The Arrest Convention

November 2000

1 Introduction

Ships and the cargoes in them have always been valuable trading assets which are (a) highly mobile and (b) capable of generating substantial wealth (and losses) (c) capable of causing (as well as suffering), considerable harm.

It was for these reasons that seizure of goods and vessels for the defaults of their owners became the simplest and most practical way of enforcing rights through the mechanism of the lien which travels with the ship, surviving any change of ownership, and comes into effect when it is triggered by an arrest of the property. A limited number of these liens are true maritime liens (their precise nature varying from country to country) but they are generally agreed to arise from collision, salvage and unpaid crews’ wages. Other liens created by statute in particular countries will not normally survive a change of ownership and may not enjoy universal recognition. They may nonetheless give effective rights of redress to claimants in specific circumstances. However, the right to detain a ship through judicial process is a powerful one, and it is plainly proper that its exercise is controlled in line with some kind of international consensus.

2 Before the previous Arrest Convention of 1952, there were substantial differences in the approach to ship arrest between the common law and civil law countries. For instance, English admiralty law permitted the automatic in rem arrest of a ship for a limited number of maritime claims while civil law countries have the saisie conservatoire, a discretionary right to detain all kinds of asset of the defendant until execution of final judgment.

3 The 1952 Convention. The 1952 Arrest Convention sought, with much, but not complete, success, to amalgamate these two philosophically distinct strands.

4 This latest attempt, in the new 1999 Arrest Convention, seeks to build on the successes of its predecessor by improving clarity, rectifying errors and omissions, introducing new categories and re-affirming, and in some cases extending, the compromises achieved in 1952. Inevitably however, some of the most difficult issues remain largely untouched and are left to national law.

5 I turn then in this short article to some of the provisions themselves and Article 1(1). As space does not permit the printing of the text of the convention here, some of the more significant articles are therefore summarized for comment.

6 The convention applies, and only permits arrest in relation to, “maritime claims”. What amounts to a “maritime claim”? The drafting debate was between a “closed” or definitive list and an “open” or illustrative list. The 1952 convention definition had a small, closed, list. This has created difficulties because (a) some claims had been omitted, such as brokerage and insurance premiums; (b) others, over time, were novel but there was no mechanism for their adoption (e.g. environmental claims). The eventual choice was for an expanded closed list. A proposal to incorpo- 
ate a general catch-all “such as” provision (effectively creating an open list in the guise of a closed list) failed. However, it was recognized that the category of environmental claims was new and developing, and this alone provides for claims for “damage, costs or loss of a similar nature” to the environmental claims identified.

7 The Changes to Maritime Claims:

(a) First there are a number of completely new permitted maritime claims:

1. Special Compensation under Article 14 of the 1989 Salvage Convention

2. Environmental and similar claims

3. Wreck removal. This also deals with ‘recovery’ and with the preservation of ships that, although creved, have been ‘abandoned’ by their owners, and the maintenance of those crew.

4. Insurance premiums & Club calls

5. Commissions and brokerage includes agency fees, but not those of, for instance, lawyers or average adjusters.

6. Sale contract disputes

(b) Secondly, many of the existing definitions have been more widely drawn.

Wider definitions:

8 For instance Art 1(1) (l) Equipment supplied. The 1952 convention has been expanded to include bunkers, containers and services supplied to the ship for not only its operation and maintenance, but also its preservation.

9 Art 1(1) (m) Construction and repair

"Reconstruction" of a ship has been added to the 1952 wording, an addition of particular benefit to shipyards.

10 Art 1(2)

The definition of “arrest” is now intended to cover Mareva (freezing) injunctions and other types of pre-judgment seizure of a defendant’s assets, although there may be some doubt as to whether it achieves this aim.

11 Article 2. Powers of Arrest

This clause makes clear that a ship may only be arrested under the authority of a court, only for a maritime claim, and that this remedy for obtaining security is available even where the court may not have jurisdiction on the merits. All other procedures are a matter for the local court.

12 Article 3: Mode of Exercise of Arrest

This article mirrors Article 3 of the 1952 Convention. During the international consultation period leading up to the Diplomatic Conference there was much talk of widening the sister-ship arrest provisions to include so-called ‘associated ships’. Some countries aligned themselves with shipowners, others with claimants. The UK proposed a definition of ownership based on ‘control’, derived from the South African model.

The UK’s proposal was listened to with sympathy by the delegations as a whole, but there were too many unresolved questions, and it did not
succeed. While the clear decision of the plenary session was the rejection of associated ship arrest, the Head of Delegation of the UK indicated his hope that “other governments with an interest in furthering the best interests of the maritime community, and of claimants in coastal states, will continue to discuss appropriate means of dealing with those who would seek to use a corporate veil to avoid their obligations under international agreements”. Thus “associated ship” provisions may be yet capable of being introduced “by the back door”, through a new definition of “owner”. As they say, this one may run and run.

The provisions actually agreed therefore were more modest:

(a) Sister-ships demise-chartered, as well as owned, by a demise charterer liable for the claim will now be open to arrest.

(b) Time and voyage charterers’ other, owned, ships are liable to arrest, but not it would appear those that they demise charter. There is a question mark over whether slot charterers are included.

13 Article 4: Release from Arrest

This differs little from the 1952 Convention, the security required now being defined as ‘sufficient security in a satisfactory form’. There is no express reference to Club letters.

14 Art 4 (2)

The court has power to determine the details of the security to be provided, but it cannot exceed the value of the ship.

15 The major change (Article 5) is the ‘topping-up’ provisions. In summary, a ship can be arrested more than once if the security obtained is inadequate in nature or amount, subject to the totality of security obtained by the arrest of that ship not exceeding her value. Furthermore, sister-ships can additionally be arrested for the purposes of ‘topping-up’ provided again that not more than the value of each ship can be obtained as security. Re-arrest is also permissible where the guarantor is likely to default, or where the ship or the security has been released by, for instance, a reasonable mistake.

16 Coming into force? The Convention will come into force 6 months after 10 states signify their agreement to be bound by it. By the 31st August deadline for signature, five countries had so indicated (Bulgaria, Denmark, Ecuador, Finland and Norway); although several are thought to be on the verge of ratification and there is no penalty for doing so after the 31st August deadline. Others are considering implementation subject to some reservations.

With thanks to Richard Harvey of Richards Butler for preparing this article