repairers, or in other cases, pursuant to the provisions of the Code, postpone them to the maritime lien holders so long as the ship is in the possession of the maritime lien

holder.

4. It is essential to provide that ships may be arrested as security in respect of a maritime claim. Personal liability of the owner must be the main requirement for arrest, with the exemptions for the maritime liens, i.e. if a claim is not secured by a maritime lien, the ship may not be arrested unless the owner is personally liable for the claim.

5. Provisions must also be made for the following:

1/ determination of the competent authority, e.g. the court;

2/ the courts power to modify or cancel the order of arrest at its discretion;

3/ that if no hearing takes place before the arrest, notice of the arrest must be given to the owner and a hearing must be fixed.

4/ the conditions under which a ship may be released from arrest: e.g. adequate security.

5/ the award of damages to the innocent party for any detention of the ship by arrest if the arrest proved to be unjustified.

6. The 1993 Convention provides that maritime liens are extinguished after the lapse of one year from the time when the claims secured thereby arose, unless prior to the expiry of such period, the vessel has been arrested and, following such arrest, is sold through a forced sale. It is deemed necessary to enlarge the provisions of paragraph 1 of Article 8 of the 1993 Convention to all maritime claims and expressly provide an extension for all maritime claims to a period of one year from the date of accrual. A provision to reflect this is required.

7. It is necessary to draft a provision to regulate the conversion of the arrest into

a seizure when an enforceable judgment is obtained on the merits, in order then to proceed to the forced sale of the ship and the distribution of the proceeds of sale. The purpose of a forced sale is to satisfy from the proceeds of the sale, the creditors of the owner of the ship, and also the creditors of persons other than the owner when their claims are secured by a charge /maritime lien, hypothèque or mortgage, possessory lien or right of retention/ of the ship. It is therefore in the general interest of the creditors, and particularly of those whose claims do not have a top priority, that the ship be sold at the highest possible price, for otherwise they may not obtain satisfaction, or total satisfaction, of the claims. The provisions of Article 11 of the 1993 Convention are therefore to be put into effect in respect of the notice of forced sale. The draft should set the thirty days days advance notice of the time and place of the sale be given to the persons mentioned in the above stated Article.

8. The draft legislation must reflect the aim of transferring a clear title in the event of a forced sale. It is advisable to achieve this by means of provisions whereby, all hypothèques and mortgages, except those assumed by the purchaser, and all liens and other rights or encumbrances of whatsoever nature cease to attach to the ship in the event of her forced sale. In addition, provision must be made to empower the competent court seized of the case to issue a certificate to the effect that the ship is sold free of all hypothèques and mortgages, and of all liens and other encumbrances.

9. The legislation aims to protect the holders of registered hypothèques and mortgages; the holders of maritime liens as well as holders of other maritime claims or rights of retention for claims arising out of shipbuilding or ship repair contracts, in accordance with Article 11 of the 1993 Convention.

10. The legislation must provide for an article containing the order awarded by the competent court and arising out of the sale of a ship. It is advisable to set the following order of priority:

- 1/ the holders of maritime liens;
- 2 the holders of preferential rights;
- 3 the holders of registered hypothèques and "mortgages";
- 4/ the holders of the other maritime claims.

11. The legislation must expressly provide that it can not be applied to state-owned ships exclusively dedicated to public non-commercial service.

ARRANGEMENT OF ARTICLES

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**Act of the Milli Mejlis of the Republic of Azerbaijan to amend the
Merchant Shipping Code.**

Whereas the Republic of Azerbaijan has ratified the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Maritime Liens and Mortgages, 1993, the Milli Mejlis of the Republic of Azerbaijan enacts as follows :

Part XIII.

Maritime claims and arrest of the ships.

Article 189.

Definitions.

In this Part the following words shall have the meaning hereby assigned to them:

1. "Arrest" means the detention of a ship by judicial process to secure of a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgement.
2. "Claimant" means a person who alleges that a maritime claim exists in his favour.
3. "Convention" means the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 1952.
4. "Maritime Claim" means a claim arising out of one or more of the following:
 - 1/ damage caused by the ship , whether in collision or otherwise;

- 2/ loss of life or personal injury caused by the ship or occurring, whether on land or on water, in direct connection with the operation of the ship;
- 3/ any agreement relating to the use or hire of the ship;
- 4/ any agreement relating to the carriage of goods or passengers in the ship;
- 5/ loss of or damage to or in connection with goods /including luggage/ carried in the ship;
- 6/general average;
- 7/ towage in respect of a ship or an aircraft;
- 8/ pilotage dues in respect of a ship or an aircraft;
- 9/ goods, materials, provisions, bunkers, equipment /including containers/ or services supplied to the ship for her operation or maintenance;
- 10/ construction, repair, converting or equipping of the ship;
- 11/ port, canal and other waterway dues and dock charges;
- 12/ wages and other sums due to the master, officers and other members of the ship`s complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- 13/ any disputes as to ownership or possession of the ship;
- 14/ any dispute between co-owners of the ship as to the employment or earnings of the ship;
- 15/ an hypothec or a "mortgage" or a charge of the same nature on the ship;
- 16/any dispute arising out of a contract for the sale of the ship;
- 17/ salvage or any salvage agreement.

5. "Person" includes an individual, a partnership and a body corporate.

Article 190.**Maritime Liens.**

1. Subject to the provisions of this Part the following maritime claims may be secured by maritime liens:

- 1/ claims for wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- 2/ claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- 3/ claims for reward for the salvage of the ship;
- 4/ claims for port, canal, and other waterway dues and pilotage dues;
- 5/ claims based on a wrongdoing act arising out of physical loss or damage caused by the operation of the ship other than loss of or damage to cargo, containers and passenger's effects carried on the ship;

2. In paragraph 1, "owner" includes, in relation to a ship, the charterer, manager or operator of such ship.

Article 191.**Claims arising from hazardous substances, etc.**

A maritime lien shall not be attached to a ship to secure a claim under subparagraphs /2/ and /5/ of paragraph 1 of Article 2 where such claims arise out of or result from:

1/ damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to law providing for strict liability and compulsory insurance; or

2/ the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Article 192.

Priority of maritime liens.

The maritime liens set out in Article 2 shall take priority over hypothèques, "mortgages" and preferential rights registered under this Code, and no other claim shall take priority over them, except as provided in Article 5.

Article 193.

Order of priority of maritime liens.

The maritime liens set out in Article 2 shall:

1/ rank in the order in which they are set out in Article 2, provided however, that maritime liens securing claims for reward for the salvage of a ship shall take priority over all other maritime liens which have attached to the ship prior to the time when the operation giving rise to such liens were performed.

2/ in the case of claims set out in subparagraphs /1/, /2/, /4/ and /5/ of paragraph 1 of Article 2, rank pari passu among themselves;

3/ claims set out in subparagraph /3/ of paragraph 1 of Article 1, shall rank in the inverse order of the time when the claims secured thereby accrued; and for this purpose claims for reward for the salvage of the ship shall be deemed to have accrued on the date on which the salvage operation was terminated.

Article 194.

Rights of ship builders and ship repairers.

Where a preferential rights arises, pursuant to the provisions of this Code, in respect of a ship in the possession of:

- 1/ a ship builder, in order to secure claims for the building of the ship; or
- 2/ a ship repairer, in order to secure claims for the repair of the ship, effected during such possession,

such rights shall be postponed to all the maritime liens set out in Article 3 but may take precedence over any hypothecation or other preferential right registered under this Code so long as the ship is in the possession of the ship builder or ship repairer, as the case may be.

Article 195.**Characteristics of maritime liens.**

The maritime liens set out in Article 2 shall arise whether the claims secured by such liens are against the owners, the demise or other charterer, manager or operator of the ship and such liens shall, subject to the provisions of Article 18, follow the ship, notwithstanding any change of ownership or of registration.

Article 196.**Arrest of ships.**

Subject to Article 9 of this Part any ship may be arrested within the jurisdiction of the Republic of Azerbaijan in respect of any maritime claim, but in respect of no other claim.

Article 197.**Government owned ships.**

Ships owned or operated by a State and used only on Government non-commercial service shall be excluded from the application of this Part.

Article 198.**Ships subject to arrest.**

1. Except as provided in paragraph 3 of this Article, 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, even though the ship arrested is ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in subparagraphs 13,14 and 15 of paragraph 4 of Article 1.
2. Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.
3. When in the case of a charterer by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Part, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims. The provisions of this paragraph shall apply to any case in which a person other than registered owner of a ship is liable in respect of a maritime claim relating to that ship.

Article 199.**Prohibition against re-arrest.**

1. Subject to paragraph 2 of this Article, a ship shall not be arrested, nor shall bail or other security be given more than once in the Republic of Azerbaijan in

respect of the same maritime claim by the same claimant, if a ship has been arrested in any one of the jurisdiction of the States parties to the Convention, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest.

2. Any subsequent arrest of the ship referred to in paragraph 1 or of any ship in the same ownership by the same claimant for the same claim shall be set aside, and the ship released by the competent court, unless the claimant can satisfy the competent court that the bail or other appropriate judicial security had been finally released before the subsequent arrest or that there is good cause for maintaining that arrest.

Article 200.

Judicial powers of arrest.

A ship may be arrested under the authority of a competent court of the Republic of Azerbaijan .

Article 201.

Release from arrest.

1. The competent court within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in subparagraphs 13 and 14 of paragraph 4 of Article 1. In such cases the competent court may permit the person in

possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest

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

Article 202.

Rules of procedure for arrest.

1. The Supreme Court shall make rules of procedure relating to the arrest of a ship, and in particular, all matters relating to a preliminary hearing.

2. If at a preliminary hearing the competent court is not satisfied upon the evidence before it that the arrest is lawful, it shall release the ship and may hold the claimant liable for the damages in respect of the arrest of the ship or for the costs of the bail or other security furnished to release or prevent the arrest of the ship.

Article 203.

Jurisdiction on the merits of the case.

1. The competent court within whose jurisdiction the arrest of a ship has been made shall have jurisdiction to determine the case upon its merits in any of the following cases namely:

- 1/ if the claimant has his habitual residence or principal place of business in the Republic of Azerbaijan;
 - 2/ if the claim arose in the Republic of Azerbaijan;
 - 3/ if the claim concerns the voyage of the ship during which the arrest was made;
 - 4/ if the claim arose out of circumstances referred to in Article 13 of the International Convention of Certain Rules of law with respect to collisions between vessels /Brussels, 1910/;
 - 5/ if the claim is for salvage;
 - 6/ if the claim is upon hypothecation or other charge of the ship arrested;
2. The competent court within whose jurisdiction the arrest of a ship has been made shall fix the time within which the claimant shall bring an action.
3. If an action is not brought within the time fixed in accordance with paragraph 2 of this Article, the defendant may apply for release of the ship or the bail or other security.

Article 204.

Limitation period.

The claims relating to a ship as set out in Article 2 shall be extinguished after a period of one year from the time when the claim secured thereby arose unless, prior to the expiry of such period, the ship has been arrested and the arrest has led to forced sale pursuant to the law for the time being in force relating to the sale of property in maritime proceedings. The one year period shall not be subject to interruption or suspension except that time shall not run during the period the claimant is legally prevented from arresting the ship.

Article 205.**Notice of forced sale.**

Prior to the forced sale of a ship, the competent court shall give or cause to be given thirty days` written notice of the time and place of such sale to:

- 1/ all holders of hypotheques, "mortgages" and other preferential rights registered under this Code;
- 2/ the holders of maritime liens set out in Article 2, whose claims have been notified to the competent court;
- 3/ the Registrar of ships;
- 4/ the registered owner of the ship.

Article 206.**Effects of forced sale.**

In the event of the forced sale of a ship all hypotheques, "mortgages" and other preferential rights registered under this Code, except those assumed by the purchaser with the consent of the holders thereof; and all liens and other encumbrances of whatsoever nature but not including a charter party or contract for the use of the ship shall cease to attach to the ship. No charter party or contract for the use of the ship shall be deemed to be a lien or encumbrance for the purposes of this Article.

Article 207.**Disposition of proceeds of sale.**

The costs awarded by the competent court and arising out of the arrest and subsequent sale of a ship shall be paid first out of the proceeds of such sale, and the balance of such proceeds shall be distributed among the holders of maritime liens under Article 2, the holders of preferential rights under Article 6 and, the holders of hypothèques, "mortgages" and other preferential rights, registered, in accordance with this Code and to the extent necessary to satisfy their claims.

Article 208.**Issue of certificate that a ship is free of hypothèques, liens, etc.**

When a ship has been the subject of a forced sale in the Republic of Azerbaijan the competent court shall, at the request of the purchaser, and on being satisfied that this Code has been complied with, issue a certificate to the effect that the ship is sold free of all hypothèques, liens and other encumbrances except those assumed by the purchaser, provided that the proceeds of such forced sale have been deposited with the authority competent to distribute such proceeds to the persons entitled thereto.

Article 209.

Incorporation of Part XIII into Merchant Shipping Code.

This Part shall come into force on the first of June, 1995 and shall, on that date be incorporated into the Merchant Shipping Code of the Republic of Azerbaijan.

Speaker of the Milli Mejlis

/Signature/

April 11, 1995.