

Arrest and Detention

by

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Arrest Convention 1999, Detention of ships under article 292 of the UN Convention on the Law of the Sea 1982 and right of safe passage under the UN Convention on the Law of the Sea 1982

Aims and Scope of the Convention

The Path to the International Arrest Convention 1999

In 1952 the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships was agreed in Brussels. In the 1980's the Joint Intergovernmental Group of Experts on Maritime Liens and Related Subjects (JIGE)¹ created the Maritime Liens and Mortgages Convention of 1993 (MLM), which resulted in the Ship Arrest Convention 1999 in Geneva. On 14th March 2011, Albania was the tenth State to ratify the 1999 Convention and so six months thereafter (14th September 2011) it came into force².

Continuity

The 1999 Convention follows, in general terms, the UK system, as currently seen especially in ss.20 and 21 of the Senior Courts Act 1981 (originally named Supreme Courts Act), which broadly follows the 1952 Arrest Convention.

At the moment, in order to arrest a vessel within the UK, the interested party must satisfy the court:

- that its claim falls within one or more of the categories set out in Section 20 of the Senior Courts Act 1981³; and
- that the ship to be arrested has a sufficient connection with the claim (s.21).

¹ Created by: the International Maritime Organisation (IMO) and the United Nations Conference on Trade and Development (UNCTAD); and aiming at the unification of legal systems and the relating conflicting interests among the State-parties.

² See art.14(1). It was open for signature by any State at the United Nations offices in New York from the 1st September 1999 to the 31st August 2000 (art.12). Current parties: Algeria (7.5.2004), Benin (3.3.2010), Bulgaria (21.2.2001), Ecuador (15.10.2010), Estonia (11.5.2001), Latvia (7.12.2001), Liberia (16.9.2005), Spain (7.6.2002) and the Syrian Arab Republic (16.10.2002); and signatories: Denmark (10.8.2000), Finland (31.8.2000), Norway 25.8.2000) and Pakistan (11.7.2000); as opposed to 90 member-States to the 1952 Convention.

³ These are claims dealing with ships (or aircraft), namely "maritime claims". Interestingly, this term does not appear in the SCA 1981, although it does appear both in the 1952 and in the 1999 Arrest Convention.

For most types of maritime claims, other than that based on a maritime lien⁴, an arrest is only possible if at the time of the arrest the vessel to be arrested is owned, or demise-chartered, by the person in fault, who would also be liable in personam, or if the sister-ship to be arrested was owned or chartered by or was in possession or control of the person in fault.

The above criteria, namely the nature of the claim and the ship's connection with the owner, are also found in the 1952 Convention but for one major difference. The Convention permits a ship to be arrested even if at the time of arrest it was not owned by the person also liable for the claim⁵. The same applies to a sister-ship. Similarly to the SCA 1981, the process in the 1999 Convention is also two-part, but on the requirement of the connection with the person at fault there is the introduction of the concept of the personal liability of the shipowner or demise charterer whose vessel is to be arrested (art.3), leaving only a very limited category of claims where an arrest is possible.

Scope of Application and the issue of Non-State Parties

One of the most important aspects of any Convention is the scope of its application in the sense that it is the standard of defining the affected subjects. The rules of the Convention are, prima facie, applied not only to all ships, sea-going or not, entering the jurisdiction of a member-State, whether or not she is flying a signatory State's flag (art.8); with the express exception of warships, state-owned ships and government vessels (para.2). The provision is, also, much clearer than the respective art.8 of the 1952 Convention. The purpose of this rule is to promote the widest possible application of the Convention and in that way achieve the much wanted uniformity of Law. This also constitutes a significant change on the 1952 rules, which only apply to sea-going ships flying the flag of a signatory State (note that the word "sea-going" was abolished in the 1999 Convention).

There is, however, some freedom of choice on that particular matter, as the State parties may choose to make a reservation and not apply the Convention's rules on non-seagoing ships, or ships which are registered in countries other than a signatory State (art.10). Additionally, the second paragraph of art.10 gives the right to a member-State, in case it is subject to a specified treaty on navigation on inland waterways, that it may declare that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in art.7 (jurisdiction on the merits of the case).

A perfect example of a member-State proceeding to an art.10 reservation and also the only State to have done so, so far, is Spain. She has reserved the right not to apply the rules of

⁴ The Maritime Lien, as it is inchoate to the vessel, it travels with it and so she can be arrested even in the hands of a new owner. Types of Maritime Liens in the UK: 1) Damage caused by a ship, 2) Salvage claim, 3) Master's Reimbursement, 4) Seamen's wages, and 5) Bottomry and Respondentia.

⁵ See Arrest Convention 1952, art.3, and especially sub-section (4).

the Convention to ships that are not registered to one of the member-states, with the purpose of the preservation of the status quo of the ships flying a flag of non-1999 Convention States.

Nevertheless, the Spanish courts will not exercise this right pursuant to a 2011 amendment to the Spanish Procedural Law Act. On 26 August 2011, the Spanish Government issued the 12/2011 Royal Decree. This introduces a new section into the Spanish Procedural Law Act reversing the 1999 Convention reservation's effect. Stated therein is that:

- All ship arrests in Spain must be directed to the Courts of Justice under the 1999 Geneva Convention notwithstanding the fact that the ship flies a non-member State of the 1999 Convention;
- Mere allegation of a maritime claim is sufficient for a ship arrest in Spain;
- Counter security of 10% will be requested by the Court from the arrestor for damages' and costs' cover; and
- The arrest may only be challenged on the grounds of 1999 Convention infringement.

This has produced a favourable result for P&I Clubs, which can now secure their claims in Spain against members in their debt with more certainty than in other jurisdictions and under an easier regime than that of the 1952 Convention.

Fundamental Differences

The lifting of the Corporate Veil

The substantial increase in the use of single ship companies, which in fact has become not only a norm, but a must, in our days, though absolutely legitimate, has brought an ever-growing need for what is called the piercing of the corporate veil. Under difficult circumstances bad faith debtors may hide behind the different companies, which in fact share a common interest and control of a group of ships, in order to avoid their pecuniary obligations.

Since the issue of the lifting of the corporate veil was not effectively dealt with by the 1952 Convention, the regulation of such instances falls individually upon each State. Similarly to the 1952 Convention (art.3(2) and (4)), the same notion of a sister-ship, and of the shareholding and demise-charter criterion was adopted in the 1999 Convention (art.3). Therefore, the legal framework has yet to be unanimously decided causing this ambiguous approach to further fuel the dispute between shipowners and claimants and firmly hold the single-ship company issue in the spot-light⁶.

⁶ E.g. under English Law see debate in *The Helene Roth* [1980] Q.B. 273 and on the beneficial ownership see *The Saudi Prince* [1982] 2 Lloyd's Rep. 255.

Definition of “Arrest”

The second important issue on the 1999 Arrest Convention is the definition of “Arrest”. In the 1952 Convention art.1(2) it is stated that arrest is 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”. In the 1999 Convention the provision was, if only not by too much, enriched becoming broader and clearer (art.1(2)). It now reads: ““Arrest” means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument”.

Maritime Claims

One of the most controversial topics of discussion to be decided upon was the list of the Maritime Claims contained in art.1. The two choices were either a similar approach to that of the 1952 Convention, i.e. provide for a closed list of claims, thus giving rise to a right of arrest (e.g. International Chamber of Shipping proposal⁷), or opt for an open-ended list of claims avoiding exclusion of genuine maritime claims from having a right of arrest (e.g. International Maritime Organisation and JIGE proposals⁸).

In the end, a compromise was achieved, which consisted of a definite and exhaustive (“closed”) list of claims giving rise to a right of arrest, albeit allowing some flexibility in certain categories of maritime claims. For instance, the new art.1(1)(d) is considered to be of an “open-list” nature, as it covers environmental claims, with a reference to damage, costs, or loss of a nature similar to those identified therein, thus becoming non-definite. In comparison to the 1952 Convention list, the categories referred therein have been expanded by 5, from 17 to 22.

Other examples include the deletion of the requirement for registration of a “mortgage” or “hypothèque” or a charge of that nature in art.1(1)(u) and the list was enriched with new types of claims (e.g. commissions due to brokers and/or agents, insurance premiums etc.) and the now completely outdated and practically abandoned bottomry claim was deleted. Also, the wreck removal claim of art.1(1)(e) has extended the terms “goods” and “materials”, which are supplied to a vessel, so as to include containers. This is similar to the provisions of

⁷ See: “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”, A/CONF.188/3 and Add.1-3, paras.114-126.

⁸ See: “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”, A/CONF.188/3 and Add.1-3, paras.127-168; and JIGE, JIGE(IX)/2, TD/B/IGE.1/2, LEG/MLM/39.

English Law (whereby containers supplied to a shipowner under a container-leasing agreement and not to a particular ship, will not give rise to a right to arrest⁹).

An addition, important for both shipowners and P&I Clubs, is the claim for insurance premiums in respect of the particular ship, which are payable by or on behalf of a shipowner or demise charterer. Under the 1952 Convention, it is not possible to arrest a ship due to unpaid insurance premiums or mutual insurance calls¹⁰. But, in the 1999 Convention, P&I club calls are mentioned, meaning that P&I clubs will be able to arrest one of their own vessels for unpaid calls (art.1(1)(q)). Finally, the 1999 Convention clarifies the issue of whether "disbursements ... on account of a ship" include fees charged by agents for their own account, which is not explicitly included as a maritime claim either in the SCA 1981 or the 1952 Convention¹¹. The new Arrest Convention also includes a specific class of claims for commissions, brokerages and agency fees (art.1(1)(r)) ending the relevant conundrum.

It is noteworthy, that the Conference tried to bring importance to the Maritime Liens and Mortgages Convention 1993. In this instance, art.1 was amended to ensure that all claims, which granted maritime lien status under the 1993 MLM Convention, are included without creating duplication or inconsistency within various subparagraphs¹². Further changes made to the 1952 Convention's list, seem to be more of an effort for clarification and harmonisation, than a substantive deviation from its spirit. After all, the 1999 Convention retained the fundamental principle of the 1952 Convention, whereby "a ship may only be arrested in respect of a maritime claim but in respect of no other claim".

Power of Arrest and the issue of determination of Ownership

In the 1999 Convention a novelty has been embodied. Art.3(1)(c) and (e) permit an arrest to secure claims arising out of a ship-mortgage or her hypothecation or a maritime lien. But art.3(3) permits the arrest of a ship which is not owned by the person liable for the claim, if under the laws of the State where the arrest is sought, a judgment in respect of that claim can be enforced against that ship by means of a judicial or forced sale of that ship. This provision distinguishes between the concept of a maritime claim and a maritime lien and makes the former dependent on the latter.

In respect of that last point, great concern was expressed by the International Ship Suppliers Association¹³. The association was alarmed by fear of contradictions and confusion with the existing set of rules (1952 Convention). There is a dichotomy between the general

⁹ See *The River Rima* [1988] 2 Lloyd's Rep. 193.

¹⁰ See: *The Sea Friends* [1991] 2 Lloyd's Rep 322.

¹¹ See: Arrest Convention 1952 art.1(1)(n) and SCA 1981, s.20(2)(p).

¹² See: changes by the Informal Working Group, JIGE, eighth session "Draft articles for a convention on arrest of ships" (TD/B/IGE.1/5).

¹³ See proposal in the "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", A/CONF.188/3 and Add.1-3, paras.169-179.

principle that a supplier needs the protection of the value of the ship and the privilege granted to the holders of maritime liens. This dichotomy is mostly marked in the proposed amendments to art.3 of the 1952 Convention, which discriminates between those entitled to a maritime claim, as defined by art.1, and those entitled to a maritime lien. In the eyes of the ISSA, if this discrimination was allowed to continue, then this major international convention would be flawed. The reason was that it would particularly apply where States have granted maritime liens under the terms allowed by art.6 of the 1993 MLM Convention and mean that in some countries a creditor would have a right of arrest while in others not. The specific proposal was that the “Entry into force” clause in Section B of the proposed draft should clearly specify that its “entry into force” is contingent on, firstly, the 1993 MLM Convention having been ratified by the required number of States and, secondly, itself “being in force” before any revision of the 1952 Arrest Convention could be applied in international law. This proposal was eventually not followed.

On a topic of a different nature, but still within the issue of power of arrest, the Arrest Convention 1999, art.2(2), provides that a ship may only be arrested in respect of a maritime claim but in respect of no other claims and art.2(4) that, subject to the provisions of the Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for. Therefrom it is inferred that it is only the issue of procedure for arrest that is left to be regulated by national law.

The difference thereon, compared to the 1952 Convention article, is noteworthy for the reason that it will be harder for the prospective arrestor to arrest ships for a non-maritime claim without contravening art.2. This is so, because in the 1999 Convention regime, whether or not a ship is to be arrested for a non-maritime claim is clearly up to the national law of the arresting state to decide.

Right of Arrest

Next on the Convention’s agenda engulfing a great debate was art.3 dealing with the exercise of the right of arrest. Taking into consideration para.1 concerning the arrest of a ship due to a maritime claim, the Committee rearranged the order of the subparagraphs. First comes the general rule and requirement of the owner’s liability for the purpose of arrest and then the cases where the demise charterer is liable for such a claim. Then exceptions follow in cases where liability of the owner is not required.

The arrest of a ship irrespective of liability of the owner is permitted if the claim is based on a mortgage or a hypothèque or concerns ownership or possession of the ship, or if the claim is against the demise charterer, manager or operator of the ship and is secured by a maritime lien, which is “*granted or arises under the law of the State where the arrest is applied for*” (forum arrestii).

It must certainly be mentioned that art.3(1)(a) requires personal liability of the shipowner or the demise charterer. Additionally, such liability must exist both at the time that a maritime claim arose and at the time that the arrest was effected. It should be noted that the 1952 Convention requires ownership of the ship “..at the time when the maritime claim arose...” (art.3(1)). This change appears to be of some considerable magnitude in jurisdictions, such as England, where it is customary to issue claim forms for statutory rights in rem, so that such claims survive in the event of a change in the ownership of the vessel.

Art.3(2), dealing with the sister ship arrest, was also debated at length. It was pointed out by some parties that the great bloom of single ship companies since 1952 often immensely hindered the possibility of sister ship arrest. This left as the only option available for many claimants to arrest the particular ship in respect of which the maritime claim originated. Many proposed that the gravity of the matter at hand in relation to the practical aspect of shipping was such as to render the national laws’ implication undesirable. It was thus that the adoption of provisions specifically providing for the arrest of associated ships using the criterion of control for the establishment of an association was proposed. A different approach would be that of the “beneficial ownership”, but it was rejected. Eventually, the Committee decided to maintain the existing text of art.3(2) of the draft convention, subject to any further drafting amendments, thus still allowing for sister ship arrests, except where the claim is made in respect of ownership or possession of the vessel.

The general rule nowadays is that a sister ship can be arrested in respect of claims against its owner. Nevertheless, the landscape is not completely unobscured and what’s more is that the issue of the determination of ownership traces so far back as to the 1952 Convention. The request even then was for a detailed addressing of the issue and clarification of the term owing to the increase of one ship companies. Art.3(2) of the 1952 Convention requires ships to be owned in all the shares by one person in order to be deemed as under the same ownership. So, in actuality, art.3(1) allows only for the arrest of the relevant ship, or any other ship owned by that vessel’s owner, which, by the time of arrest, would be unlikely to be in his hands. An addition is found in art.3(4), which allows for arrest of the ship as a means of security against a demise charterer, but it does not contribute as much as expected.

The 1999 Convention, on the other hand, responded to the pleas for change. According to art.3(1)(a), arrest is permissible if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is the owner of the ship when the arrest is effected. There have been concerns that the word “effected” may mean different things in different jurisdictions, but even so, the concept remains the same and so the provision’s result is unaltered.

On the issue of whether a ship can be arrested, even if sold, the answer lies in finding out the time of the effecting of the arrest, i.e. whether it was before or after the sale (so as to see if there was eventually a change in the ownership). Exceptionally, arrests based on a mortgage (art.3(1)(c)), or relating to ownership or possession (art.3(1)(d)), or in respect of a maritime lien under national law (art.3(1)(e)) may take place even if the current owner is not the person liable. And finally, art.3(2) includes no criteria on the determination of the

ownership, which seems to offer increased flexibility in terms of the definition of ownership. But this freedom has provided for some scepticism in relation to the unification of the States' laws, as national legislation has been given much freedom in defining the term.

Right of Re-arrest and Multiple Arrests

In a completely different fashion than that of the 1952 Convention, the 1999 Convention allows claimants multiple opportunities to secure their claims. Art.3(3) of the 1952 Convention permits re-arrest only in case the claimant can satisfy the court that the bail or other security has been finally released before re-arrest or if the claimant can show "good cause". The rule still stands that, *prima facie*, a ship may not be arrested more than once for the same claim, and it was reaffirmed in the 1999 Convention, but for a new exception introduced in art.5. According to the provision, a claimant has the option of re-arrest of a ship after its release, as well as the option of arresting more than that one initial vessel, but the right may only arise after at least one of three requirements are met. One is when the provided security is inadequate, keeping in mind that in cases of re-arrest the security cannot exceed the value of the arrested vessel. Secondly, when the person providing the security is not, or will most likely not, be able to fulfil his obligations and, finally, when the ship or the original security is released either with the consent of the claimant acting on reasonable grounds or because he could not, by taking reasonable steps, prevent the release.

Given the magnitude of these provisions, the claimant would not be expected to willingly contract out of these provisions lightly and without further consideration. Difficulties would arise in certain situations, for example, under the customary wording of letters of undertaking, which would remove these privileges from the claimant's quiver of rights. It is therefore imperative for all interested factions to give emphasis on the fact that claimants arresting in a member-State's jurisdiction will (and should) try and reserve these rights under art.5 in any letters of undertaking or other agreements in connection with the release of the arrested vessel.

Release from Arrest

After arrest has taken place the immediate need of the owner of the arrested asset is to guarantee its release. This concern was addressed in the 1999 Convention similarly to the 1952 Convention. Under that heading, the vessel is allowed to be released if and only if adequate security is provided, subject to the discretion of the court to grant such a relief (art.4). As stated above, the amount of security cannot exceed the amount claimed, or the value of the ship, retaining the lowest of the two options (art.4(5)). It is concluded that this provision is much in favour of the shipowning community, although maybe not so much for the suppliers. The reason is that a maritime claim may count in millions more than that of the value of the arrested vessel. On the other hand, one could reply by saying that a ship may be arrested for a claim lesser than the value of a ship. But if the value of the vessel is completely

disanalogous to the amount claimed, then the national legislation will most probably apply and prevent such an inequitable sanction.

A provision in immediate service to the States ratifying the 1999 Convention is art.4(4). Thereby, the rights of the member-States in terms of the balance between arrest and security are fortified. According to the article, if a ship fails to be released in a State which is not party to the Convention, although security has been provided, the defendant may apply to the courts of a State party for an order releasing that security. This grants the ratifying States power over the relevant decisions made in non-member-States and therefore becomes a good reason for attracting more jurisdictions to join the Convention.

Provision of Security and Counter-security

As mentioned above, the condition for the release of an arrested ship is “sufficient security”, meaning that it may not exceed either the price of the vessel or the amount claimed, whichever is the lowest (art.4). Accordingly, if the value of the vessel is insufficient to cover the claim, sister ships can be arrested for the purpose of covering the difference¹⁴.

In an attempt to avoid unnecessary and wrongful arrests, the 1999 Convention explicitly sets out an innovative article empowering the court dealing with the application for arrest to impose upon the claimant, if satisfied by the facts for such a need, counter-security as a condition for the arrest (art.6). In the 1952 Convention no such right is recognised and it is tactfully left to the *lex fori* to deal with the matter. The criterion for applying the right is in the 1999 Convention dependent upon the likely losses that may be incurred by the shipowner, or the demise charterer, as a result of the arrest, for which the claimant may be found liable. The unclear part is the circumstances under which a court will be able to order the counter-security. The 1999 Convention provision gives two paradigms of non-restrictive grounds for an application for counter-security, namely wrongful or unjustified arrest and excessive security being demanded and provided. This leaves a lot of room for manoeuvre around the term “unjustified”. For example, such an unjustified arrest may be found when the claimant proceeds with the arrest unreasonably and without any good cause. Under the current UK law, the legal framework seems simpler and clearer, as a shipowner may make such a request only in cases of gross negligence or bad faith on behalf of the arrestor.

It has been noted that parallel to the request for counter-security, the applicant may also claim for damages for wrongful arrest pursuant to the Arrest Convention 1999, art.6. This could prove, though, to be quite a feat to establish, because evidence of bad faith on the part of the arresting party is required thereto and to prove this is, as a matter of fact, a rare case.

¹⁴ See *The "Banco"* [1971] 1 Lloyd's Rep 49; and *The "Kommunar" (No 2)* [1997] 1 Lloyd's Rep 8 and S21(8) of SCA 1981.

Jurisdiction

The issue of the jurisdiction on the merits of the case called for an immediate amendment and as a result art.7 of the 1999 Convention was changed in a new, straightforward approach. It now grants jurisdiction to the courts of the States, where the arrest of the vessel or security for her release has taken place, in order to determine the case upon its merits. An exclusion is found where the parties agree to submit the dispute to the courts of another State or to arbitration. The Convention also proceeded with the omission of the part referring to the jurisdiction of the States where security is given to prevent arrest, while an extensive debate erupted on the contents of art.7(5). The provision dealt with the recognition and enforcement of foreign judgments and many proposals indicated as best practice the leave for the arresting State's legislation to deal with the issue. It was additionally commented on the article that the expression "due process of law" bore ambiguity to the extent of being in need for clarification¹⁵. The Conference reached the verdict that decisions shall be recognized and given effect only in cases where the defendant has been given reasonable notice of such proceedings and reasonable opportunity to present his case and that such recognition is not contradictory to public policy (*ordre public*).

Another power granted by art.7 is that the arresting court can provide for a time limit in order for the claimant to bring substantive proceedings. This stands even where the substantive proceedings are to be held in a different jurisdiction. The logical inference is that non compliance with the time limit would result in the release of the arrested vessel.

Lastly, we should note, that under the 1952 Convention's regime, the court of arrest has jurisdiction to determine the case on its merits:

- subject to its national law granting such a jurisdiction;
- if the claimant is based in the arresting State;
- if the claim arose there; or
- if the claim deals with salvage and other occasions,

whereas the 1999 Convention disregards such detail requiring only a valid jurisdiction agreement and a refusal permissible by the law of the arresting State.

Comparison to English Law

¹⁵ See the International Maritime Organisation proposal in the "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", A/CONF.188/3 and Add.1-3, paras.127-168.

Arrest

According to English maritime law, in order to arrest a vessel, the claimant must legally move against the ship connected to the claim (action in rem) and base that claim on a maritime or statutory lien (SCA 1981, ss.20, 21). If the claim is still not satisfied after the sale of the vessel, the rest of the amount is pursued by an action against the person in fault (action in personam). A trap for the claimant, though, may be found if the case falls under the case law of *The Indian Grace* [1998] 1 Lloyd's Rep. 1, where the two types of claim were held to be effectively one and so the claimant was barred from further claiming through the in personam proceedings. On the other hand, this will prove very helpful for the shipowners as only one asset will be able to be arrested and forcefully sold.

List of claims

The list of claims is basically of the same reach in the two systems, with the 1999 Convention holding only three more than SCA 1981, s.20. Further on, art.3(1)(a) of the 1999 Convention requires personal liability of the shipowner or the demise charterer. Such liability must exist both at the time that a maritime claim arose and at the time that the arrest was effected. This change is important in England, where, as explained, the claim is issued in the form of a right in rem, so that it survives in case of a change in ownership. This means that the nature of a 1999 Convention claim is more similar to an in personam proceeding. So if one disposes of his vessel before the effect of arrest takes place then no arrest may be made (note: the debt will still remain), since the Convention grants significance to the time of transfer. Exceptions constitute arrests based on a mortgage (art.3(1)(c)), or relating to ownership or possession (art.3(1)(d)), or in respect of a maritime lien under national law (art.3(1)(e)), which may still take place even if the current owner is not the person liable. Also, art.3(2) includes no criteria of determining ownership, which offers increased flexibility in terms of interpretation.

Exceptionally under the 1999 Convention, art.1(q) grants a basis for arrest in cases of dispute arising from contract for sale of a ship. This provision is non-existent in English law. The only remedy in the latter's jurisdiction would be a freezing order (see below). Parenthetically, this is not included in the 1952 Convention. Similarly, insurance premiums that are unpaid can give rise to a maritime claim under art.1(q) of the 1999 Convention, but not under English jurisdiction (and also not under the 1952 Convention).

Liens

Under English Law, the owner of the vessel matters not for a maritime lien, as the lien attaches to the ship by operation of the law. For a statutory lien, though, the person liable on the claim in an action in personam (“relevant person”) must be the owner or charterer or the person in possession or in control of, the ship, when the cause of action arises. This may bring some difficulties in case the ship changes hands before the claim is brought to court. It must be noted, that in relation to satisfaction in case of multiple arrestors, the party with the maritime lien will be paid off first, then the mortgagee and then party with the statutory lien.

In a similar structure, the 1999 Convention incorporates the above two conditions, but it also requires that the shipowner or demise charterer, whose vessel is to be arrested, must be personally liable, when targeted as the person in fault (art.3). This leaves a very limited category of claims, where an arrest is possible in spite of the long list of maritime claims.

Sister-ship arrest

In terms of sister-ships, the SCA 1981 states that they can be arrested, but only instead of the main ship in fault and not in addition to that. But the shipowning community should worry even less, as within the English jurisdiction, single ship companies are legitimate and the lifting of the corporate veil can only be imposed if it is shown that the transfer of ownership was made with the purpose of defeating a possible claim against them. Timing is also important thereto, as time-wise, the closest to the claim, the easier it is to prove that the transfer was made pursuing its avoidance.

As mentioned above, the 1999 Convention does not clearly deal with the lifting of the corporate veil, so one must be mindful of the national legislation, where the ship is to be arrested. What is stated is that the vessel must be owned by the person against whom the claim arose.

Cargo and freight arrest

English Law allows for freight arrest by the service of an in rem claim form on the cargo. A freezing order is also available, as well as advisable (and preferable) in many occasions (see below). In the 1999 Convention there is no such provision and the matter is referred to the local courts. Same applies for an arrest on the bunkers.

Arrest against charterers, managers and operators

Both the English Law and the 1999 Convention allow for an arrest against a vessel of a bareboat or demise charterer for a claim against him provided that the vessel is the one in respect of which the claim arose (for the former) or it is in connection with the claim (or is another vessel of the same charterer) (for the latter). No such arrest can be made against a time or voyage charterer under the rules of the above systems; under English law, a vessel owned by that charterer is still able to be arrested. Against a manager or operator, under English Law, no arrest may be made, unless the manager acted as an agent of the shipowner or demise charterer. Under the 1999 Convention, it is permitted for a claim which is secured by a maritime lien that is recognised by the court of the place of arrest.

Security, counter-security and release

If the ship is arrested under the SCA 1981 rules, then security may be offered and she will be released, subject to the discretion of the court. The amount of security though will have to be sufficient to satisfy the claim and therefore is not restricted to the value of the ship. A letter of undertaking will need to be granted guaranteeing that the defendant will pay on demand any other fees and expenses. A review of the amount of security by the court is possible on request by the defendant. A P&I Club or other security provider will not be able to request a reduction or modification of the security as it will not be a party to the claim (damages may still be claimed). In case the arrest is wrongful, the defendant has the option of requesting counter-security in order to cover damages due to the wrongful arrest, but only if gross negligence or bad faith on behalf of the arrestor is proven. A subsequent arrest is not prohibited per se; what is allowed as a pre-judgement arrest, not a top-up arrest afterwards. Where security is provided, re-arrest is unlikely to take place. Same applies in cases where a letter of undertaking has been provided by a P&I Club.

The 1999 Convention also provides for security in exchange for the release of a vessel, although the limit is the lowest of either the value of the vessel, or the amount claimed. The local courts retain the discretion to reduce, modify or cancel the security measure. Unlike the English Law, the security provider may apply for an alteration in the security provided. The 1999 Convention gives the right to re-arrest a vessel should the security provide inadequate, or the provider of the security will likely not fulfil his obligations, or if the ship was improperly released. More importantly it also gives the right to arrest more than one vessel under certain conditions, which is dangerous for shipowners and beneficial to the claimants. As for a counter-security, the Convention's provision has two grounds for such an application: wrongful or unjustified arrest and excessive security. But as stated already, this leaves a lot of space for evasive action around the term "unjustified".

Jurisdiction

Finally, the 1999 Convention currently applies to a restricted amount of jurisdictions, but its power engulfs any ship entering them. This means that national law preventing such arrests will be preceded thereby. However, this should not make any difference under English law where there are no restrictions according to the flag flown. In order for the jurisdiction of the court to be found, English law and the 1999 Convention allow for the arresting court to decide; e.g. a forum non convenience challenge may be based on the arrest taking place in a foreign jurisdiction. The same regime applies for arbitration and the courts retain the right for a stay of the proceedings. It must be added at this point, that under neither regime, can a ship be arrested in order to execute, satisfy or enforce a judgement, an arbitration award or other enforceable instruments ex post.

Freezing order (Mareva injunction)

An English law alternative to arrest is worth mentioning, namely the freezing order (also known as the Mareva injunction¹⁶), which:

- requires an action in personam (i.e. against the person in fault, not the vessel),
- requires proceedings originating from English jurisdiction or abroad,
- requires the prospectively arrested assets to be within the UK or abroad,
- does not give rise to a maritime or statutory lien,
- is not restricted to one asset,
- permits for the frozen assets to be used for basic needs, at discretion of the court, and
- in case of breach of the freeze, the transgressor may be found in contempt of court and therefore fined, imprisoned, have his assets seized and even be debarred of his defence on the substantive claim or sequestration of assets.

Conclusion

Overall, the 1999 Convention is regarded with reluctance by the States, despite its wide approval at the Diplomatic Conference in Geneva. Keeping in mind that more than a decade has passed after its introduction and that only in 2011 did the 10th State ratify it, this should logically not be a surprise as the maritime law systems were based upon the tried and tested 1952 Convention. This reluctance, though, has many an explanation, as, for example, that the novelties introduced are not sufficiently far-reaching and do not guarantee the continuity of the previous system's solid points of regulation. Given the fact that the 1999 Convention does not seem to wholly deal with the weaknesses of the 1952 Convention and

¹⁶ See: *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All E.R. 213.

the fact that national legislation may be in many occasions preferable to the 1999 Convention provisions, the attitude towards it can only be expected to remain hesitant.

As for the English Law and 1999 Convention comparison, in a nutshell, one can notice that they are not very dissimilar and that the 1999 Convention leaves much room for local legal regulation. If a choice had to be made, it would be suggested that English Law would provide more protection to a shipowner. Oppositely, parties claiming against the shipowners would be advised to seek out a 1999 Convention State, while looking out for any unwanted local legislation still in effect.

NOTES

Further Reading:

- United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships Note by the Secretariat.
- Report of the United Nations/International Maritime Organisation Diplomatic Conference on Arrest of Ships 1999.
- JIGE session paper, JIGE(IX)/2, TD/B/IGE.1/2, LEG/MLM/39
- “Draft articles for a convention on arrest of ships” (TD/B/IGE.1/5).
- “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” (A/CONF.188/3 and Add.1-3).
- “Report of the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects on its ninth session” (TD/B/IGE.1/4).