

## INTERNATIONAL CONVENTION ON ARREST OF SHIPS

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On 12<sup>th</sup> March 1999, the United Nations/International Maritime Organization Diplomatic Conference (hereinafter “UN/IMO Diplomatic Conference”) unanimously adopted the International Convention on Arrest of Ships, 1999 (hereinafter “the 1999 Arrest Convention”). The representatives from around 100 nations as well as about 20 intergovernmental and non-governmental organizations participated at the UN/IMO Diplomatic Conference, which was held in Geneva under the auspices of the United Nations Conference on Trade and Development (UNCTAD). The 1999 Arrest Convention entered into force on 14 September 2011 upon ratification/accession by ten States (article 14).

The subject of ship arrest is of paramount importance to the international shipping and trading community. It is also an area that traditionally has been subject of divergent approaches by different legal systems. Civil law systems permitted arrest for any claim against the owner of the ship even if it was not of maritime nature; while in common law a ship could only be arrested for a very limited number of maritime claims.

Moreover, the interests of different sectors of the industry also vary considerably with regard to the subject. While the interest of owners of ships and cargo lie in ensuring that international trading is not interrupted by unjustified arrest of a ship, the claimants are primarily interested in being able to obtain security for the enforcement of their legitimate claim by way of arrest.

The aim of the 1999 Arrest Convention is to provide a more modern successor to the 1952 Brussels Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (hereinafter “1952 Convention”). The main objective of the 1952 Convention was to establish an international legal instrument that would reconcile the different legal systems, avoiding arrest of a ship for claims unrelated to its operation, protecting interests of the relevant parties. The Convention succeeded in reconciling the differences between civil law and common law systems and striking a balance between different interests involved.

However, since its adoption in 1952, important developments have occurred in the field of international shipping giving rise to the need for a new international instrument that takes account of the developments of the past few decades reflecting the new features of the shipping industry.

### **Historical Background**

The subject of maritime liens and mortgages and arrest of ships had been included in the work programme of UNCTAD (resolution 49 (X) of UNCTAD Committee of Shipping) and IMO (resolution A 405 (X) of the IMO Assembly). While both the UNCTAD Committee on Shipping and the IMO Council recognized that both organizations had legitimate interests in the subject, both bodies stated repeatedly that all necessary steps must be taken to avoid duplication of work. After extensive consultations between the two organizations, it was recognized that the best approach to deal with the subject was the establishment of a joint intergovernmental expert group.

Following a recommendation from the UNCTAD Working Group on International Shipping Legislation (WGISL), endorsed by the UNCTAD Trade and Development Board (at its 32<sup>nd</sup> session) and by the IMO Council (at its 13<sup>th</sup> extraordinary session and at its 56<sup>th</sup> session in June 1986), the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (hereinafter “the JIGE”) was established. The mandate of the JIGE was to review the existing Conventions on Maritime Liens and Mortgages and Arrest of

Ships. The JIGE held its sessions alternately in Geneva and in London and was serviced jointly by the secretariats of UNCTAD and IMO.

The JIGE completed the preparation of a set of draft articles for a convention on maritime liens and mortgages in 1989. It also held an exchange of views concerning the possible review of the 1952 Convention. The JIGE, however, decided that in view of the close linkage between the 1952 Convention and a future convention on maritime liens and mortgages, preparation of any such amendment would have to be postponed until after the adoption of the Convention on Maritime Liens and Mortgages by a diplomatic conference.

In May 1993, the UN/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages, having adopted the International Convention on Maritime Liens and Mortgages, 1993 (hereinafter “the 1993 MLM Convention”), also adopted a resolution recommending that the relevant bodies of UNCTAD and IMO, in the light of the outcome of Conference, reconvene the JIGE with a view to examining the possible review of the 1952 Convention (see the report of the Conference, A/CONF.162/8, annex I).

The JIGE devoted three sessions to the review of the 1952 Convention and prepared a set of draft articles for a new convention on the subject in December 1996. Following the General Assembly resolution 52/182, the UN/IMO Diplomatic Conference was convened in Geneva, under the auspices of UNCTAD, from 1 to 12 March 1999. The 1999 Arrest Convention was adopted with active participation of all major trading nations including developing countries by consensus.

### **Reform of the 1952 Convention**

The 1952 Convention achieved a wide measure of international support and was ratified or acceded by around 75 countries. However, after almost half a century since its adoption, some of its provisions had become outdated requiring amendments; other provisions were considered ambiguous giving rise to conflicting interpretations hampering uniform implementation of the Convention. Article 1(1) of the 1952 Convention, for example, which provides a list of maritime claims that give rise to a right of arrest, had often been criticized as being incomplete and outdated and the description of some maritime claims unsatisfactory. Provisions concerning ships that may be arrested in respect of a maritime claim (art. 3(1) and (4)) had given rise to varying interpretation and controversy. It was not entirely clear from the wording of these paragraphs whether or not liability of the owner was essential for the purpose of arrest under the 1952 Convention.

Moreover, the adoption of the 1993 MLM Convention further necessitated the revision of the 1952 Convention. It was essential to ensure that all claims giving rise to a maritime lien under the 1993 MLM Convention would enjoy a right of arrest under the 1952 Convention. With the terminology used in article 1(1) of the 1952 Convention differing from that of the 1993 MLM Convention, there could be claims which were granted maritime lien status but remain outside the 1952 Convention.

Thus, the first important issue for the JIGE was the scope of the amendment of the 1952 Convention. It was necessary to decide whether to limit the scope of the revision to merely drafting amendments consequential upon the adoption of the 1993 MLM Convention, or whether a thorough revision of the Convention was desirable. A view was expressed by some delegations that in view of wide acceptance of the 1952 Convention, any revision should be confined to drafting consequential amendments. The majority of delegations, nevertheless, felt that a general review of the 1952 Convention was necessary, and it could be achieved without deviating from the basic principles established by the Convention. It was, therefore, decided that in view of the comprehensive character of the revision the outcome of the work of the JIGE needed to be embodied in a new convention rather than a protocol.

## Negotiating history and overview of the key provisions

The following section provides a brief overview of the main features of the 1999 Arrest Convention and, where appropriate, highlights amendments introduced over the 1952 Convention.

### A. Maritime claims: article 1(1)

The definition of a “maritime claim”, i.e. claims in respect of which a ship may be arrested, was one of the major points on which opinions had been divided at the UN/IMO Diplomatic Conference. The main issue was whether the Convention should adopt a similar approach to that of the 1952 Convention and provide for a “closed list” of claims giving rise to a right of arrest, or whether it should provide a more flexible approach by providing for an “open-ended” list of claims and avoid exclusion of genuine maritime claims from having a right of arrest. The delegations supporting a closed list argued that this approach would provide certainty as to the right of arrest, avoid liberal interpretations by national courts and promote uniformity. Those who supported a non-exhaustive list of claims emphasized the importance of retaining flexibility and avoiding exclusion of certain maritime claims from having a right of arrest as it was the case with the 1952 Convention.

Following an extensive debate, and through an informal working group, a compromise solution was reached. The compromise package involved maintaining a closed list, while allowing some flexibility in certain categories of maritime claims: article 1(1)(d) dealing with environmental claims is left open-ended on the basis that these types of claims were likely to develop in the future and could not be precisely defined. It, therefore, includes the phrase “... and damage, costs, or loss of a similar nature to those identified” in the subparagraph; in article 1(1)(u) the requirement for registration of a “mortgage” or “hypothèque” or “a charge of the same nature” has been deleted; and finally, article 1(1)(l) dealing with supply claims also includes supply of material and services to the ship for its management, in addition to its operation, preservation and maintenance.

Thus, arrest of a ship is only permitted in respect of maritime claims listed in article 1(1). Without providing for a general definition, article 1 merely provides that “‘Maritime Claim’ means a claim arising out of one or more of the following”. The list of maritime claims that follows is wider than that of the 1952 Convention. It has been expanded so as to cover all claims that have been granted a maritime lien status under the 1993 MLM Convention and to include further claims of maritime nature. Some individual maritime claims provide for a relatively wider scope of coverage. For example, paragraph 1(a) covers any loss or damage caused by the operation of the ship that would also cover economic and consequential loss.

Other new claims of maritime nature have been added. They include environmental claims (art. 1(1)(d)), wreck removal (art. 1(1)(e)), insurance premiums (art. 1(1)(q)), brokerage (art. 1(1)(r)) as well as disputes arising out of a contract for sale of the ship (art. 1(1)(v)).

The remaining maritime claims are drafted in a much clearer manner and their scope slightly extended. For example, subparagraph (c) covering salvage claims includes not only salvage operation but also claims arising from any salvage agreement and special compensation payable under article 14 of the 1989 Salvage Convention. Subparagraph (l) extends supply claims to include not only goods and materials but also “provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance”.

Subparagraph (n) dealing with port claims is relatively wide. It covers “port, canal, dock, harbour and other waterway dues and charges”. Subparagraph (o) covering crew wages reproduces the wording of the 1993 MLM Convention. It includes claims of other members of the ship’s complement in respect of their employment on board the ship, including “cost of repatriation and social insurance contributions payable on their behalf”. Under subparagraph (u) there are no requirements for a “mortgage” or “hypothèque” or “a charge of the same nature” to be registered so as to give rise to a right of arrest.

Thus, although the 1999 Arrest Convention includes a closed list of maritime claims in respect of which a ship may be arrested, it provides for a much wider scope for arrest than that of the 1952 Convention.

### **B. Definition of “arrest”: article 1(2)**

The concept of arrest is defined in article 1(2). It clarifies that the 1999 Arrest Convention only deals with pre-trial arrest for the purpose of obtaining security for the enforcement of a maritime claim. The 1999 Arrest Convention provides for a slightly wider definition than that of the 1952 Convention. It covers not only detention but also “restriction on removal” of a ship by order of a court to secure a maritime claim, not including the seizure of a ship in execution or satisfaction of a judgment “or other enforceable instrument”.

### **C. Powers of arrest: article 2**

The core principle of the 1999 Arrest Convention is stated in article 2(2) in that “a ship may only be arrested in respect of a maritime claim but in respect of no other claim”. This provision together with article 1(1) aim at reconciling the different approaches between civil law and common law systems. While in civil law a ship could be arrested for any debt irrespective of the nature of claim, in common law countries arrest was only permitted in respect of limited number of maritime claims. Thus, while article 1(1) extends the number of the claims for which a ship may be arrested, article 2 clearly limits them only to those of maritime claims.

Article 2(3) clarifies that a ship may be arrested to obtain security for claims whose merits may, by virtue of a jurisdiction or arbitration clause, be heard in a court of another State. Article 2(4) leaves the procedure relating to arrest to the law of the forum of arrest.

### **D. Exercise of the right of arrest: article 3**

Article 3 of the 1999 Arrest Convention sets out conditions for arrest of a particular ship in respect of which a maritime claim arose. It also includes provisions for arrest of another ship or ships owned by the person liable for the maritime claim.

#### **1. Arrest of a particular ship in respect of which a maritime claim arose**

As a general rule, a claimant may arrest the ship in respect of which a maritime claim arose provided that the owner of the ship is liable for the claim. This principle is not clearly stated in the 1952 Convention. The relevant provisions of the 1952 Convention (art. 3(1) and (4)) have given rise to diverse interpretations and implementations in different jurisdictions; in some jurisdictions permitting arrest of a ship for claims against time charterers.

Unlike the 1952 Convention, article 3(1) of the 1999 Arrest Convention clearly sets out the cases in which liability of the owner is required for the purpose of arrest of the particular ship in respect of which a maritime claim is asserted and those cases which do not require liability of the owner. Article 3(1)(a) states the general rule permitting arrest of any ship in respect of which a maritime claim is asserted if:

“the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected”;

This general rule is followed by the exceptions to the general rule in which case arrest is permissible irrespective of the owner’s liability. They include cases where demise charterer is liable for the claim (art. 3(1)(b)); or the claim is based on mortgage or “hypothèque” or a charge of the same nature on the ship (art. 3(1)(c)); or it concerns the ownership or possession of the ship (art. 3(1)(d)); or if the claim is secured by a maritime lien (art. 3(1)(e)).

In addition, article 3(3) clarifies that the arrest of a ship which is not owned by the person liable for the claim, such as the case of demise charterer, is permissible only if, under the law of

the State where the arrest is applied for, a judgment in respect of such claim can be enforced against that ship.

The provisions of article 3(1)(e) dealing with the exception of arrest for claims secured by a maritime lien were the subject of considerable debate both at the UN/IMO Diplomatic Conference and during the meetings of the JIGE.

The problem related to the provisions of the 1993 MLM Convention which, in addition to providing a list of internationally recognized maritime liens (article 4), also permits States Parties to grant, under their national laws, other maritime liens (article 6). Such maritime liens would be subject to a shorter extinction period and rank after registered mortgages or “hypothèque”.

A proposal had been put forward by the delegation of the United States during a meeting of the JIGE to the effect that both types of maritime liens should be given a right of arrest under the 1999 Arrest Convention. The majority of delegations, however, could not agree to extend the scope of arrest to cover the so-called national maritime liens granted under article 6 of the 1993 MLM Convention. Following an extensive debate, the compromise reached at the UN/IMO Diplomatic Conference was to permit arrest for claims secured by a maritime lien which is “granted or arises under the law of the State where the arrest is applied for”, provided that the claim is against the owner, demise charterer manager or operator of the ship.

The term “granted” is used instead of “recognized” that was originally proposed by the United States delegation. The effect is to exclude the application of the private international law rules of the State where the arrest is requested. The word “arises” is to cover the situation in common law countries as lien is not granted by statute. Thus, in States which are parties to the 1993 MLM Convention, article 3(1)(e) would cover both internationally recognized maritime liens under article 4 as well as those granted under national law according to article 6 of that Convention (see report of the UN/IMO Diplomatic Conference on Arrest of Ships, A/CONF.188/5, chapter II, pp. 19-20).

## **2. Arrest of any other ship owned by the person liable for the claim**

The 1999 Arrest Convention, similar to its predecessor, permits a maritime claimant to arrest any other ship, or so-called sister ship, owned by the person liable for the claim.

Article 3(2) of the 1999 Arrest Convention permits arrest of any other ship or ships owned by the person liable for the claim, provided that at the time the claim arose, such person was either “the owner” or “demise charterer, time or voyage charterer” of the ship in respect of which the maritime claim arose.

An important problem which arises in this context is identifying other ships in the ownership of the person liable – in other words, establishing common ownership. The proliferation of single ship companies since 1952 has meant that in many cases the only option for a maritime claimant is the arrest of the particular ship against which a maritime claim arose.

The question was raised at the UN/IMO Diplomatic Conference, where the provisions of article 3(2) were subject of an extensive debate. A proposal had been put forward by the delegation of the United Kingdom to include provisions for the arrest of “associated” ships. The proposal was to include an explicit provision to “pierce the corporate veil” allowing the arrest of “associated” ships, using the concept of “control” as the criterion for establishing an association.

While the proposal was favoured by some delegations, it did not receive wide support. Although, it was acknowledged that the problem did exist and the proliferation of single ship companies since 1952 often effectively excluded the possibility of sister ship arrest and had meant that the only option available to many claimants was to arrest the particular ship in respect of which a maritime claim arose. It was nevertheless considered that the problem was more of a general nature with implications on other areas of law, such as corporate law and contract law, and could not be solved in the context of the 1999 Arrest Convention.

The text of article 3(2) of the 1999 Arrest Convention leaves the issue to be determined by national laws and is not intended to prohibit “piercing the corporate veil”.

#### **E. Release from arrest: article 4**

Article 4(1) of the 1999 Arrest Convention lays down mandatory rules for release of the ship from arrest upon provision of sufficient security in a satisfactory form. The question as to what is a “sufficient security” or a “satisfactory form” is left for the parties to decide. If, however, there is no “agreement between the parties as to the sufficiency and the form of the security, the Court shall determine its nature and amount thereof, not exceeding the value of the arrested ship” (art. 4(2)).

A proposal was made at the UN/IMO Diplomatic Conference by the delegation of Greece and supported by the International Chamber of Shipping (ICS) to include provisions clarifying that satisfactory form could include “bail, bank guarantee or security provided by a financial institution, P&I Clubs or any similar institution”. It was argued that the proposal would avoid courts in some jurisdictions considering cash as the only satisfactory form of security. The proposal, however, was not accepted by the Conference.

Discussions also took place as to whether or not limit the amount of the security to the value of the ship. The Conference considered that, since the security replaces the ship, the value of the ship was the maximum amount that the claimant could obtain in the event of forced sale of the ship. Thus, article 4(5) clarifies that in no case the security could exceed the value of the arrested ship.

#### **F. Rearrest and multiple arrest: article 5**

The 1952 Convention does not permit rearrest of the same ship or the arrest of another ship for the same claim (art. 3(3)). Article 5 of the 1999 Arrest Convention, on the other hand, specifically sets out cases in which a ship may be rearrested or another ship may be arrested for the same claim by the same claimant; namely: (a) if the nature or amount of security already obtained in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; (b) the person who has already given the security is not, or unlikely to be, able to fulfil some or all of his obligations, or (c) that the ship arrested or security provided was released in the circumstances beyond his control.

#### **G. Liability for wrongful arrest: article 6**

The 1952 Convention leaves all questions relating to wrongful arrest to be determined by the *lex fori*. Article 6 of the 1999 Arrest Convention, on the other hand, specifically grants discretion to the Court to impose upon the claimant the obligation to provide security for any loss which may be incurred by the shipowner or demise charterer as a result of wrongful arrest. A proposal to include a mandatory rule for the Court to impose the obligation on the claimant to provide security upon seeking arrest was not accepted by the UN/IMO Diplomatic Conference.

Article 6(1) of the 1999 Arrest Convention is also more specific in setting out the cases in which the security may be imposed by the Court and the cases in which the claimant may be liable. They include loss or damage incurred by the defendant in consequence of (a) the arrest having been wrongful or unjustified, or (b) because excessive security has been demanded and provided.

Article 6(2) grants jurisdiction to the Courts of the State in which an arrest has been made to determine the extent of the liability of the claimant arising from wrongful arrest and the liability of the claimant is determined by the law of the State where arrest was made (art. 3).

#### **H. Jurisdiction on the merits: article 7**

Article 7 of the 1952 Convention grants jurisdiction on merits of the case to the Courts of the country within which the arrest is made in a limited number of cases where such jurisdiction

does not exist under the *lex fori*. While the 1999 Arrest Convention, as a general rule, grants jurisdiction to the Courts of the State in which an arrest has been made, or security is given to obtain release of the ship, to determine the case upon its merits, unless the parties agree to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration (art. 7).

The Courts of the State, in which an arrest has been made or security is provided, have been given power to refuse to exercise jurisdiction. This is on condition that: (a) refusal is permitted by the law of that State and (b) a Court of another State accepts jurisdiction (art. 7(2)). In such cases the Court may, and if the parties request must, fix the time limit within which claimant must bring proceeding before a competent court or arbitral tribunal (art. 7(3)). If the proceedings are not brought within the time limit, the ship arrested or the security given must be released (art. 7(4)).

The question of recognition and enforcement of foreign judgment, in cases in which the courts of the State of arrest have no jurisdiction to determine the case on its merits, was the subject of much controversy and debate at the Conference.

Proposal was made to leave the matter to the relevant laws in the State where the ship was arrested. The proposal was not accepted by the UN/IMO Diplomatic Conference as being inconsistent with the main aim of the provision that was to ensure recognition and enforcement of judgment without undue delay. Deliberations through a small working group brought about a compromise text which was adopted by the UN/IMO Diplomatic Conference. Article 7(5), therefore, provides that any final decision shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:

- (a) the defendant has been given reasonable notice of such proceeding and a reasonable opportunity to present the case for the defence; and
- (b) such recognition is not against public policy (*ordre public*).

It is also clarified that this provision shall not restrict any further effect given to a foreign judgment or arbitral award under the law of the State of where the arrest was made or security provided to obtain its release.

### **I. Application of the Convention: article 8**

The scope of application of the 1999 Arrest Convention has been extended in order to promote its wide application. While the 1952 Convention only governs the arrest of seagoing ships, the 1999 Arrest Convention, according to article 8, applies to any ship within the jurisdiction of any State Party, whether or not flying the flag of a State Party. Article 10, however, permits State parties to reserve the right to exclude its application to ships which are not seagoing, or ships which do not fly the flag of a State Party.

### **J. Influence of the 1999 Arrest Convention**

The 1999 Arrest Convention clearly presents significant improvements over its predecessor. It addresses the shortcomings of the 1952 Convention, both in terms of substance and drafting. The 1999 Arrest Convention is far more clearly drafted than the 1952 Convention, which would facilitate its implementation and application at the national level. It would also assist in reducing disputes concerning the cases in which ships might be arrested or released from arrest.

The 1999 Arrest Convention is closely aligned with the 1993 MLM Convention. Arrest being the means of enforcing maritime liens and mortgages, it was essential to ensure consistency and alignment in concepts and terminology with the 1993 MLM Convention.

While the 1999 Arrest Convention is an entirely independent and self-standing legal instrument, together with the 1993 MLM Convention, they establish a complete set of legal principles for the recognition and enforcement of maritime liens and claims. The 1999 Arrest Convention was prepared with active participation of all major trading nations including

developing countries. It is hoped that the 1999 Arrest Convention will achieve its intended objective of promoting international uniformity on such an important area of maritime law.

## **Related Materials**

### ***A. Legal Instruments***

International Convention relating to the arrest of seagoing ships, Brussels, 10 May 1952, United Nations, *Treaty Series*, vol. 439, p. 193.

International Convention on Salvage, London, 28 April 1989, United Nations, *Treaty Series*, vol. 1953, p. 165.

International Convention on Maritime Liens and Mortgages, Geneva, 6 May 1993, United Nations, *Treaty Series*, vol. 2276, p. 39.

International Convention on Arrest of Ships, Geneva, 12 March 1999, United Nations, *Treaty Series*, vol. 2797, p. 3.

### ***B. Documents***

Report jointly prepared by the IMO and UNCITAD Secretariats, "Consideration of the scope to the revision of the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels, 10 May 1952" (UNCITAD-TD/B/C.4/AC.8/22 of 8 August 1989).

United Nations/International Maritime Organization Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages, Geneva, from 19 April to 6 May 1993 (A/CONF.162/8 of 21 July 1993).

Report of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects on its 7<sup>th</sup> session, Geneva, from 5 to 9 December 1994 (TD/B/CN.4/GE.2/3 of 21 December 1994).

Report of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects on its 8<sup>th</sup> session, London, from 9 to 10 October 1995 (TD/B/CN.4/GE.2/10 of 5 December 1995).

Report of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects on its 9<sup>th</sup> session, Geneva, from 2 to 6 December 1996, (TD/B/44/3 of 6 February 1997).

General Assembly resolution 52/182 of 18 December 1997 (International Trade and Development).

Report of the United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships, Geneva, from 1 to 12 March 1999 (A/CONF.188/5 of 19 July 1999).

### ***C. Doctrine***

F. Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions*, 3<sup>rd</sup> ed., London, LLP, 2000. For detailed discussion on the provisions see the *travaux préparatoires* of the Convention, Appendix III, pp. 546-549.