



**Diplomatic Conference
on Arrest of Ships**



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PREPARATION AND ADOPTION OF A CONVENTION
ON ARREST OF SHIPS

Compilation of comments and proposals by Governments
and by intergovernmental and non-governmental
organizations on the draft articles for a convention
on arrest of ships

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INTRODUCTION

1. This document sets out the comments and proposals on the draft articles for a convention on arrest of ships that were received between 16 October and 31 December 1998. In that period, comments were received from the Governments of Madagascar and Morocco.

COMPILATION OF COMMENTS AND PROPOSALS

Government of Madagascar

[Original: FRENCH]

Article 1 - Definitions

2. This article should also contain the definitions of the terms "demise charter", "manager" and "hypothèque" in order to avoid any ambiguity, since there is no obvious difference between them and the following terms:

"Demise charter and bareboat charter";

"Manager or operator of the ship";

"Mortgage and 'hypothèque'".

Article 3 - Exercise of right of arrest

3. The concept of "claim based on tort" which has been introduced in paragraph (1) (a) (v) should apply to the fines to which the ship and its crew are liable.

Article 4 - Release from arrest

4. The right of the person who has furnished security should be limited to the possibility of requesting that such security should be reduced. It would be pointless to ask him to provide security if, under the provisions of article 4, paragraph (5), he may apply to the court to have that security cancelled.

Article 6 - Protection of owners and demise charters of arrested ships

5. Paragraph (1) of this article should be amended so that the authorization to arrest a ship or maintain an arrest already effected is not systematically subject to the provision of security by the arresting claimant. It may happen that the claimant does not have the means to furnish security. This is the case of a crew member whose wages have not been paid.

6. Moreover, if the prior provision of security is necessary, the amount should not exceed that of the claim asserted.

7. The comments made on article 4 also apply to paragraph (5) of article 6.

Government of Morocco

[Original: ARABIC]

8. The draft convention is fairly important since it is worded in a clear and well arranged manner and article 1, in particular, contains a wealth of definitions that should help to eliminate any ambiguity that might impede the implementation of the convention.

9. However, we note that there are areas in which the convention conflicts with Moroccan private law. For example, while article 1 of the draft convention stipulates that ships may be arrested, as a conservatory measure, only in order to secure a maritime claim, Moroccan law permits the arrest of a ship, as a conservatory measure, regardless of the type of claim (article 110 of the Maritime Code).

10. Moreover, the same article 110 of the Moroccan Maritime Code conflicts with article 2, paragraph 1, of the draft convention, which stipulates that a ship may be arrested only by or under the authority of a court of the Contracting State in which the arrest is made, while the Moroccan Maritime Code also permits such arrest on the basis of an enforceable instrument.

11. Article 111 of the Moroccan Maritime Code also conflicts with the provisions of article 2, paragraph 3, since it does not permit the arrest of a ship from the time when its captain is granted permission to sail until the completion of the voyage, while we find that the draft convention totally contradicts that stipulation by permitting the arrest of a ship even though it is ready to sail or is sailing.

12. Moreover, article 4 of the draft convention stipulates that a ship may be released from arrest when security has been furnished and, in the absence of agreement between the parties, the latter may petition the court to determine the nature and amount of the security, which must under no circumstances exceed the value of the ship. In our view, this would serve the interests of a foreign owner or charterer of a ship to the detriment of the interests of a Moroccan claimant.

13. In short, the draft convention merely serves to protect the interests of developed countries, such as the United Kingdom and the United States of America, which have long-standing international maritime traditions or a large merchant marine fleet and, consequently, wish to protect their ships from the calamity of arrest, which would prevent them from operating. Hence, they are seeking to restrict the scope of application of the rules of arrest.



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INTRODUCTION

1. This document sets out the comments and proposals of the Government of the United Kingdom of Great Britain and Northern Ireland on the draft articles for a convention on arrest of ships that were received between 1 January and 15 February 1999.

COMMENTS AND PROPOSALS ¹

United Kingdom of Great Britain and Northern Ireland

Article 1 (1)

2. The current draft text for the definition of "maritime claim" in article 1 (1) provides for two alternatives, either:

(a) An exhaustive list (the current text of article 1 (1) with the square brackets, and the text between them, deleted from the chapeau); or

(b) A general description, followed by a list of examples (the current text of article 1 (1) with the square brackets deleted, but the text between them retained).

3. The decision on the definition of "maritime claim" is linked to decisions on other key issues, in particular, the circumstances in which a claimant may obtain the arrest of a ship, and what the consequences of doing so will be for the claimant. Together with other key elements, the form of definition will determine the balance that the new convention strikes between shipping interests and claimants.

4. The preference of the Government of the United Kingdom would be to have an expanded, exhaustive list for the definition of "maritime claim" (alternative (a)). However, once such a claim exists, we believe that it ought not to be unduly onerous for the claimant to obtain an arrest.

5. The negotiations within the Joint Intergovernmental Group of Experts on Liens and Mortgages and Related Subjects suggest that, while there will be support for both of the current alternatives for article 1 (1), neither might obtain sufficient support to permit its adoption according to the rules of procedure. The Conference may therefore wish to consider a compromise option.

6. The Government of Mexico has already proposed such an option (document A/CONF.188/3, para. 35). While the Government of the United Kingdom would prefer an exhaustive list, we may be able to accept such a compromise option if the Conference decides most of the other key issues in favour of claimants.

¹Initial comments from the United Kingdom pending completion of approval procedures.

7. Should the Conference decide to consider a compromise option, it may wish to consider a simpler formulation than the one proposed by the Government of Mexico. For example the Conference could delete the square brackets and the text between them from the chapeau, and add a new subparagraph at the end of article 1 (1) as follows:

"Maritime claim" means any claim in respect of:

[(a) - (v)]; and

(w) any other claim of a similar nature to those referred to under (a) to (v) above.

8. The advantage of this approach is that it would provide an element of *ejusdem generis*, like current alternative (a). However, the flexibility provided would be more restricted than under current alternative (b).

Article 3

Introduction

9. The Government of the United Kingdom proposes an amendment to article 3 of the draft convention on the arrest of ships. Like the proposal made by the International Maritime Committee (CMI), the proposed amendment would clarify that national law would determine whether a claimant may arrest a ship other than the particular ship in respect of which the maritime claim arises. It goes further than the CMI proposal, however, by providing explicitly for the arrest of "associated" ships (associated ships are ships that are in common control). We also discuss the definition of control, and whether the convention ought to contain any guidance.

Background

10. The 1952 Convention on Arrest of Ships seeks to strike an equitable balance between the interests of shipowners and those of claimants. Article 3 (1) of the 1952 Convention provides for the arrest of "sister" ships. A claimant may arrest either the particular ship in respect of which a maritime claim arises, or any other ship owned by the person who is, at the time when the maritime claim arises, the owner of the particular ship. Article 3 (2) of the 1952 Convention provides that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

11. Since 1952, the stratagem of the single-ship company has proliferated. As a result, few ships have "sisters" within the meaning of the 1952 Convention. The only option available to many claimants, therefore, is to arrest the particular ship in respect of which the maritime claim arises. The balance that the 1952 Convention sought to strike has tilted in favour of the shipowner.

12. The Government of the United Kingdom understands that article 3 (2) of the draft convention addresses this problem by implicitly allowing States to specify which ships are in common ownership under national law. We agree with

the CMI that it would be better to make this explicit. Our preference, however, would be to go further. We believe that article 3 (2) should provide explicitly for the arrest of associated ships.

Proposal

13. As currently drafted, the new convention would provide for the arrest both of the particular ship in respect of which the claim arises, and of other ships owned by the person liable for the claim. We wonder, however, whether this approach would provide sufficient flexibility.

14. The use of the concept of ownership might limit the scope of the provision. In the same way that the single-ship company proliferated after 1952, future developments in the shipping industry might reduce the usefulness of the concept of common ownership.

15. We therefore propose that the provision provide explicitly for the arrest of "associated" ships. We propose further that it use the concept of control as the criterion for establishing an association. We believe that this would provide greater scope for national law to keep pace with developments that might otherwise prevent attempts to pierce the corporate veil.

16. The following amendments to article 3 would give effect to these proposals:

(1) *[No change.]*

(2) *Arrest is also permissible of any ship or ships controlled by the person who:*

(a) is allegedly liable for the maritime claim; or

(b) controls the company that is allegedly liable for the maritime claim,

and who was, when the claim arose:

(i) the person who controlled the ship in respect of which the maritime claim arose[; or

(ii) the demise charterer, time charterer or voyage charterer of that ship[, or any part of it]].

(3) *For the purposes of this article, a person controls a ship if that person owns the ship or controls the company that owns it. The national law of the State in which the arrest is applied for shall determine whether, for these purposes, a person owns a ship or controls a company that owns a ship.*

(4) *Paragraph (2) shall not apply to claims in respect of ownership or possession of a ship.*

(5) *Notwithstanding the provisions of paragraph (1), the arrest of a ship which is not controlled by the person allegedly liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgement in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.*

17. The changes of substance are those that we have made to paragraphs (2) and (3). The new paragraph (4) is the tail-piece to the current article 3 (2). The new article 3 (5) is the current article 3 (3), to which we have made some consequential amendments.

18. As under the current wording of article 3 (2), a claimant would not be able to arrest an associated ship which happened to be demise-, voyage- or time-chartered to the person liable for a maritime claim. However, if a person became liable for a maritime claim while chartering a ship, a claimant would be able to arrest any ship which that person controlled (either by owning it or controlling the company that owns it). We do not intend that a demise charterer would be a person having "control" of a ship simply by virtue of being a demise charterer.

19. We have added the words "or any part of it" to the new article 3 (2) (b) to cover slot charterers. We believe that the drafting of article 1 (1), particularly subparagraph (f), is sufficiently wide for claims for which a slot charterer might be liable to fall within the definition of "maritime claim".

Definition of control

20. In the interests of the uniformity of international maritime law, the Diplomatic Conference might wish to provide States with some guidance on how national law might define the concept of "control". Should the Conference decide that this is desirable, we suggest that the guidance should consist of a list of criteria, as in article 13 of the 1989 International Convention on Salvage.

21. The Conference may wish to include such criteria in the convention itself. Alternatively, it may prefer to offer them as a model for national law, perhaps by means of a conference resolution. The Conference may wish to consider the following text as a basis for either of these approaches:

The State in which the arrest is applied for may set criteria in its national law, or provide for a case-by-case examination, for the purpose of determining whether a person owns a ship or controls a company that owns a ship. All relevant factors should be taken into account, including whether the following criteria (without regard to their order) apply in respect of the ships concerned:

- (a) *Common or similar names;*
- (b) *Common shareholding of the companies owning the ships;*
- (c) *Common management of the shipowning companies;*

- (d) *Common financing arrangements;*
- (e) *Cross-guarantees or other security between the shipowning companies; and*
- (f) *Insurance on a fleet basis.*

Evidence

22. Another important issue that national law would need to consider is the burden of proof. For example, national law could place the burden of proof on the claimant, or on the person that the claimant has alleged controls two associated ships. However, there is no need to make this explicit in the convention. The rule contained in article 2 (5) suffices: procedural issues are a matter for national law.

Action requested of the Diplomatic Conference

23. The delegation of the United Kingdom requests that the Diplomatic Conference:

- (a) Adopt the amendment to article 3 set out in paragraph 16 above;
and
- (b) Consider the need for guidance as suggested in paragraph 20 above.



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INTRODUCTION

1. This document sets out the comments and proposals of the Government of Italy and the Latin American Association of Navigational Law and Law of the Sea (ALDENAVE), a non-governmental organization, on the draft articles for a convention on arrest of ships that were received between 1 January and 19 February 1999.

COMPILATION OF COMMENTS AND PROPOSALS

Government of Italy

A. Article 1, paragraph 1 - Definitions, list of maritime claims

2. In view of the stance already taken by the Italian delegation at the eighth session of the UNCTAD/IMO Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (London, 9-10 October 1995), we reaffirm that it is appropriate to establish a *non-exhaustive* list of maritime claims. This would leave some flexibility in the wording of the article so that the Convention could be continually adjusted to suit any legal changes that occurred in this area in future.

B. Article 2, paragraph 3 - powers of arrest

3. This is an addition to the provisions of the 1952 Convention, and causes confusion mainly on practical grounds, since arresting a ship that is already sailing would appear to be difficult to accomplish.

C. Article 4, paragraphs 2 and 4 (b) (ii) - security and release of security given

4. Following the comments made at UNCTAD by certain delegations on limiting the amount of security to be provided, the phrase "not exceeding the value of the ship" in paragraphs 2 and 4 (b) (ii) will be the subject of earnest and detailed discussion at the forthcoming Diplomatic Conference.

5. Italy is in favour of retaining the phrase, given the provisions of its Code of Civil Procedure governing distraint which, according to article 463 of the Shipping Code, apply by extension to the Shipping Code.

6. Article 468 of the Code of Civil Procedure explicitly states that in order to secure a release from distraint from the courts, the debtor must furnish sufficient security, due regard being had to the "amount owed which gave rise to the distraint" and the expenses incurred "by reason of the value of the items distrained".

7. Limiting the security that must be furnished under the Convention in order to secure a release from arrest thus seems perfectly consistent with current national legislation on the matter.

D. Article 8 - Application

8. Empirical considerations suggest that to the exceptions indicated in article 8, paragraph 2, there should be added another referring to

article 648 (b) of the Shipping Code, which states that vessels employed in shipping services may not be forcibly expropriated or subjected to other precautionary measures such as arrest itself except with the formal authorization of the Minister of Transport and Shipping.

Latin American Association of Navigational Law and
Law of the Sea (ALDENAVE)

9. We hereby forward our brief suggestions on the draft amendments to the 1952 Convention Relating to the Arrest of Seagoing Ships (TD/E/IGE.1-/5), for consideration at the Diplomatic Conference to be held between 1 and 12 March 1999.

10. Firstly, it must be pointed out that the 1952 Convention is, in international legal terms, an exception to normal practice because it offers only formal or procedural solutions, which the academic literature says are the preserve of national legislation. As a result, the only justification for the Convention is that it accomplishes the specific objective pursued, since:

(a) The 1952 Convention establishes a formal regulatory system which can permit the arrest of a ship to secure the satisfaction of any judgment that may eventually be pronounced because the holder of a maritime lien cannot, sometimes in a matter of hours, fulfil the standard procedural requirements (likelihood of the claim alleged, valid title, precise value of the claim and risks of delay) under formal national or domestic regulations for his application to proceed;

(b) Arrest under the Convention is preventive or executive, detaining a ship so as to secure the satisfaction of any judgment that may eventually be pronounced if title to the underlying lien is recognized by the courts, and thus preventing it from being exposed to further risks *de facto* (during operation) or *de jure* (if the owner takes on further obligations which enjoy preference);

(c) The 1952 Convention is constructed on a dual foundation: the claim asserted must derive from a maritime claim and arrest must be ordered by a competent judicial authority.

11. These three points must be borne constantly in mind when the 1952 Convention is amended, since they provide the justification for the remedies it affords. We propose the following amendments:

Article 1.1: SHIPS MAY BE ARRESTED PURSUANT TO THIS CONVENTION:

(a) IN RESPECT OF MARITIME LIENS RECOGNIZED IN ARTICLE 4 OF THE 1993 INTERNATIONAL CONVENTION ON MARITIME LIENS AND MORTGAGES;

(b) IN RESPECT OF CLAIMS ARISING OUT OF THE OPERATION OF THE SHIP WHOSE ARREST IS SOUGHT.

12. Most of the "maritime claims" listed in the draft correspond to maritime liens within the meaning of the 1993 MLM Convention; it would be sound legislative practice simply to refer to that Convention. On the other hand,

the other claims proposed (hypothèques or mortgages, commissions, brokerages or agency fees, ownership or possession of the ship, disputes between co-owners) do not arise out of the "operation of the ship" (e.g. a hypothèque may be given as security on a loan, for civic activities or even for gambling debts) and can be pursued without the need for arrest of the ship under this Convention to secure application of the relevant procedures.

13. Arrest "for claims arising out of the operation of the vessel" (towage, general average, tort, insurance premiums, supplies) must, however, be admitted since these claims match the description (operation of the ship).

Article 1.2: "ARREST" MEANS THE DETENTION, NOTIFIED TO ITS REGISTER, OR BAN OR RESTRICTION ON REMOVAL OF A SHIP IMPOSED AS A CONSERVATORY MEASURE BY ORDER OF A COURT TO SECURE A MARITIME CLAIM, BUT NOT THE SEIZURE OF A SHIP IN EXECUTION OF A JUDGMENT, ARBITRAL AWARD OR OTHER ENFORCEABLE INSTRUMENT.

14. Immobilizing a ship or restricting its removal (the meaning of the English term "arrest") is no impediment to the sale or mortgage, gift in payment, donation etc. of the ship, even fraudulently, to escape arrest; the measure can, however, be made effective by notifying the relevant register for entry in the records. It will thus be possible to secure the satisfaction of any eventual judgment, which is the reason for arresting the ship, besides immobilizing the ship or prohibiting it from sailing.

Article 2.3: NO SHIP WHICH AT THE TIME OF ITS ARREST IS LOADED AND HAS PERMISSION TO SAIL FROM THE MARITIME AUTHORITY MAY BE ARRESTED.

15. The arrest of a ship "ready to put to sea" must be rejected, it being an incontrovertible principle that navigation must always be facilitated, especially when the ship is "ready to sail" or has permission to do so from the Maritime Authority. The stipulation that the ship must be loaded has been added to prevent it from sailing empty solely in order to evade arrest. Argentine law (art. 541), the Italian Code (art. 645), the Netherlands (Code of Civil Procedure, art. 582), and the Swedish (art. 345), Finnish (art. 278) and German (art. 482) Codes rule out arrest of a ship that is "ready to sail". Before then the ship may be ordered arrested as a conservatory measure, but the prohibition on sailing may not be enforced.

Article 3.1: should be brought into line with the wording proposed for article 1.1.

Articles 6.2.a and 6.2.b: the grounds cited do not make sense. Only a court should be able to determine how much security to demand, and it must be presumed that court orders are not wrongful.

Article 7.1: insert "... to arbitration PROVIDED THAT SUCH AGREEMENT WAS REACHED AFTER THE EVENT OR AGREEMENT THAT GAVE RISE TO THE CLAIM UNDERLYING THE APPLICATION FOR ARREST."

16. The proposed insertion would permit only "ex post facto" agreement in order to avoid the insertion of clauses "for form's sake" that might preclude arrest of a ship.

Article 7.3: insert "... order a period of time NOT TO EXCEED 30 DAYS, AFTER which the claimant..."

17. Stipulating that the court should order a period of no more than 30 days prevents the claimant from being allowed time *ad libitum* and prevents such time from being construed as a procedural delay.

Article 8.2: insert "... to ships OPERATING IN THE SERVICE OF THE PUBLIC AUTHORITIES WHEN THE CLAIM IN RESPECT OF WHICH ARREST IS SOUGHT AROSE."

18. This is proposed in response to paragraph 99 of document TD/B/IGE.1/L.2. The intention is to establish that a ship's not being subject to arrest is not a matter of its being owned or operated by a State but of its being used in the "public service" (as a hospital, isolation hospital etc.), even if owned by a third party, at the moment when the claim arises.

19. NOTE: To confirm the purpose of the Convention, the adjective "*preventivo*" should be added before "*embargo*" throughout the Spanish text.

20. We also propose:

New article: THE CLAIMANT SEEKING ARREST MUST PROVIDE BRIEF CORROBORATION OF THE CIRCUMSTANCES UNDERLYING HIS CLAIM.

FOR APPLICATIONS IN RESPECT OF CLAIMS ARISING OUT OF COLLISIONS, SALVAGE OR OTHER SHIPPING ACCIDENTS, PRODUCTION OF THE PROTEST OR ACCOUNT GIVEN BY THE CAPTAIN OR SHIP'S AGENT TO THE APPROPRIATE AUTHORITY OR CONSUL SHALL SUFFICE.

ARRESTS OF SHIPS IN RESPECT OF CLAIMS OTHER THAN THOSE REFERRED TO IN ARTICLE 1.1 MUST COMPLY WITH THE REQUIREMENTS OF ORDINARY LAW.

21. The wording proposed here, which appears neither in the 1952 Convention nor in the draft amendments, will facilitate rapid processing of applications for arrest, and is inspired by accumulated experience.

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