

**ARTICLE 6: PROTECTION OF OWNERS AND DEMISE
CHARTERERS OF ARRESTED SHIPS**

Draft of the CMI International Sub-Committee

(1) THE COURT MAY AS A CONDITION OF THE ARREST OF A SHIP, OR OF PERMITTING AN ARREST ALREADY MADE TO BE CONTINUED, IMPOSE UPON THE CLAIMANT WHO SEEKS TO ARREST OR WHO HAS ARRESTED THE SHIP THE OBLIGATION TO PROVIDE SECURITY OF A KIND AND FOR AN AMOUNT, AND UPON SUCH TERMS, AS MAY BE DETERMINED BY THAT COURT FOR ANY LOSS WHICH MAY BE INCURRED BY THE DEFENDANT, AND FOR WHICH THE CLAIMANT MAY BE FOUND LIABLE, AS A RESULT OF THE ARREST, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE INCURRED BY THAT DEFENDANT IN CONSEQUENCE OF:

- (I) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED, OR
- (II) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND OBTAINED.

[Alternative text for Article 6(1)]

(1) UNLESS THE COURT DETERMINES OTHERWISE IN EXCEPTIONAL CASES, ARREST SHALL ONLY BE MADE IF THE CLAIMANT

[(A) SHOWS A GOOD ARGUABLE CASE, OR]

(B) PROVIDES SECURITY OF A KIND AND FOR AN AMOUNT, AND UPON SUCH TERMS, AS MAY BE DETERMINED BY THE DEFENDANT, AND FOR WHICH THE CLAIMANT MAY BE FOUND LIABLE, AS A RESULT OF THE ARREST, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE INCURRED BY THAT DEFENDANT IN CONSEQUENCE OF:

- (I) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED, OR
- (II) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND OBTAINED.]

(2) THE COURT OF THE STATE IN WHICH AN ARREST HAS BEEN MADE SHALL HAVE JURISDICTION TO DETERMINE THE EXTENT OF THE LIABILITY, IF ANY, OF THE CLAIMANT FOR LOSS OR DAMAGE CAUSED BY THE ARREST OF A SHIP, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE CAUSED IN CONSEQUENCE OF

- (A) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED, OR
- (B) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND OBTAINED.

(3) THE LIABILITY, IF ANY, OF THE DEFENDANT IN ACCORDANCE WITH PARAGRAPH (2) OF ARTICLE 6 SHALL BE DETERMINED BY APPLICATION OF THE LAW OF THE STATE WHERE THE ARREST WAS MADE.

(4) IF A COURT IN ANOTHER STATE OR AN ARBITRAL TRIBUNAL IS TO DETERMINE THE MERITS OF THE CASE IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 7 OF THIS CONVENTION THEN PROCEEDINGS RELATING TO THE LIABILITY OF THE CLAIMANT IN ACCORDANCE WITH PARAGRAPH (2) OF THIS ARTICLE 6 MAY BE STAYED PENDING THAT DECISION.

(5) WHERE PURSUANT TO PARAGRAPH (1) OF THIS ARTICLE SECURITY HAS BEEN PROVIDED, THE PARTY PROVIDING SUCH SECURITY MAY AT ANY TIME APPLY TO THE COURT TO HAVE THAT SECURITY REDUCED, VARIED OR DISPENSED WITH.

Report of the Chairman of the CMI International Sub-Committee

Art. 6 provides rules with respect to wrongful arrest.

The problem of security for wrongful arrest was also discussed before the adoption of the 1952 Convention. In the end, art. 6, para. 1 of that Convention left the problem to be determined by the State of arrest.

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Some countries automatically require security for wrongful arrest as a condition for arrest. In other countries the question is left to the discretion of the courts.

The draft contains alternative texts in this respect. The first draft gives the court complete discretion while the alternative draft only gives the courts a very limited discretion.

In para. (2) and (3) questions of jurisdiction and choice of law are regulated. Para. (4) permits staying of the proceedings while awaiting a decision by another court as to the merits of the case.

CMI Draft

(1) THE COURT MAY AS A CONDITION OF THE ARREST OF A SHIP, OR OF PERMITTING AN ARREST ALREADY EFFECTED TO BE MAINTAINED, IMPOSE UPON THE CLAIMANT WHO SEEKS TO ARREST OR WHO HAS PROCURED THE ARREST OF THE SHIP THE OBLIGATION TO PROVIDE SECURITY OF A KIND AND FOR AN AMOUNT, AND UPON SUCH TERMS, AS MAY BE DETERMINED BY THAT COURT FOR ANY LOSS WHICH MAY BE INCURRED BY THE DEFENDANT AS A RESULT OF THE ARREST, AND FOR WHICH THE CLAIMANT MAY BE FOUND LIABLE, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE INCURRED BY THAT DEFENDANT IN CONSEQUENCE OF:

(A) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED; OR

(B) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND OBTAINED.

(2) THE COURTS OF THE STATE IN WHICH AN ARREST HAS BEEN EFFECTED SHALL HAVE JURISDICTION TO DETERMINE THE EXTENT OF THE LIABILITY, IF ANY, OF THE CLAIMANT FOR LOSS OR DAMAGE CAUSED BY THE ARREST OF A SHIP, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE CAUSED IN CONSEQUENCE OF:

(A) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED, OR

(B) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND OBTAINED.

(3) THE LIABILITY, IF ANY, OF THE CLAIMANT IN ACCORDANCE WITH PARAGRAPH (2) OF THIS ARTICLE SHALL BE DETERMINED BY APPLICATION OF THE LAW OF THE STATE WHERE THE ARREST WAS EFFECTED.

(4) IF A COURT IN ANOTHER STATE OR AN ARBITRAL TRIBUNAL IS TO DETERMINE THE MERITS OF THE CASE IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 7, THEN PROCEEDINGS RELATING TO THE LIABILITY OF THE CLAIMANT IN ACCORDANCE WITH PARAGRAPH (2) OF THIS ARTICLE MAY BE STAYED PENDING THAT DECISION.

(5) WHERE PURSUANT TO PARAGRAPH (1) OF THIS ARTICLE SECURITY HAS BEEN PROVIDED, THE PERSON PROVIDING SUCH SECURITY MAY AT ANY TIME APPLY TO THE COURT TO HAVE THAT SECURITY REDUCED, MODIFIED OR CANCELLED.

CMI Report

69. Article 6 corresponds to Article 6, paragraph (1) of the 1952 Convention. It provides rules with respect to wrongful arrest. It was adopted with 25 votes to 1 with 7 abstentions.

70. The draft submitted to the Lisbon Conference contained alternative proposals on this point. One proposal was to leave the decision on whether security should be provided for wrongful arrest to the complete discretion of the judge. Another proposal was to make it the principal rule that security for wrongful arrest should be given and give the judge a possibility in exceptional cases to dispense with the security. The Conference chose the former alternative. Even a proposal that security should be obligatory in cases other than those where the claim is secured by a maritime lien was rejected.

71. The provisions of paragraphs (2) to (4) do not prevent the parties from agreeing to submit the question of compensation for wrongful arrest to the court or arbitral tribunal to which they have agreed to submit the merits of their case for decision, cf. Article 7.

JIGE

Seventh Session, 5–9 December 1994

Report—Annex I

22. One delegation believed that the Convention should not, even as a matter of discretion, permit courts to make arrest conditional upon the provision of security by the claimant. In the

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opinion of some other delegations, the Convention should include guidelines as to whether courts should make the arrest conditional upon the provision of security by the claimant, as well as provisions on liability for loss or damage in case of wrongful arrest.

23. Some delegations opposed this view on the grounds that it would limit the discretion of the courts to rule on cases of wrongful arrest in accordance with the law of the *forum arresti*. The article contained in the CMI draft was accordingly considered a suitable one. Some delegations, however, considered this provision unsatisfactory and preferred to retain the original provision contained in the 1952 Convention.

24. Some delegations referred to the need to include appropriate text to ensure that seamen would be exempted from the obligation to provide guarantees against wrongful arrest in respect of claims secured by maritime liens mentioned in article 4(1)(a) of the 1993 MLM Convention.

25. The majority of delegations, however, agree that the text of the CMI Draft should be used as a basis for future work.

Draft Articles 1994

Note of the Editor. The text of this article in the Draft Articles 1994 is the same as that in the CMI Draft.

Report—Annex I

52. The observer for IAPH said that the liability of the claimant in a case of wrongful arrest was not regulated by the provisions of the draft Convention. This was the case not only *vis-à-vis* the owner or bareboat charterer but also the Port Authority, who could well suffer considerable economic loss arising out of immobilisation of an arrested ship when the owner, bareboat charterer or arrestor went into liquidation. This situation could also seriously affect other port users. He stressed the importance for the Convention to address these issues and said that port authorities should be associated with the competent judicial authority ordering the arrest of a ship in order to examine the consequences and modalities of the arrest, such as the need for unloading dangerous cargo, transferring the ship to a waiting safe berth, etc. The Convention should provide for appropriate security to be requested from the claimant who sought arrest in order to cover ordinary port dues and expenses.

Submission by the International Chamber of Shipping

ICS believes that there should be an obligation on the part of the claimant to provide security for any loss incurred by the defendant for which the claimant may be found liable. This obligation should be mandatory rather than discretionary. ICS therefore proposes that the opening words of Article 6(1) be amended to read:

"The court shall as a condition of the arrest of a ship . . ."

Comments and proposals by the United Kingdom

25. The United Kingdom delegation is not convinced that there is any valid reason to change the simple provision contained in Article 6 of the 1952 Convention. If, however, the majority view is that the additional detail contained in Article 6 of the JIGE text is desirable, the United Kingdom delegation would suggest that the references to "unjustified" arrest should be deleted from paragraphs 1(a) and 2(a).

26. Without the deletion of the references to "unjustified" arrest, the provision might conflict with United Kingdom law, which is based on the premise that, with the exception of wrongful arrest, a claimant should not be penalised for having arrested a ship, even if the action fails on the merits. The concept of an "unjustified" arrest is also ambiguous: an arrest might be perfectly justified based on the facts available to the claimant at the time the arrest is demanded, but could turn out not to be justified when the true facts of the case become clear. Paragraphs 1(a) and 2(b) should therefore be amended to refer only to:

the arrest having been wrongful.

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Ninth Session, 2-6 December 1996

Report—Annex II

Paragraph (1)

84. Some delegations supported the view expressed by the observer for the ICS that there should be an obligation on the part of the claimant to provide security for any loss incurred by the defendant for which the claimant might be found liable. Thus, it was suggested that paragraph 1 should contain a mandatory rule for the court to impose the obligation to provide security upon a claimant seeking arrest. The expression “may” should accordingly be replaced by “shall”. The majority of delegations were unable to accept this proposal. In their view, courts should be given discretion to decide as to if, when and in what nature and amount security should be required from an arrestor. In this regard mention was made of the right of crew members to request the arrest of a ship to secure payment of wages; their right to obtain arrest should be recognised even if they were unable to provide security. In the view of the delegations supporting the replacement of “may” by “shall”, these situations were, however, properly addressed in the remaining paragraphs of the article. These delegations were also of the view that this matter had been correctly categorised by the Chairman as a matter of principle which required consideration by the diplomatic conference. To that effect, these delegations suggested that the word “may” be placed in brackets.

85. The Group considered a proposal made by the United Kingdom (document JIGE(IX)/3, paras. 25 and 26) to delete reference to “unjustified” arrest from paragraphs 1(a) and 2(a). It was suggested that, with the exception of wrongful arrest, a claimant should not be penalised for having arrested a ship, even if the action failed on its merits. This proposal was opposed by several delegations. In their view, the deletions suggested would result in narrowing the possibilities of defence of the defendant, who would be compelled to prove the existence of bad faith on the part of the claimant to obtain compensation for loss resulting from the arrest. In connection with the argument that reference to unjustified arrest might conflict with national law, it was noted that such conflicts could be avoided by the operation of paragraph 3 of this article, according to which the liability of the claimant would be determined by the application of the law of the State where the arrest was effected.

86. It was noted that, while in Article 7(1) reference was made to the jurisdiction on the merits of the case in connection not only with effected arrests but also with security given to prevent arrest, reference to this last case had not been included in Article 6, paragraph (2). In this regard, it was suggested that reference in this paragraph to “security given to prevent arrest” and “obtain the release of the ship” could be included.

87. The Sessional Group agreed to retain the text of Article 6 as presently drafted, but leave the word “unjustified” in paragraph 1(a) and 2(a) in brackets.

Paragraph (2)

88. The observer for the CMI said that paragraph (2) did not expressly provide which State should have jurisdiction if security was provided before an arrest.

Paragraphs (3), (4) and (5)

89. No specific comments were made in connection with these paragraphs.

Draft Articles 1997

Note of the Editor. The text of this article in the Draft Articles 1997 is the same as that in the CMI Draft, except that the words “or unjustified” in paragraphs 1(a) and 2(a) have been placed in square brackets following a proposal from the delegation of the United Kingdom which was supported by some other delegations.

**Diplomatic Conference
Comments and Proposals**

Hong Kong, China

DOCUMENT 188/3

22. This article introduces the right of a court to set counter security for wrongful or unjustified arrest as condition for the arrest of a ship. This right exists in some jurisdictions. It can be beneficial in making a claimant reconsider arrest in doubtful circumstances or where arrest may be contemplated as means of applying unreasonable pressure. Certain interests, particularly cargo claimants may, therefore, object if this right extends beyond wrongful arrest claims to "unjustified" arrest claim. This article is supported as it deters wrongful arrests.

Mexico

DOCUMENT 188/3

47. As in article 5, the words in brackets "or unjustified" in subparagraph (a) of paragraph 1 are considered to be a subjective criterion which should not appear in this text. The Government of Mexico therefore proposes that it be deleted and that the phrase should simply read: "the arrest having been wrongful".

Tanzania

DOCUMENT 188/3

101. Article 6(1) and 2(a), it is our opinion that the word "unjustified" be well defined.

Thailand

DOCUMENT 188/3

91. The principles of the Article are acceptable. However, the word "unjustified" in paragraph 1(a) and 2(a) should be deleted. "Unjustified" should be inherent in the general meaning of "wrongful". Having the new word which has never been internationally tried or tested can lead to the increase in disputes or problem in interpretation.

Madagascar

DOCUMENT 188/3/ADD.1

5. Paragraph (1) of this article should be amended so that the authorisation 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.

CMI

DOCUMENT 188/3

150. In the heading of Article 6 reference is made to the owner and to the demise charterer. It would appear therefore that the intention was to consider the owner and the demise charterer as the persons in whose favour security can be provided even though no reference is made to the demise charterer in the text of this article. It is thought however that in certain jurisdictions persons other than the demise charterer may be entitled to obtain protection such as, for example, time charterers. It is suggested, therefore, that the present heading be replaced by a more general one, such as: "*Liability for wrongful arrest*" or "*Liability for wrongful or unjustified arrest*" if the words "or unjustified" are retained in paragraphs 1(a) and 2(a).

151. The words "or unjustified" in paragraph 1(a) as well as in paragraph 2(a) have been placed in square brackets since it was objected that under (a) they would have enabled courts to impose

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security upon the claimant and under 2(a) to determine his liability in situations the nature of which is not clearly defined.

152. It is thought that there are situations which do not come within the concept of wrongful arrest but nevertheless justify the imposition of security and the assessment of liquidated damages. This is the case, for example, when there is no possible doubt about the solvency of the owner or when the arrest is not required in order to prevent the extinction of a maritime lien.

153. Attention must be drawn to the fact that there would in any event be complete freedom of the courts in respect of the imposition of security and the liquidation of damages since the situations mentioned in (a) and (b) are preceded by the words "including but not restricted to such loss or damage as may be incurred . . . in consequence of".

154. The remark made during the ninth session of JIGE that in paragraph 2 of Article 6 reference should also be made to the case in which security is given to prevent arrest is correct. In fact a loss may also occur in such a case if the amount of the security is excessive.

155. This paragraph could, therefore, be amended as follows:

(2) The Courts of the State in which an arrest has been effected *or security given to prevent arrest* shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused *thereby*, including but not restricted to such loss or damage as may be caused in consequence of:

- (a) the arrest having been wrongful or unjustified; or
- (b) excessive security having been demanded and obtained.

ICS

DOCUMENT 188/3

124. ICS is of the view that the square brackets in Article 6, paragraphs 1(a) and 2(a) should be deleted and the words "or unjustified" should remain.

125. ICS believes that at present the draft Convention is unbalanced because a defendant has to furnish security in order to obtain the release of the vessel whereas claimants are not compelled to provide any security for losses incurred by the defendant for which the claimant may be found liable. ICS therefore strongly believes that the word "may" in the first line of Article 6, paragraph 1 should be deleted and replaced with "shall". Concern has been expressed about the ability of certain claimants to provide security (e.g. crew members). However, that concern is addressed in the remainder of the paragraph which provides flexibility to deal with such situations. If the claimant's obligation to provide security was mandatory rather than discretionary, the court would remain responsible for determining the kind, amount and the terms of the security. In the situations which aroused concern, such security could in fact be nominal.

Denmark

DOCUMENT CRP.5

Article 6, paragraph 1

"The Court *shall save in cases where it would be unreasonable to do so* as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who had procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of"

Canada

DOCUMENT CRP.1

3.1 In effect this provision vests courts with the discretion to impose counter-security in certain circumstances. Canada is of the view that such a provision would have the effect of slowing down and complicating the arrest process, thereby making it ineffective in many cases. A routing requirement for counter-security would greatly discourage the arrest of ships.

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3.2 Canada notes that national courts possess the power to impose counter-security in any event.

3.3 Canada therefore proposes the entire deletion of this article.

Egypt

DOCUMENT CRP.9

Article 6, paragraph 1

We propose that not only the defendant but also the ports should benefit from the security that the court might impose on the claimant to cover any loss which might be incurred as a result of wrongful arrest.

Accordingly, we believe that the text should be amended to read as follows:

“The court may, as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that court for any loss which may be incurred by the defendant or to cover the normal port dues and costs as a result of the arrest, and for which the claimant may be found liable, . . . etc.”

Ukraine

DOCUMENT CRP.11

14. After “for an amount” add “, not to exceed the value of the ship.” In subparagraphs (a) of this and the following paragraphs, Ukraine prefers the expression “unjustified” arrest.

**Proceedings of the Main Committee
Report of the Chairman of the Drafting Committee**

*11 March 1999*⁷⁶

TITLE

The Chairman of the Drafting Committee reported as follows:

There was some discussion. First the question of title. We did not discuss headings at all. We did not have the time. We have to live with the present heading.

PARAGRAPH 1

*First reading—4 March 1999*⁷⁷

Two issues have been debated. Firstly, whether the provision of counter security should be compulsory or decided discretionally by the Court. Secondly, whether the words “or unjustified” in sub-paragraph (a) should be maintained. It was also suggested that security should be provided also in favour of third parties such as port authorities. Some delegations made also the radical proposal to delete the entire article 6. The most significant part of the debate is reproduced below.

Canada We have made a proposal in CRP.1 at § 3. In our view this provision vests courts with discretion to impose counter-security in certain circumstances. We believe that there are real practical difficulties to vest courts with such a power specifically in this Convention. We fear that

76. Text from tape No. 75.

77. Text and summary from tapes Nos. 33 and 34.

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those representing the interest of ships may well try to persuade courts that counter-security must be imposed or on the contrary to impose counter-security in all cases. This favours forum shipping. Suggests deletion of article 6 as a whole.

Spain As respects (1) we request replace "may" with "shall". We have doubts about word "unjustified" in (1)(a).

Denmark We have made a proposal in CRP.5. Our amendment is to change "may" to "shall". Our purpose is to avoid forum shipping but our solution is opposite to the Canadian one. There may be, however, some special cases in which it would be unreasonable to demand counter-security as in case of crew members. We prefer to have the word "unjustified" in. The reason for this is that the system in our country is that if someone causes a lawsuit and he doesn't win, he would have to pay for whatever costs opponents will have. It has nothing to do with preventive arrest.

CMI If this is not too boring for the delegates present here I may try to summarise in two words the background of this provision. As far back as 1952 the issue which we are discussing today was raised by the Scandinavian delegations. The Scandinavian delegations at that time asked for a provision in the draft 1952 Convention to the effect that a security should be provided in any event by the arrestor. There was no agreement on that and therefore in the 1952 Convention a rather vague provision was inserted which is art. 6 of the 1952 Convention. When the new draft Convention was discussed at Lisbon by the CMI the same issue was raised again and it was deemed proper to rephrase art. 6 of the 1952 Convention in a much more detailed manner, indicating that the competent court could request the claimant to provide security and the details are now provided in art. 6. So this was a sort of compromise which was arrived at first before 1952 and then in the course of the debates which have now brought this draft Convention in front of you. This is the situation if this may be of interest to the delegates.

Egypt We suggest that security be provided not only for shipowner, for also for possible losses of third parties, such as a port authority.

IIDM Security should be obligatory.

United States Supports deletion of entire article. In any event delete "unjustified".

United Kingdom JIGE did at least an attempt to achieve a balance. I feel more than happy with the explanation of Prof. Berlingieri. We certainly could not accept the Spanish proposal. If we must keep something I would propose deletion of word "unjustified". The notion is novel and ambiguous. Keep text with deletion of that word.

Germany To restore a fair balance it is necessary to have counter-security. As to term "unjustified", it should be retained, because this term is regulated and widely accepted because the defendant is entitled to damages if the claim fails. As to harbour fees, we think this belongs to article 1(5) since it refers to the cost of proceedings. It is not necessary to regulate this in article 6. We prefer the JIGE text but can live with Danish proposal.

Chairman 1) There is a strong opposition to the Danish proposal.

2) With respect to the words in square brackets, the division is more even. We have to keep this as an open issue. First agreement on the substance is necessary.

3) As to the Egyptian proposal, there has been some support. There is equal agreement on the substance. It is up to the State concerned to see that protection be granted to ports. This can be ensured in article 2(5) or in article 8(4). There is a risk that if we introduce this concept here, there may be implied that States have no right otherwise to take action in order to protect port.

At this stage we cannot decide if something must be introduced in this article.

Second reading—8 March 1999⁷⁸

Three different views were expressed. Firstly that the words "or unjustified" should be deleted; secondly that the word "wrongful" should be deleted and, thirdly that both words should be maintained. Here follows the transcript of the most significant statements made during the debate.

Chairman We have also article 6(1) and (2). In both of these provisions reference is made to wrongful or unjustified arrest. The words "or unjustified" are in square brackets in both paragraphs.

78. Text from tapes Nos. 52 and 53.

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There was an inconclusive debate in this respect. Some delegations promised to look into this further and the Belgian delegate I think is able to report on what has been done.

Belgium We have indeed had a meeting. We were only three delegations. We worked on a very simple example: a collision between two or three vessels, dense fog, followed by the arrest of the wrong ship. The arrest is unjustified, but is it wrongful? It all depends on what "wrongful" and "unjustified" mean. The Hong Kong delegate proposed that everything that is wrongful is in some way unjustified, but the reverse is not true. "Wrongful" is what is not in accordance with the law, "unjustified" covers a lot more. And the Danish law, however, and may be other national laws, from the moment the arrest appears not to be justified, it gives automatic right to damages, apparently on tort. Therefore "unlawful" or "unjustified" give the same result: liability and damages for arrest by mistake. The Belgian delegation believes that there should be no problem. Article 6(2) gives a wide power of appreciation to the Court of the State in which the arrest has been effected and this should satisfy the Danish delegation, at least for all arrests effected in their country. The question whether there is a difference under the terms of the Convention between "wrongful" and "unjustified" could arise in England, when an arrest could be wrongful, i.e. against the law, and decide that "unjustified", for instance is as respects an owner who has sufficient solvency. Reference is made to the CMI document A/Conf.188/3 p. 28. "Wrongful" must be translated, this is important, in usual French, as "unjuste" and in more legal language as "illegale", "injustifié". Therefore the difficulty arises when one adds the word "abusive", that refers more to the abuse of law, *abus de droit*, but it is not necessary since under civil law the abusive use of right is illegal in any case and I quote a famous Author who said "la formule 'usage abusif de droit' est une logomachie, car si j'use de mon droit mon acte est licite et quant il est illicite, ce que je dépasse mon droit et s'agit sans droit selon la loi aquilienne". After considering the comments of the Danish delegate and the interpretation of the wording by the Hong Kong delegation the Belgian delegation suggests in English to delete "wrongful" and to keep "unjustified" and in French to delete "abusif" and to keep "unjustifié". I must say that the Hong Kong delegation disagrees with this proposal.

Hong Kong China I should make it quite clear that the Hong Kong suggestion is to delete the words "or unjustified" because in our view they purport to expand the scope of liability beyond what is merely wrongful, to some ill-defined notion of what is unjustified. In fact we had a meeting and the first report was I think that the conclusion reached was that the words "or unjustified" should be deleted. Unfortunately there was a second revised version prepared saying that they should be retained. Our position has been consistent throughout and we would like seeing those words deleted.

Mexico We support the views of the Belgian delegation.

Cyprus We support the Hong Kong delegation. We consider that the word "unjustified" would entail unnecessary lengthy and cumbersome litigation in order to consider what is unjustified. "Wrongful" we believe is sufficient to discourage any arrest which is not in accordance with the law. And this is what we are concerned with, that the arrest should be in accordance with the law.

Benin We prefer the term "unjustified" in as much as an arrest that is unjustified is not necessarily wrongful and we think that in all cases where an arrest is unjustified it should give right to a claim for damages. But in order to reach a compromise we would accept the Belgian proposal to keep both "unjustified" and "wrongful".

Chairman That is different from the Belgian position, but we noted your views.

United Kingdom When we spoke on this issue before, we said that we would wish the words in brackets to be deleted; that is still our preference. In making our point before we made the point that we didn't want article 6 to become mandatory and as I understand the debate at the moment that doesn't seem likely. If article 6(1) allows the Court, because the Court may as a condition of the arrest etc. etc. the Court has some discretion, and if the Court retains its discretion under 6(2) the Court shall have jurisdiction that is the Court of the State concerned is allowed to determine the issue. As long as things stay like that, in the interest of progress we could live with the removal of the brackets and the retention of the JIGE text. That is to say our overwhelming preference would be to delete the words "or unjustified" but I am trying to help you finding your middle way, Mr Chairman.

Norway Because the principle of security is important in our national law we prefer to keep "wrongful or unjustified". However, as it was explained by the UK the law of the State may still require security in more cases than in (a) anyway. Therefore we could accept deletion of "or unjustified".

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Denmark I noted that the Belgian delegation already presented what are our views. I have listened carefully to the interventions and as explained by the UK there is already flexibility built in the text. I think that since some delegations wanted both “wrongful” and “unjustified” in the text and although we think that what is unjustified is also wrongful in a spirit of compromise we could live with having both in the text.

Canada We would like to associate ourselves with the comments that were made and the position taken by Hong Kong China and supported by Cyprus and others, to delete the words “or unjustified”. We believe that they may give rise to unfairly penalising the claimant simply on the ground that he would fail in his action on the merits and we think that is entirely inappropriate and unduly restrictive of the right of arrest.

Italy We are in favour of keeping both terms. We think it is possible that there is an arrest that is not wrongful and can be unjustified, for example if there was no doubt on the solvency of the debtor. But in a spirit of compromise we could accept the proposal of Belgium, to maintain the word “unjustified” and delete “wrongful”.

Argentina We think that there may be an arrest not justified that may give rise to liability and therefore we wish to delete the square brackets and keep both terms.

Chairman There hasn't been much development since last time. The views are still divided. I am not in a position to make a ruling on what is a consensus view or a view that can be adopted by the Committee. I think we have to consider it further. I think that the remark made by the United Kingdom may be worth recalling, that the wording is such that it does not impose any obligations on the Contracting States or on the Courts of a Contracting State. The provision indicates what Contracting States or the Courts may do, but it doesn't really tell them what to do and I think that it is worth bearing in mind when we revert to this article later on. You may also wish to consider the possibility of putting a full stop earlier on in the text. For example if you look at paragraph (1) you may put a full stop after the words “and for which the claimant may be found liable”.

Turkey We think that the inclusion of (a) and (b) doesn't add too much because in any case in paragraph (3) it is left to the law of the State, to the Court's discretion to establish the liability and the extent of damages. Therefore it may be a good idea to stop where you have suggested in paragraphs (1) and (2).

Iran Putting a full stop as you suggested I think doesn't add much to the Convention. It seems to me that when we are drafting the Convention we should clarify and should go more in the detail of the debate. If everything is left to the discretion of the Court we do not reach uniformity. I think we should keep sub-paragraphs (a) and (b). May be we can have some informal consultation in order to keep the words “or unjustified”.

Chairman This would be most welcome.

When article 6(1) and (2) was again discussed, the UK delegation, who had originally objected to the word “unjustified”, stated that they could accept it, whereupon it was agreed to keep the word and delete the square brackets.

The Chairman of the Drafting Committee reported that there had been some discussion on the word “defendant” in paragraph (1), which it was stated not to be a proper word in the context of this paragraph and that the suggestion was made to delete it. But since this would have implied a change of substance, it was decided to keep it.

PARAGRAPH 2

First reading—4 March 1999

This paragraph was adopted without any relevant discussion.

PARAGRAPH 3

First reading—4 March 1999

This paragraph was adopted without discussion.

THE TRAVAUX PRÉPARATOIRES

PARAGRAPH 4

First reading—5 March 1999

This paragraph was adopted without discussion.

PARAGRAPH 5

First reading—5 March 1999

This paragraph was adopted without discussion.

1999 Convention

1. THE COURT MAY AS A CONDITION OF THE ARREST OF A SHIP, OR OF PERMITTING AN ARREST ALREADY EFFECTED TO BE MAINTAINED, IMPOSE UPON THE CLAIMANT WHO SEEKS TO ARREST OR WHO HAS PROCURED THE ARREST OF THE SHIP THE OBLIGATION TO PROVIDE SECURITY OF A KIND AND FOR AN AMOUNT, AND UPON SUCH TERMS, AS MAY BE DETERMINED BY THAT COURT FOR ANY LOSS WHICH MAY BE INCURRED BY THE DEFENDANT AS A RESULT OF THE ARREST, AND FOR WHICH THE CLAIMANT MAY BE FOUND LIABLE, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE INCURRED BY THAT DEFENDANT IN CONSEQUENCE OF:

- (A) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED; OR
- (B) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND PROVIDED.

2. THE COURTS OF THE STATE IN WHICH AN ARREST HAS BEEN EFFECTED SHALL HAVE JURISDICTION TO DETERMINE THE EXTENT OF THE LIABILITY, IF ANY, OF THE CLAIMANT FOR LOSS OR DAMAGE CAUSED BY THE ARREST OF A SHIP, INCLUDING BUT NOT RESTRICTED TO SUCH LOSS OR DAMAGE AS MAY BE CAUSED IN CONSEQUENCE OF:

- (A) THE ARREST HAVING BEEN WRONGFUL OR UNJUSTIFIED, OR
- (B) EXCESSIVE SECURITY HAVING BEEN DEMANDED AND PROVIDED.

3. THE LIABILITY, IF ANY, OF THE CLAIMANT IN ACCORDANCE WITH PARAGRAPH 2 OF THIS ARTICLE SHALL BE DETERMINED BY APPLICATION OF THE LAW OF THE STATE WHERE THE ARREST WAS EFFECTED.

4. IF A COURT IN ANOTHER STATE OR AN ARBITRAL TRIBUNAL IS TO DETERMINE THE MERITS OF THE CASE IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 7, THEN PROCEEDINGS RELATING TO THE LIABILITY OF THE CLAIMANT IN ACCORDANCE WITH PARAGRAPH 2 OF THIS ARTICLE MAY BE STAYED PENDING THAT DECISION.

5. WHERE PURSUANT TO PARAGRAPH 1 OF THIS ARTICLE SECURITY HAS BEEN PROVIDED, THE PERSON PROVIDING SUCH SECURITY MAY AT ANY TIME APPLY TO THE COURT TO HAVE THAT SECURITY REDUCED, MODIFIED OR CANCELLED.