

**Liability for Wrongful Arrest of Ships: the efforts
towards possible uniform rules***

Giorgio Berlingieri**

ABSTRACT

The question whether uniform rules on liability for wrongful arrest of ships should be established is debated since the origins of unification of the law on arrest of ships.

In fact conflicting views immediately emerged and continued to be expressed.

This did not allow to give full regulation to the subject matter in an international convention. Recently the issue has been considered again by the Comité Maritime International. A Working Group was formed, whose activities are summarized together with what is being discussed since the outset, and the possible way ahead.

SUMMARY:

1. The first draft Convention and the 1930 CMI Antwerp Conference – 2. The subsequent debate and the CMI Conferences from 1933 to 1949 – 3. The compromise in the 1952 and 1999 Arrest Conventions – 4. 2014-2016: new attempts to provide uniform rules. The CMI Questionnaire and the plea for reform at international level - 5. The position in the Iberoamerican countries – 6. The 2018 CMI London Conference and the follow-up Questionnaire - 7. The decisions in the “Alkyon” – 8. Prospects of higher uniformity.

1. The first draft Convention and the 1930 CMI Antwerp Conference

The initiative to seek uniformity on arrest of ships dates back to 1930 when, in preparing the Conference of the Comité Maritime International (CMI), to take place

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** President Italian Maritime Law Association.

on that year in Antwerp, the National Maritime Law Associations members of the CMI, were asked to suggest new subjects to be studied by the CMI.

The French, German and Italian Associations proposed arrest of ships¹, as this matter was closely linked with collision, maritime liens and hypothecs, which were already given uniform regulation with the relating Brussels Conventions of 1910 and 1926.

The proposal was accepted and, at the CMI 1930 Antwerp Conference, arrest of ships was therefore considered, with issues relating to wrongful arrest immediately emerging².

In compliance with the traditional CMI way of working a Questionnaire was subsequently prepared.

Replies were received from the National Associations of Belgium, France, Germany, Italy, Netherlands, Norway, Portugal, Sweden, United Kingdom, United States of America and Yugoslavia³.

A preliminary text of Convention was drafted⁴, which in its art. 2 stated that the arrest of a ship was to be granted upon the Court simply checking that the claim was likely.

¹ Antwerp Conference 1930, CMI Bulletin n. 91, 1931 p. 507. See also F. Berlingieri, *On arrest of ships*, LLP, 1992, 1-12; G. Berlingieri, *Arrest of ships in the International Conventions, in Italian Law and in Spanish Law*, Libro Conmemorativo de los Doscientos Años de creación de la Corte de Almirantazgo en Venezuela, Caracas, 2019, p. 247 and in *Dir. Mar.*, 2019, p. 245.

² As reported in CMI Bulletin n. 91 p. 514, F. Berlingieri sr. pointed out that “*There is an important difference in the consequences of arrest in various countries. In England and in America the arrest is only the subject of further investigation and complaint where a real culpable fault almost amounting to fraud has been committed in order to secure the arrest, but in Italy and in some continental countries this question of demanding an arrest and obtaining bail for the arrest gives rise to the question of compensation in quite another way. Wherever the arrest has been demanded, lightly or frivolously, or an excess of bail has been insisted upon, that question is reserved for further examination and compensation can be claimed and obtained. That is an important difference which merits further examination*”. And A. Bagge of the Swedish MLA noted (p. 515) that among the points of interest there was the issue of security to be lodged by the arrestor for the eventual payment of damages awarded to the owner in the event of the arrest being found to be unjustifiable and vexatious.

³ Oslo Conference 1933, CMI Bulletin n. 96, 1934, respectively at pages 86, 127, 21, 39, 29, 60, 94, 54, 202, 68 and 49. For a review of the debate on wrongful arrest, starting from the 1933 CMI Oslo Conference: F. Berlingieri, *On arrest of ships*, VI ed., Vol. I, Informa Law from Routledge, 2017, p. 602.

⁴ CMI Bulletin n. 96 p. 157.

However the Court could require the arrestor to supply security, as deemed reasonable, to cover damages in the event the arrest proved to be wrongful.

In an effort to obtain broad consensus art. 7 of the draft provided that, in case of release of the ship from an arrest which was considered unjustified, the arresting party had only to pay the costs of the security which was put up to release the ship. It then provided that if the unjustified arrest was performed in bad faith, the arresting party could be condemned to pay also the damages caused by the arrest⁵. However this wording was not sufficient to get the approval of the British Association.

Art. 8 finally contemplated that the procedural rules relating to the arrest were those of the law of the place of the arrest.

The draft text was discussed among National Associations, with amendments being made, to be considered at the 1933 CMI Conference in Oslo.

Whilst art. 3 stated again that the Court had to release the ship from arrest if evidence was offered that it was unjustified, or if satisfactory security was furnished, new art. 5 repeated⁶ what was provided in art. 7 of the previous text referred to above.

2. The subsequent debate and the CMI Conferences from 1933 to 1949

At the Oslo Conference, the provision under art. 5 continued to be opposed by the British Association, which was against the adoption of sanctions, even if limited to the case of bad faith. It was therefore agreed to have the issue adjourned until the next Conference⁷.

⁵ From the report of M. Léopold Dor (CMI Bulletin n. 96 at p. 155) it appears that the provision was strongly opposed by the British Association: *“L’article 7 soulève une question délicate, celle de la responsabilité encourue par le saisissant au cas de saisie injustifiée. Nous sommes convaincu que, si la projet de Convention prévoit des sanctions trop rigoureuses, il se heurtera à l’opposition irréductible des milieu britanniques, qui feront échouer la future Convention. Nous avons donc rédigé l’article 7 de façon à limiter la responsabilité du saisissant de bonne foi au remboursement des frais de la caution fournie par le propriétaire pour obtenir main-levée de la saisie. Par contre, il est tout naturel que, lorsque la saisie a été effectuée de mauvaise foi, le créancier soit entièrement responsable de toutes les conséquences dommageables de son acte illicite et qu’il répare le prejudice ainsi cause, non seulement aux intéressés sur corps, mais également à ceux sur cargaison”*.

⁶ CMI Bulletin n. 96 p. 182.

⁷ CMI Bulletin n. 96 p. 472: *“The President, summing up the debate, says that there are serious differences of opinion on various important matters in this draft Convention: further, a very important group of our members, the British members, are not in a position to consider it, nor to give their opinion as to the merits of the proposals made. Under*

During discussions it appeared that there were clear differences between common law and civil law systems⁸: under common law, arrest was only permitted when the claimant was entitled to enforce its claim by proceeding *in rem*; under the civil law systems, which are not uniform, the arrest was allowed as security for any claim, whether of a maritime nature or not, with some jurisdictions granting the possibility to hold the arresting party liable for damages in case of wrongful arrest.

Subsequently to the Conference in Oslo, the CMI Sub Committee on arrest of ships met in Paris the 2 June 1936. In an effort to find a solution agreeable to as many National Associations as possible, the scope of application of the Convention was restricted to certain claims secured by a maritime lien under the 1926 Brussels Convention on maritime liens and hypothecs, i.e. to claims for salvage and collision⁹.

At the 1937 CMI Conference in Paris, whilst the British and the U.S. Associations refrained from making comments, other National Associations including the Italian one regretted the restricted scope of application of the Convention¹⁰.

these circumstances, the President suggests that it would not be wise to go into a reading of this draft as such, but that it is better to keep it before the Conference, leaving it to the Permanent Bureau to consult again the sub-Committee and bring the matter back before the next Conference when all these first ideas on a new subject, which had not been considered up to date, will have ripened, and we may probably arrive at an unanimous conclusion".

⁸ The quite interesting debate is published in CMI Bulletin n. 96 at p. 440-484. There at p. 442 the rapporteur Léopold Dor stated: *"There is no doubt that in article 1 we differ from the English practice. If I am not right I know that Sir Leslie Scott will correct me. In the English procedure in rem you can arrest only the ship upon which the debt has been incurred, while in the system under article 1, which is the Continental system, you can arrest another ship. In most countries on the Continent you can arrest one ship of the shipowner because of a collision with another ship or because he has supplied coal to another ship and has not paid his bill. Another point which gave rise to considerable discussion was the question of the damages in the case of an arrest which is unjustified. On the whole of the Continent, it is settled law that the man who arrests, if he is held to have had no claim and his action (is adjudged) to be unjustified, is condemned to pay the whole of the damages incurred by the arrest. If a ship has been lying there for two or three weeks, that may mount up, especially when freights are high. In England, on the contrary, he is only condemned to pay the amount of the bail fees."*

⁹ Paris Conference 1937, CMI Bulletin n. 102, p. 85. The text of art. 1 (at p. 80) read as follows: *"Art. 1 – Any creditor of the owner of a ship, by reason of a collision, or damage caused by such ship or of salvage services, may operate the provisional arrest of such ship or of any other ship belonging to the same owner, even when ready to sail"*.

¹⁰ CMI Bulletin n. 102, p. 134: *"The Italian Association of Maritime Law observe that article 1 of the draft elaborated by the Paris Sub-Committee has limited the right of provisional arrest to certain classes of creditors protected by a lien and excludes amongst others, the creditors in respect of repairs to the ship, whereas the former drafts contemplated provisional arrest generally, without establishing a distinction according to the nature of the claims. Apart from the fact that in their view there can be no justification for such restriction to the class of creditors having the benefit of a lien, the Italian Association are of opinion, that the co-existence, which would ensue, of the rules embodied in the international convention – even if they were extended to all creditors having the benefit of a lien, - and of different rules contained in the national legislations as regards the right of effecting provisional arrest where no distinction is made as to the nature of the claims, would bring about a most peculiar and unjust condition of things. The Italian Association therefore are of opinion that it would be preferable to consider a draft which, like those who preceded that submitted to the Paris*

However, upon suggestion of the German Association, the scope was even more restricted to the case of collision¹¹.

The Conference finally approved a suggestion to leave to the Court of the arrest the issue of damages for wrongful arrest, and it was agreed that the arresting party was to refund the cost of the security to release the ship in case of wrongful arrest.

At the 1947 CMI Conference in Antwerp, and at the following of 1949 in Amsterdam, it was considered that the scope of the draft agreed at the 1937 Conference was too narrow. Another Questionnaire was circulated, to collect additional information on national laws¹². The answers outlined the differences between the English and the continental systems¹³.

3. The compromise in the 1952 and 1999 Arrest Conventions

A new draft was prepared, which was considered at the 1951 CMI Conference in Naples¹⁴. A wording was agreed, notwithstanding different opinions continued to be

Conference, regulates in a general way and without any such distinction, the provisional arrest of ships, starting from the principle that all the property of the debtor are to constitute the common security of his creditors”.

¹¹ CMI Bulletin n. 102, p. 340: “Art.1 – Any creditor of the Owner of a ship, by reason of a collision, may operate the provisional arrest of such ship, even when ready to sail”.

¹² The Questionnaire was drafted by J.T. Asser of the Netherlands delegation and by Cyril Miller of the British delegation. In his report on the new Questionnaire, published in CMI Bulletin n.104, on the Amsterdam Conference 1947, at p. 530 J.T. Asser stated: “Article I of the first draft provided that each creditor of the owner of a ship may arrest her. According to the report presented by Maitre Dor on that occasion, this article was intended to mean that any ship might be arrested in respect of any debt of her owner whether maritime or non-maritime. In other words, this first draft reproduced what is called the Continental system of the law of arrest. This draft met with a great deal of opposition on the part of the British delegates, who stated that they were reluctant to abandon, in favour of the Continental system the British system of a very restricted possibility of arrest. As a result of this opposition, article I was redrafted several times; the article was gradually amputated more and the text finally adopted at the Paris Conference stated no more than that: «Any creditor of an owner of a ship, by reason of a collision, might operate the arrest of such ship». Consequently, whilst the first draft had incorporated the continental notion of the widest scope of arrest, providing for the arrest in respect of all claims, the final draft was based on the English conception of the action in rem, dealing merely with collision claims, the question of arrest in respect of all other claims being left to the respective municipal laws. So what was intended to be international uniformity became merely a reproduction of the law of England. If I may be permitted to say so, this was a rather meagre result. Anyhow, the Permanent Bureau felt that it was a result hardly worthy of the dignity of being put before the Diplomatic Conference, and it was therefore decided that a new effort should be made towards international uniformity in the whole field of the arrest of ships, whereupon Mr. Miller and I were entrusted by the Bureau Permanent with the task of drafting a questionnaire. In view of what had happened in the past, Mr. Miller and I felt that if any success were to be expected from this new attempt, it would be inexpedient to follow up the work which so far had been done, that is to say to start wording on the basis of the draft convention of 1937. On the contrary, we believed that the problem should be made the subject matter of an entirely new study. In view thereof, we called upon friends in various countries to send us memoranda on their national legislation on the subject of arrest of ships.”.

¹³ The history of the discussions on the scope of a convention on arrest of ships and on liability for wrongful arrest is summarized by F. Berlingieri, *On arrest of ships*, VI ed., Vol. I, cited, p. 1.

¹⁴ The Preparatory Works of the 1952 Arrest Convention are published in F. Berlingieri, *On arrest of ships*, VI ed., Vol. I, cited, p. 490. The Preparatory Works are also published by the Comité Maritime International in a Volume edited in

expressed by the National Associations regarding the provisions on wrongful arrest¹⁵.

1977 by F. Berlingieri. Those relating to art. 6 on wrongful arrest are then uploaded in the CMI website → *Work* → *Arrest/Attachment of Ships*.

¹⁵ The following was argued by Mr Kaj Pineus of the Swedish Association at the Plenary Session 25 September 1951 of the Naples Conference, The Preparatory Works, in F. Berlingieri, *On Arrest of Ships*, VI ed., Vol. I, p. 615:

“Mr President and gentlemen, I propose this amendment on behalf of Finland, Norway and Sweden. It was handed in yesterday. It contains four sentences, and I should like to read them to you just to make sure that we all know what we are talking about. The first is: “Should an arrest be found unjustified the claimant shall be liable to pay all costs and damages of whatsoever kind which have arisen on account of the arrest”. The second is: “Before the arrest of a ship is authorized the claimant shall ordinarily be bound to furnish a guarantee sufficient to cover the damages and all costs for which the claimant may be liable if it appears that his claim is unjustified”. The third is: “In exceptional cases the Court or other appropriate authority may permit arrest without such security provided that the claim is considered likely to succeed and if the condition of security will cause undue hardship”. The fourth is: “The nature and the amount of such security shall be determined by the court or authority who permits the arrest to be made”.

However M. J. de Grandmaison of the French Association objected (p. 619):

“On the second point, which is the point of the compulsory furnishing of bail imposed by the judge upon the claimant, I should like to say this. It is an obligation, say the Scandinavian countries, upon the judge. We do not agree. The actual position is this. The judge is at liberty. He has full liberty to decide if he will impose such a bail upon the claimant. He takes into consideration all the facts put before him and decides if the claim is reasonable or feasible. He takes all those matters into consideration. But he must take into consideration, too, the personality of the claimant and his financial position and possibilities. I gave an example. Take a collision case. On the day following somebody in a foreign country might want to arrest a foreign ship which was ready to sail and which will never come back. Is the judge bound and tied to impose a guarantee to cover expenses and damages following an arrest if it is unjustified? It is impossible for anyone to know at the date of the arrest whether it will be justified or not. That cannot be a solution for such cases as where people have no money and no possibility of getting any, because they will not be able to arrest that ship. That seems to us undemocratic, and we think that our Parliament would not accept such a thing. We think that it is better to rely entirely upon the wisdom and experience of the judge, who will give, in certain exceptional cases, permission to arrest a ship without any bail, or who will, on the contrary, order the furnishing of bail or a bank guarantee if he thinks it advisable. That is why I suggest that we should heartily support the commission’s text.”.

This latter view was supported by Mr G. Berlingieri of the Italian Association (p. 620):

“We heartily support what has been said by Maitre de Grandmaison, and we really cannot see that a judge could be compelled to make the arrest of a vessel subject to the payment of a guarantee which in some cases the claimant could not supply. We find that in the Scandinavian text the mention of exceptional cases is too restricted as far as the freedom of the judge to act is concerned. Therefore, we cannot support the test of our Scandinavian colleagues, and we give all our support to the text submitted to us by the International Commission.”.

The debate was concluded by President Albert Lilar who, after supporting the views of the delegates having expressed opinions against security being compulsory in order to be granted with an arrest, stated (p. 620):

“It seems that after what Mr. Houston (also the U.S. delegate, Mr. Oscar R. Houdson, supported the adoption of the language put forward by the International Commission), Mr de Grandmaison and Mr. Berlingieri have said, I have nothing to add in order to show how right they all are; but on behalf of the Belgian delegation I should like to make a remark to our Norwegian, Finnish and Swedish friends. We will not deny that their opinion has a sound basis, but the only thing we ask is that they consider our feelings in the same way. We must come to a decision and bear in mind that our principal aim is to achieve unification in maritime law. We should like our colleague Mr. Pineus to recognize that the committee went as far as possible and has reached the point beyond which it is really impossible to achieve any agreement between all the countries concerned. It seems to me that our commission went as far as possible and reached the maximum point after which no agreement will be achieved, and that the text of the commission is the utmost to which we can gain the approval of the countries and the ratification of the governments. Therefore, I must ask our Scandinavian friends to recognize that we are right in asserting what we do and that the text of the commission is the unique and sole basis on which the agreement of all countries can be achieved. Therefore, on behalf of the Belgian delegation, I give my full and hearty approval to the text submitted to us by the International Commission”.

The following text was therefore approved by the Naples Conference with the Norwegian, Finnish and Swedish Associations voting against (p. 623):

“Article 6. All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, or whether he shall be required himself to furnish guarantee to secure the payment of such damages or costs, shall be determined by the law of the Contracting State in whose jurisdiction the arrest is made or applied for.”.

The text was submitted to a Diplomatic Conference held in Brussels from 2 to 10 May 1952. During this conference, the more debated issues were related to: the liability for wrongful arrest; the requirement for the claimant to provide security; and the jurisdiction of the Court of the arrest to decide on the merits.

What was approved by the Diplomatic Conference¹⁶ was to agree – by way of a compromise - to solve the differences on liability for wrongful arrest which were existing between civil law and common law countries; the latter, however, were even against the mention of the word ‘*security*’ in the Convention. Therefore, by a rule of private international law, the reference to security, as had been approved at the CMI Conference in Naples, was deleted and, instead the matter was left to be decided according to the law of the place of the arrest¹⁷.

The Scandinavian delegates made objections to that, insisting for the arresting party to provide security before the arrest¹⁸, whilst the delegates from a number of continental States, including Italy and France, expressed their disagreement.

To possibly obtain consensus over different views, it was suggested by the President of the Diplomatic Conference Albert Lilar and by the French delegate Georges Ripert, to state that the Court of the arrest may require the claimant to provide security¹⁹. But a strong opposition came from the British delegates, who

For the full debate at the Plenary Session on 25 September 1951, F. Berlingieri, *On Arrest of Ships*, VI ed., Vol. I, cited, p. 615–623. See also p. 482–485.

¹⁶ The text of the Convention may be found in <https://treaties.un.org>.

¹⁷ F. Berlingieri, *On arrest of ships*, VI ed., Vol. I, cited, p. 371.

¹⁸ This is what it was stated by the Danish delegate at the tenth Plenary Session on 9 May 1952: “*M. Boeg (Denmark) estime l'article 6 particulièrement important. La question a déjà été discutée longuement lors de conférences antérieures, et lors des réunions du comité de rédaction. Pourtant, le texte actuel ne satisfait pas les pays scandinaves, Danemark, Finland et Suède. Aussi ont-ils présenté un autre texte, qui a été distribué aux membres de l'assemblée. Ce texte permet d'obtenir, en principe, des dommages-intérêts pour toute saisie injustifiée qui a causé un dommage ou des frais, et oblige à fournir une caution pour assurer le paiement de ceux-ci. Il est toutefois possible que le demandeur se soit trouvé dans l'impossibilité de savoir que sa saisie était injustifiée; l'amendement admet que, dans ce cas, le demandeur n'est pas responsable. De même, le nouveau texte admet que, exceptionnellement, le dépôt d'une caution n'est pas nécessaire si la saisie est suffisamment justifiée ou si le demandeur a des difficultés très sérieuses pour fournir caution. Mais dans les cas normaux, M. Boeg considère le dépôt d'une caution comme une condition primordiale de la saisie, et le Danemark ne pourrait signer la convention s'il n'était pas donné suite, de l'une ou de l'autre manière, au vœu des pays scandinaves*”.

¹⁹ By adding a second paragraph to state as follows: “*The Court or other appropriate judicial authority of the country in which the arrest was made or applied for may require the claimant to furnish sufficient bail or other security for such liability as he may ultimately incur under the domestic law.*”.

insisted that all questions relating to liability for wrongful arrest and security were to be determined by the law of the State of the arrest²⁰.

The opposition was accepted²¹ and this is the reason why the Scandinavian countries ratified the Convention²² only after ratification became necessary for the members of the European Union.

The question whether uniform rules were to be provided in respect of the obligation of the arrestor to provide security, and of his liability in the event of wrongful arrest, continued to be studied by the CMI together with other issues pertaining to arrest of ships.

The draft of a new Convention was thus approved by the CMI at the 1985 CMI Conference in Lisbon²³. However, as to liability for wrongful arrest, the differences which prevented the incorporation of any rule regarding wrongful arrest in the 1952 Convention continued to exist.

Noting that some countries were requiring security as a condition of the arrest, with other countries leaving the issue to the discretion of the Court, the Conference

²⁰*"Sir Gonne St. Clair Pilcher (United Kingdom) remercie M. le Président Lilar et M. Ripert de leurs remarques et suggestions. Mais la délégation britannique doit soumettre à l'assemblée un amendement qui devrait être discuté au préalable. Comme M. Miller l'a dit ce matin, le projet de la conférence du Comité Maritime International de Naples était acceptable. Le texte actuel ne l'est plus. Les instructions du gouvernement de Sa Majesté ne permettent pas d'accepter le paragraphe 2 qui laisse à l'appréciation du juge le soin de décider s'il faut fournir une caution. La délégation britannique propose donc la suppression pure et simple du paragraphe 2. Le Royaume-Uni possède une des plus grandes flottes du monde, et les pays scandinaves ont également de très grandes flottes. En Grande-Bretagne, il n'y a jamais eu de plaintes à ce sujet et si les pays scandinaves insistent tellement sur la question de la caution à fournir, c'est surtout à cause d'expériences que ces pays ont faites aux Etats-Unis. Cette question pourrait, semble-t-il, se régler plutôt aux Etats-Unis qu'ici. Le Royaume-Uni a fait de concessions, notamment en admettant la saisie d'un sister-ship et en acceptant la limitation des créances maritimes selon l'article 1er. Les pays continentaux ont fait également des concessions. Il serait dommage que cette convention très importante échoue par la volonté des pays scandinaves de conformer cette convention à leurs législations nationales. Ne pourrait-on plutôt essayer de faire adopter par les Etats-Unis la ligne de conduite que nous indiquons dans cette convention?"*

For the full debate on wrongful arrest at the Diplomatic Conference, F. Berlingieri, *On Arrest of Ships*, VI ed., Vol. I, cited, p. 623-627. See also p. 485-487.

²¹ Put to vote the amendment of the Scandinavian countries to make security compulsory was rejected by fifteen votes: Germany, Austria, Belgium, Brasil, Egypt, Spain, France, Greece, Italy, Lebanon, Monaco, Netherlands, United Kingdom, Holy Seat, Thailand. There were five votes in favour: Denmark, Finland, Norway, Sweden, Yugoslavia, and the abstention of Japan. As to the amendment by the United Kingdom, it was adopted by thirteen votes: Germany, Austria, Belgium, Brasil, Egypt, Spain, France, Greece, Lebanon, Monaco, Netherlands, United Kingdom, Holy Seat, with six votes against: Denmark, Finland, Norway, Sweden, Thailand, Yugoslavia, and two abstentions: Italy and Japan.

²² Denmark: 2 May 1989, Sweden: 30 April 1993, Norway: 1 November 1994, Finland: 21 December 1995.

²³ CMI 1985 – Lisboa II, p. 118; CMI News Letter, Summer 1985, p. 1. S. La China, *La Conferenza di Lisbona del CMI - Revisione della Convenzione di Bruxelles del 1952 sul sequestro conservativo di navi*, Dir. Mar., 1985, p. 617.

discussed a draft text of art. 6 containing two alternative proposals. The first was to vest the Court with complete discretion, the second to consider security as the main rule, with the Court determining otherwise in exceptional cases²⁴. The Conference chose the first alternative and it was thus agreed to continue in avoiding to dictate specific rules and to simply say that the Court, as a condition of the arrest, may impose upon the claimant the obligation to provide security for any losses which may be incurred by the arrested party as a consequence of the arrest, including but not restricted to damages for wrongful or unjustified arrest, or for excessive security having been demanded and provided²⁵. This is the gist of what art. 6 of the text of the draft Convention, which was approved by the CMI at Lisbon, states.

Such draft of art. 6, with the draft of the other articles containing revisions to the 1952 Arrest Convention was submitted to IMO and UNCTAD together with the draft, similarly approved by the CMI at Lisbon, containing revisions to the 1967 Convention on maritime liens and hypothecs.

A Joint International Group of Experts (JIGE) was then established by IMO and UNCTAD, which first considered the revision of the Convention on maritime liens and hypothecs and, after a relating new Convention was adopted in 1993, the JIGE started with a review of the 1952 Arrest Convention²⁶.

²⁴ Draft of the CMI International Sub-Committee at the 1985 Lisbon Conference:

“(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 an 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 no 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.]”.*

²⁵ F. Berlingieri, *On arrest of ships*, VI ed., Vol. II, cited, p. 120.

²⁶ F. Berlingieri, *On arrest of ships*, VI ed., Vol. II, cited, p. 3; F. Berlingieri, *International Maritime Conventions*, Vol. 2, Informa Law by Routledge, 2015, p. 275.

The CMI Lisbon draft was taken as a basis of the work and it was considered whether to keep the wording of art. 6 of the Arrest Convention without mention of the Court having the discretion to make the arrest conditional to the providing of security. However certain delegations observed that if the wording of the Lisbon draft was to be retained, crew members were to be exempted from providing security when claiming payment of their wages.

Security was to be mandatory for the International Chamber of Shipping, with the consequent amendment of the Lisbon draft to read: *'The Court shall as a condition of the arrest of a ship... instead of The Court may....'*

An opposite view was expressed by the United Kingdom: keep what is provided in the 1952 Arrest Convention, or at least have the word *'unjustified'*, as found in the Lisbon draft, deleted. The British delegation actually felt that a claimant should not be penalized if the arrest action failed on the merits, provided the arrest was not wrongful.

The wording of the Convention prepared by the JIGE (and which the IMO and UNCTAD Secretariats submitted to the Diplomatic Conference) was that of the CMI Lisbon draft, with the word *'unjustified'* in square brackets. In fact it was considered that even if not wrongful, an arrest could be unjustified, for example when there are no doubts about the solvency of the owner or when the arrest is not required to prevent the extinction of a maritime lien²⁷.

The debate which took place at the Diplomatic Conference convened at Geneva from 1 to 12 March 1999 saw Belgium making the point of the meaning of *'wrongful'* and *'unjustified'*²⁸. The International Chamber of Commerce expressed the view that

²⁷ For an abstract of the Session on art. 6, F. Berlingieri, *On Arrest of ships*, VI ed., Vol. II, cited, p. 320.

²⁸ The Belgian delegate observed as follows: *"Wrongful" must be translated, this is important, in usual French, as "unjuste" and in more legal language as "illegal", "injustifié". Therefore the difficulty arises when one adds the words "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 abusive 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 d'agis sans droit selon loi aquilienne".... the Belgian delegation suggests in English to delete "wrongful" and to keep "unjustified" and in French to delete "abusive" and keep "injustifié".*

the word '*unjustified*' should remain and observed that without it there was an imbalance, in that whilst, on the one hand, the defendant was compelled to post security to obtain release of the ship from arrest, this was not, on the other hand, the case regarding the claimant, who was not obliged to pay damages, if the arrest proved to be wrongful.

It was, therefore, proposed by the International Chamber of Shipping, joined by Spain, that the word '*may*' be replaced with '*shall*', while Denmark suggested for an exception to apply to cases where it would be unreasonable for security to be provided, so that, by way of a compromise, the obligatory meaning of the word '*shall*' would be mitigated in such cases.

Germany noted that counter security was necessary, whilst the United Kingdom, supported by the United States, insisted for the deletion of '*unjustified*', pointing out that the relating notion was novel and ambiguous.

Norway, confirming the position taken during the discussion regarding the 1952 Arrest Convention in Naples and later at the Diplomatic Conference in Bruxelles, asked for both words '*wrongful*' and '*unjustified*' to be maintained in the draft, but accepted to have '*unjustified*' deleted if the principle of providing security was agreed.

Italy appeared to be in favor of keeping both terms, but approved the Belgian proposal to keep '*unjustified*' and to delete '*wrongful*'.

After consultation among the various delegations, the United Kingdom agreed with the word '*unjustified*', which was therefore accepted, with the square brackets being consequently deleted.

The Diplomatic Conference therefore adopted the text of art. 6 as it was approved by the CMI Conference in Lisbon²⁹.

For an abstract of the comments and proposals at the Diplomatic Conference, F. Berlingieri, *On Arrest of ships*, VI ed., Vol. II, cited, p. 323.

²⁹ The Convention entered into force the 14 September 2011 after the tenth accession of Albania. The State parties total 12. In addition to Albania: Algeria, Congo, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain, Syrian Arab Republic,

4. 2014 – 2016: new attempts to provide uniform rules. The CMI Questionnaire and the plea for a reform at international level

The idea to review again wrongful arrest issues was considered by the CMI after a presentation by Dr Aleka Mandaraka Sheppard on the subject at the CMI Conference of 2014 in Hamburg titled '*Wrongful arrest of ships: a case for reform*'³⁰.

There the position on wrongful arrest in English law was outlined and compared with that in other common law and in some civil law jurisdictions.

The presentation concluded with a plea for a reform generally, not just of English law³¹ but for a reform of the law on liability for wrongful arrest at an international level and it was emphasized that the 1999 Arrest Convention was a significant landmark.

A campaign to proceed with a reform of English law had started quite some time ago³².

Turkey. However other States have enacted many of its provisions in their national law, or have adopted the list of the maritime claims provided therein. For relating details: F. Berlingieri, *International Maritime Conventions*, Vol. 2, cited, p. 278. The Preparatory Works of the 1999 Arrest Convention are published in F. Berlingieri, *On arrest of ships*, Vol. II, VI ed., cited, p. 175. The Preparatory Works relating to art. 6 are also uploaded in the CMI website → work → arrest/attachment of ships. Generally, on the revision of the 1952 Arrest Convention, F. Berlingieri, *La revisione della Convenzione del 1952 sul sequestro conservativo di navi*, Dir. Mar. 1995, p. 276; F. Berlingieri – L. Rovelli, *La nuova Convenzione sul sequestro di navi*, Dir. Mar. 2000, p. 1; F. Berlingieri *The 1952 Arrest Convention revisited*, LMCLQ 2005, p. 327.

The text of the Convention may be found in <https://unctad.org>.

³⁰ In CMI Yearbook 2014, p. 283, and published also in *Journal of International Maritime Law*, 2013, p. 41.

³¹ The test for wrongful arrest in English law is based on the decision of the Privy Council of 1858 in the "Evangelismos". That related to a casualty at night in the Thames, when a ship navigating in the river collided with a ship at anchor but continued her course. Boats from the ship at anchor, the "Hind", made searches of the other ship and the following day found a ship in a dock, the "Evangelismos", which was assumed to be the ship which had collided with the "Hind" as she had damages to her bow. The "Evangelismos" was arrested but it was discovered that she was not the ship which collided with the "Hind". Thereafter the owners of the "Evangelismos" claimed damages for wrongful arrest over a period of nearly three months. However the claim for wrongful arrest was dismissed on the basis that the arrest was made in the *bona fide* belief that the "Evangelismos" was the colliding ship. This was confirmed on appeal by the Privy Council, which held that the identity of the colliding ship was not proved but there were grounds to believe that the "Evangelismos" was the one which collided with the "Hind". In order to be entitled to damages the owners of the "Evangelismos" had the burden of proving that the arresting party acted with *mala fides* or *crassa negligentia*. For a discussion of the requirements for wrongful arrest in English law, A. Mandaraka Sheppard, *Modern Maritime Law*, Vol. 1, Informa Law from Routledge, 2013, p. 158. See also F. Berlingieri, *On Arrest of Ships*, VI ed., Vol. I, cited, p. 384.

³² The promotor of this campaign, Sir Bernard Eder, in explaining why English law needs a reform, being considered too favourable to the arresting party, lists quite a number of reasons in his article *Liability for wrongful arrest – Introductory remarks*, CMI Yearbook 2016, New York II, p. 328. Of the same Author *Wrongful arrest of ships: a time for change*, Tulane Maritime Law Journal, 2013, p. 115. A contrasting view was expressed by Martin Davis, the Director of the Tulane Maritime Law Center, in his article "*A reply to Sir Bernard Eder*", who in turn made a reply in his subsequent article "*Rejoinder by the Honourable M. Justice Eder*". These articles are similarly published in Tulane Maritime Law Journal, 2013, p. 137 and 143.

Much of the criticism stems from the fact that the claimant is not required to give security to cover damages if the arrest is to be found wrongful³³. The idea brought forward is that the position with regard to the granting of an injunction should be followed. In fact in English Law it is a standard requirement, when issuing a freezing order, that the claimant is to give a cross-undertaking in damages, which should be fortified with appropriate security³⁴.

The proposal made at the 2014 CMI conference at Hamburg for a revision of the law on liability for wrongful arrest of ships, and the emphasis drawn to the existence of an unified approach to wrongful arrest among the various jurisdictions, gave the opportunity to consider again the issue and in 2015 the CMI constituted a Working Group³⁵ to study the subject. The mandate was to find out how the legal issues regarding liability for wrongful arrest are dealt with by the national laws of the CMI Member States, aiming at obtaining suggestions or recommendations for a possible amendment of the provisions contained in the International Conventions. With a further step probably consisting with the drafting of proposals³⁶. A Questionnaire was therefore circulated among the National Associations, whose broad questions were:

- what is the applicable law in respect of ship arrest and liability for wrongful arrest
- whether countersecurity is required
- what is the legal test and the required proof to succeed in a wrongful ship arrest claim

³³ However history tells that this is the position which was always taken by the British Maritime Law Association since the CMI 1930 Antwerp Conference: see foot notes n.5, 7, 20.

³⁴ B. Eder, *Arresting ships. The need for change*, Institute of International Shipping and Trade Law, Swansea University, 15th Annual Colloquium – September 2019.

³⁵ Made up by Giorgio Berlingieri, chair, Aleka Mandaraka Sheppard, rapporteur, Christopher O. Davis, Ann Fenech, Karl Johan Gombrii, then joined by Sir Bernard Eder.

³⁶ G. Berlingieri, *Liability for wrongful arrest, a report on this study and on the activities of the IWG*, CMI Yearbook 2015, p. 296.

The responses³⁷ included those from Italy and the United Kingdom, which are party to the 1952 Arrest Convention³⁸ but not to the 1999 one.

As far as countersecurity is concerned, the United Kingdom does not require it, whilst in Italian law it is discretionary on the Court.

With regard to damages for wrongful arrest, in the United Kingdom proof of gross negligence or bad faith by the claimant is required and in Italy proof that the claimant acted without normal prudence must be offered³⁹.

5. The position in the Iberoamerican countries

The 1952 Arrest Convention was ratified by Spain the 8 December 1953 and by Portugal the 4 May 1957. It was acceded by Costa Rica the 13 July 1955, by Cuba the 21 November 1983, by the Republic of Dominica the 12 April 1965, by Paraguay the 22 November 1967. Subsequently Spain became party to the 1999 Arrest Convention

³⁷ In the CMI website, under *Work* → *Arrest/Attachment of Ships*.

³⁸ Italy, a signatory party, enacted the Convention with Law 25 October 1977 n. 880. Enactment was made conditional to ratification and the relating instrument was deposited the 9 November 1979, with the Convention entering into force the 9 May 1980. Italy availed itself of the reservation permitted by article 10(a) and (b) of the Convention which provides:

“The Hight Contracting Parties may at the time of signature, deposit of ratification or accession, reserve: the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o) and (p) of Article 1, but to apply their domestic laws to such claims; the right not to apply the first paragraph of Article 3 to the arrest of a ship within their jurisdiction for claims set out in Article 1, paragraph (q)”.

The reservation under letter (a) is motivated by the fact that, in addition to the conservative arrest, Italian law contemplates also the judicial arrest which is the appropriate preventive measure whenever the dispute does not relate to the payment of a debt but to the ownership or possession of a certain asset. As to the reservation under letter (b) it was felt that in maritime claims relating to mortgage or hypothecation of a ship the claimant may arrest only that particular ship but no other ship of the debtor as contemplated by art. 3 (i) of the Convention.

Among the literature on the entry into force: F. Berlingieri, *On Arrest of ships*, VI ed., Vol. I. cited, p. 21; F. Berlingieri, *Ratification of the Brussels Conventions 10 May 1952 on civil and penal competence relating to collision and on conservative arrest of ships*, Dir. Mar. 1978, p. 148; G. Franchi, *On the Brussels Convention relating to conservative arrest of ships and to civil and penal competence in the matter of collision, a commentary*, Nuove leggi civili commentate, 1978, p. 1800; A. Mordiglia, *The Brussels Convention of 10 May 1952 on Conservative arrest of ships and its recent entry into force in Italy*, Dir. Mar. 1981, p. 133; S. La China, *Two novelties (of old date!) in the field of international procedural civil maritime law: the Brussels Conventions of 10 May 1952*, Il Foro It., 1978, p. 253.

The United Kingdom, a signatory party, ratified the Convention the 18 March 1959. The text has not been enacted in English law, and some of its provisions are reproduced in sections 20 and 21 of the Senior Courts Act 1981. Section 20 (1) deals with the Admiralty jurisdiction of the High Court, whilst section 20 (2) lists the maritime claims, with a wording different from that of art. 1.1 of the Convention. Section 21 relates to the mode of exercise of Admiralty jurisdiction. It therefore seems that quite a number of provisions, or articles, of the Convention are not reproduced in English law.

For an analysis of the implementation of the Convention in England, F. Berlingieri, *On Arrest of ships*, VI ed., Vol. I, cited, p. 28.

³⁹ All the answers are summarized in CMI Yearbook 2015, p. 300.

by way of accession on 28 March 2002, published in the Boletín Oficial de Estado of 2 May 2011. As a consequence, on 28 March 2011 Spain denounced the 1952 Arrest Convention.

Also Ecuador, one of the six signatory States, is a party to the 1999 Arrest Convention, by way of ratification which took place the 15 October 2010.

A brief review is made of the provisions relating to liability for wrongful arrest in a number of Iberoamerican countries.

Argentina. The Argentinian Navigation Act of 1973 incorporates certain provisions contained in the 1952 Arrest Convention. Section 538 of the Act states that security may be requested prior to executing the arrest.

It could be provided by a local insurer and it is usually requested in an amount between 20% and 30% of the claim.

Damages may be claimed in tort if the arrestor acted with bad faith or malice and the affected party should prove the wrongful behaviour, the size of the damages and that they occurred as a consequence of the arrest.

Brazil. It is a signatory party of the 1952 Arrest Convention, however no ratification or accession followed. The law sources are the code of civil procedure and the commercial code and the civil code. Security is not mandatory and is discretionary on the Court either before issuing an *ex parte* warrant or to secure a possible claim for wrongful arrest.

Security to guarantee the payment of Court costs and legal fees may be asked to foreign arrestors in a sum usually between 10% and 30% of the claim. There are no specific provisions regarding wrongful arrest, and the general rules on liability set out in the civil code would apply.

A claim for wrongful arrest may be filed in the arrest proceeding or in a separate proceeding, and the damaged party should prove that the arrestor acted with bad faith, gross negligence or malice.

Chile. The rules on arrest of ships are contained in the commercial code and are generally based on the provisions of the 1952 Arrest Convention.

Security is discretionary as well as its amount and may be requested if the evidence supporting the petition of arrest is not considered sufficient.

Similarly to what provided in other jurisdictions, the rules on liability for wrongful arrest are those for the claims in tort and the bad faith or the negligence of the arrestor need to be proved.

Colombia. Together with Bolivia, a land locked country, Ecuador and Perù, is a party to the Pacto Andino, formed in 1969 with the Treaty of Cartagena.

It aims at the harmonic development of the member States, which originally included also Chile and Venezuela, through integration and economic and social cooperation.

Such objectives are achieved *inter alia* with the issuance of standardized regulations at regional level though the so called Decisions which are issued by the Commission of the Andean Community.

A decision of particular importance in the maritime sector is Decision n.487/2000, which regulates and harmonizes maritime liens and hypothecs and ship's arrest⁴⁰.

Decision n.487 partly incorporates the 1993 Convention on maritime liens and hypothecs and almost all the provisions of the 1999 Arrest Convention.

As to security in the matter of arrest of ships, art. 50 of the Decision gives discretion to demand it in a kind and for an amount to be decided by the Court, to cover possible damages arising from an unjustified or illegal arrest.

In Colombian law (art.513 of the code of civil procedure) security is compulsory and is to be given for the 10% of the claimed amount.

⁴⁰ For comprehensive information on the Pacto Andino and on Decision n. 487, J. M. Apolo, *Arrest of ships in the Andean Community*, Scritti in Onore di Francesco Berlingieri, Il Diritto Marittimo, 2010, p. 108.

As to wrongful arrest, there is no specific test. However art. 80 of the code of civil procedure states for the liability of the parties acting recklessly or in bad faith, whilst art. 51 of Decision 487 vests the Courts of the arrest with powers to decide whether the arrest was illegal or unjustified, or if the security requested and obtained by the arrestor was excessive.

Costa Rica. Is a party to the 1952 Arrest Convention by way of accession on 13 July 1955. Security is required for an amount equal to 25% of the claim if posted in cash or to 50% if by way of letter of credit or bank guarantee.

A claim for wrongful arrest can be filed for all costs and damages if the arrest is rejected or a judgment on the merits holds against the arrestor.

Ecuador. Is a party to the 1999 Arrest Convention and applies Decision 487 of the Pacto Andino. Its art. 50 reflects the provisions of art 6.1 of the 1999 Arrest Convention and the Courts may therefore impose security to the arrestor as a condition of the arrest.

Under art. 51 of the Decision the arrestor would be liable for the damages caused by a wrongful or unjustified arrest or for excessive guarantee having been requested and obtained, this also being the position with the 1999 Arrest Convention.

Mexico. It incorporates the provisions of art. 6 of the 1952 Arrest Convention and requires the arrestor to put up security, in an amount to the discretion of the Court, save for specific cases when there is entitlement to retain the ship as in salvages cases or when the claim is based on a document of title.

If the claim is rejected the arrestor would be liable for the damages, which will be increased if the arrest was made with negligence or bad faith.

Panama. The relevant Statute is Law n. 8 of 1982 constituting the code of civil procedure.

If the arrest is to secure a claim in *personam* to prevent the arrested party to dispose of the ship before a decision on the merits is delivered, security is to be posted in an amount between 20% and 30%. However if the arrest serves the purpose of

conferring jurisdiction to the Panamanian maritime Courts, or to enforce a claim secured with a maritime lien, security is required only for an amount of USD 1.000,00.

Generally damages for wrongful arrest may be claimed if they are proved together with the existence of an act of negligence or bad faith of the arrestor.

Paraguay. Is a party to the 1952 Arrest Convention. The rules governing arrest of ships are contained in the code of commerce and in the code of civil procedure. Security is required to meet the costs and the damages which may result if it is found that the arrest is deprived of grounds. The test of wrongful arrest is contained in art. 702 of the code of civil procedure, namely abuse or excess of right by the arrestor.

Perù. Like the other States party of the Pacto Andino, its law incorporates the 1999 Arrest Convention. Security may be required, as contemplated by art. 50 of Decision 487, in an amount to be established by the Court and in a form allowed by the Peruvian code of civil procedure, which includes bank guarantees. Reportedly⁴¹ security is a condition to obtain the arrest, as provided by art. 613 of the code of civil procedure.

There seem to be no specific test for wrongful arrest. However, as for any wrongful claim, the damaged party may file a claim for the losses suffered.

Portugal. Is a party to the 1952 Arrest Convention. The request of security to have the arrest granted is discretionary on the Court. Under art. 390,12 of the code of civil procedure and art. 621 of the civil code the arrestor will be held liable for the damages proving that the arrestor acted without the normal prudence.

Spain. Is a party to the 1999 Arrest Convention. Security is compulsory and art. 472,2 of the Ley de Navegación Marítima 14/2014 requires its posting in the minimum amount of 15% of the alleged maritime claim⁴².

⁴¹ J.M. Apolo, *Arrest of ships in the Andean Community*, Scritti in Onore di Francesco Berlingieri, cited, 2010, p. 108.

⁴² For a review and a comparison of the rules on arrest of ships in Spanish law and in Italian law, G. Berlingieri, *Arrest of ships in the International Conventions, in Italian law and in Spanish law*, Libro Conmemorativo de los Doscientos Años de creación de la Corte de Almirantazgo en Venezuela, cited, p. 247 and in *Dir. Mar.*, 2019, p. 245.

Liability of the arrestor is strict and if the arrest is deprived of grounds and is lifted, the arrestor would be liable to pay all damages arising from the consequences of the arrest.

Uruguay. The new Ship's Arrest Act n. 18.803 provides for security to be posted in an amount which may be equal to the estimated costs of the ship's stay whilst under arrest, with a maximum of ten days.

Wrongful arrest is acknowledged and the arrestor may be held liable to pay all damages suffered as a consequence thereof.

Venezuela. The Law on Maritime Commerce (Official Gazette n. 38351 of 5 January 2006) incorporates the provisions of the 1999 Arrest Convention. If sufficient evidence proving the existence of a maritime claim as listed in art. 93 of the Law is not offered, the arrestor may be asked to post security in the amount and subject to the conditions determined by the Court, as provided by art. 97 of the Law, which may consist of the 30% of the claimed amount.

Damages for wrongful arrest are dealt with by art. 99 of the Law, according to which the Court having granted the arrest is also to determine the extent of liability of the arrestor for any loss suffered as a consequence of the arrest being wrongful, or of excessive security having been demanded and provided.

6. The 2018 CMI Conference in London and the follow-up Questionnaire

The issue of liability for wrongful arrest was debated again in 2018 at a meeting in London⁴³, in the occasion of the CMI Assembly, which was attended also by representatives of P&I Clubs and of the Industry⁴⁴.

It was decided to circulate a follow-up Questionnaire,⁴⁵ containing specific questions regarding wrongful arrest precedents and the test for wrongful arrest.

⁴³ The 9 November 2018, at Thomas Miller & Co. Reference is made to the relating Discussion Paper, proposed by Dr Aleka Mandaraka Sheppard, who substituted the Author of this article in chairing the International Working Group of the CMI, with Edmund Sweetman and George Theocharidis rapporteurs. The Discussion Paper, which was circulated among the National Associations members of the CMI together with the follow-up Questionnaire, contains a useful abstract of the answers of the National Associations to the first Questionnaire.

⁴⁴ The transcript of the debate is published in CMI Yearbook 2017-2018, p. 449.

⁴⁵ It was sent by the CMI to the National Associations the 7th July 2019.

Asking also whether there is support for the provision of countersecurity, inquiring on the remedy in the event of a finding on wrongful arrest and demanding if higher uniformity is desired.

The answers are being received by the Working Group and a report will be made to the CMI, which is then to evaluate whether the study is worth of being continued. if the decision is affirmative, the Working Group is likely to be turned into an International Sub-Committee, open to all National Associations and Consultative Members, to consider the way ahead, possibly including the drafting of revisions to the uniform rules already existing.

7. The decisions in the “Alkyon”

A few months before the meeting organized by the Working Group of the CMI in London, the 31 July 2018, a judgment of the High Court of Justice was published⁴⁶, in the matter of the arrest of a ship. The arrestor was asked to provide a cross-undertaking in damages, in the form usually given in the context of freezing orders, for compensation of the damages caused by the arrest, with release of the ship from arrest if the requested undertaking was not provided.

In delivering judgment Teare J. fully reviewed the facts and the admiralty action *in rem*, and considered which is the purpose of an arrest, namely to enforce an admiralty action *in rem* and to establish the jurisdiction of the Admiralty Court.

Then, after analyzing the requirements pertaining to the issue of a warrant of arrest and the action for wrongful arrest, discussion concentrated on the exercise of discretion by the Court and on the providing of security⁴⁷.

⁴⁶ The “Alkyon”, [2018] 2 Lloyd’s Rep. p. 601. Natwest Markets plc, formerly the Royal Bank of Scotland, made a loan to defendants, Stallion Eight Shipping Co. Ltd, the owners of the “Alkyon”. The loan was secured, *inter alia*, by a first preferred mortgage on the ship. Among the events of default, which were entitling the bank to accelerate the loan and to declare it immediately due and payable, there was the percentage ratio between the value of the ship and that of the loan, (VTL ratio) which was required to be 125%. The bank claimed that the market value of the ship was 112% of the aggregate amount of the loan then outstanding, thus less than the 125% VTL ratio. It therefore required the owners of the “Alkyon” to put up security additional to that constituted by the ship. The owners disputed the valuation and the shortfall, however a notice of acceleration was eventually given by the bank, whereby the loan was declared immediately due and payable and the ship was arrested.

⁴⁷ It was noted [41 and 42] that although the Court has a discretion to release a ship from arrest, the discretion must be exercised in a “principled” manner, one of the principles being that a claimant *in rem* may obtain a warrant of arrest

The conclusion, at [57], of Teare J. was the following: *“The court is unable to accede to the application that the vessel be released in the event that the bank fails to provide a cross-undertaking in damages. To exercise the court’s discretion to release in that way would: (i) run counter to the principle that a claimant in rem may arrest of right; (ii) be inconsistent with the court’s long-standing practice that such a cross-undertaking is not required: and (iii) be contrary to the decision of the Court of Appeal in Bazias 3 and Bazias 4⁴⁸ and to the dicta of Lord Clarke in Willers v. Joyce⁴⁹ which I, as a first instance judge, must respect. Finally any change in Admiralty law and practice, given that the present position has prevailed for so long, is not a matter for the court to change overnight (even assuming it could do so) but for Parliament or the Rules Committee to consider after proper consultation”*.

On appeal⁵⁰, after an introduction and a factual background, a framework of the Statutory, CPR and Practice Direction, is given. Detailed reference to the judgment of

as of right. The observation followed that if the Court, in exercising its discretion, orders the release from arrest unless a cross-undertaking in damages is provided, this would appear to be *“an unprincipled exercise of its discretion or, at any rate, an exercise of discretion which pays insufficient regard to the principle underlying the issue of a warrant of arrest”*. And it was also noted [53] that although a cross-undertaking in damages would serve to avoid injustice and put the parties on an equal footing, such a change in practice *“should be a matter either for Parliament to consider..... or for the Rules Committee to considerhaving consulted with the Admiralty and Commercial Court users’ Committee and the shipping and marine insurance industry”*. And, significantly: *“In this regard it is to be noted that when the 1952 Arrest Convention (which is the foundation of the present statute conferring jurisdiction in rem) was under consideration the UK delegate to the diplomatic conference was opposed to a suggestion that arresting courts be empowered to order security and in the event the proposal was defeated. The UK delegate said that actions for wrongful arrest are very rare in England and that he has never heard of any complaint in that respect (see Berlingieri on Arrest of Ships Vol. 1 p.373 paragraph 18.05). The 1999 Arrest Convention does contain such a provision but the UK has not ratified that Convention (see Berlingieri on Arrest of Ships Vol. 2 p. 120 paragraph 11.01)”*.

⁴⁸ [1993] 1 Lloyd’s Rep. 101 Lloyd L. J. said: *“this (a cross undertaking in damages in case the arrest turned out to be unjustified) has never been the practice in Admiralty actions and I do not regard this case as being one in which we can introduce so far reaching a change in the practice for the first time”*.

⁴⁹ [2016] 3 WLR 477. There at [68], Lord Clarke of Stone-cum-Ebony states:

“A person who arrest a ship does not have to provide security to the defendant in respect of any loss which he might incur. It is thus not helpful (as I see it) to note that it is now commonplace for claimants to be required to give undertakings as a condition of obtaining a freezing order. I recognize that there are those who favour the introduction of such an approach in the case of the arrest of ships: see for example Sir Bernard Eder in a lecture given on 12 December 1996 under the auspices of the London shipping law Centre entitled Wrongful Arrest of Ships However, so far as I am aware, no such approach has been adopted in any decided case.”

⁵⁰ [2019] 1 Lloyd’s Rep. 406. Judgment delivered the 11 December 2018.

Teare J. is then made, together with a review of the precedents, of domestic law and practice, as well as to the literature⁵¹, the case law and the position internationally⁵².

In the discussion a number of considerations are listed, [85-92] supporting the *status quo* or telling against departing from existing law and practice. However it is observed that to alter from the present position there is no need of legislation or of the intervention of Parliament or the Rules Committee.

In fact and making reference [95] to the judgment of the Singapore Court of Appeal in the “Vasily Golovnin”⁵³ the Court of Appeal noted that the usual practice and the law would be capable of being changed, with the Court being open to reconsider the position, *“but it should only do so if properly informed as to the views of the maritime community, including the practical ramifications of any proposed changes and the preferred route to be adopted if any such changes are decided upon. Moreover, the Court would wish to be informed of the likely consequences for this jurisdiction internationally if the status quo was to be altered. In short, the Court would wish and need to have a clear understanding of the industry implications of any proposed change before acceding to it. It is unnecessary to be prescriptive as to how the views of the maritime community should be obtained (whether by way of consultation or otherwise) or whether a consensus would need to be apparent – but, plainly, a case for change would be much strengthened if it could rely on significant support from the maritime community, extending much wider than the views of (even eminent) legal commentators. Additionally, it would be for the Court entertaining such*

⁵¹ A description is made of what Sir Bernard Eder exchanged with Prof. Martin Davies, supra foot note n. 27 and of his earlier lecture in 1996: *Wrongful arrest of ships (The London Shipping Law Centre, Public Lecture Papers)*. Reference is also made to the contributions of Steward Boyd QC, *Shipping Lawyers: Land Rats or Water Rats*, the tenth Donald O’May Lecture in Maritime Law, [1993] LMCLQ 317, of Shane Nossal, *Damages for the wrongful arrest of a vessel* [1996] LMCLQ 368, of Michael Woodford, *Damages for Wrongful Arrest: section 34, Admiralty Act 1988* (2005) 19 MLAANZ Journal 115, of D.J. Cremean, *Mala Fides or Crassa Negligentia*, [1998] LMCLQ 9 and of the paper on *Wrongful Arrest of Ships – A case for Reform* of Dr Aleka Mandaraka Shepard cited above, foot note n. 30.

⁵² Including [70-76] a detailed account of the works of the CMI on Liability for Wrongful Arrest, of the Questionnaire, of the summary of the responses and of the comments by Dr Aleka Mandaraka Sheppard.

⁵³ [2008] SGCA 39; [2008] 4 SLR(R) 994.

a challenge to consider the impact on the rule in The Evangelismos of a departure from the existing practice”.

This is quite a significant statement, which seems to suggest open-mindedness of the Court to potential changes in the practice of the Admiralty Court Rules.

To proceed, possibly, in this direction, it is observed that more consensus is required and that proposals by academic writers are not being considered sufficient.

In fact, as previously noted the Court of Appeal considers [91] that: “... *there is no, or no significant, pressure from the maritime industry for a change in the balance struck for so long between shipowners, on the one hand, and potential maritime claimants, on the other. It is further clear (from Dr. Sheppard’s survey) that there is no consensus internationally on the approach to be adopted; it is noteworthy that the 1999 Arrest Convention has not been ratified by the UK or more widely internationally. Still further, as appears from literature, the debate amongst the commentators does not disclose a consensus, nor is it all one way”.*

However, it is worth mentioning the praise of the CMI project by the Court of Appeal and its encouragement for it to continue. When referring to the open meeting of the IWG of the CMI in November 2018 in London, the Court of Appeal noted the value of the survey, stating: [70] “*The upshot was ... a most helpful survey (“the survey”) of the applicable laws and legal test in this area internationally”.*

Let us look at the facts with regard to the point made by the Court of Appeal that we need to know the views from the maritime industry.

It has been previously mentioned that either during the revision works of the CMI Lisbon Draft by the Joint International Group of Experts established by IMO and UNCTAD and at the subsequent Diplomatic Conference, the International Chamber of Commerce expressed firm favour to security being compulsory⁵⁴.

⁵⁴ F. Berlingieri, *On arrest of Ships*, VI ed., Vol. II, cited, 2017, Appendix IX, The Travaux Préparatoires of the International Convention on Arrest of Ships 1999, p. 321, JIGE Seventh Session 5-9 December 1994: “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

The Non-Governmental Organizations which were represented at the Diplomatic Conference⁵⁵ included the Instituto Iberoamericano de Derecho Marítimo⁵⁶, whose delegate, at the debate which took place the 4 March 1999 in the occasion of the first reading stated: *'Security should be obligatory'*⁵⁷.

A voice from the Industry comes from the UK Freight Demurrage and Defence Association which expressed its concerns to the IWG of the CMI in a letter 29 August 2019 Re: *'Cross undertaking in wrongful arrest claims'*⁵⁸.

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..."

p. 324 – Diplomatic Conference, Comments and Proposals: *"ICS Document 188/3 125. 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 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". Concerns 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 situation which aroused concern, such security could in fact be nominal."*

At [52] of his judgment Teare J. refers to the suggestion in Maritime Law, IV ed., by Y. Baaz, Informa Law from Routledge, 2017 not to extend the requirement for a cross undertaking to claims by master and crew, which however Teare J. does not believe to assist with a possible change in practice.

⁵⁵ F. Berlingieri, *On the arrest of ships*, VI ed., Vol. II, cited, p. 174.

⁵⁶ The Ibero American Institute of Maritime Law (www.iidmaritimo.org) is an International Organization established the 24 May 1985 with the Statement of Lisbon in the occasion of the 1985 CMI Lisbon Conference.

The States party are all the Ibero American countries: Argentina, Bolivia, Brasil, Chile, Colombia, Costa Rica, Cuba, Equador, Spain, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Perú, Portugal, Puerto Rico, Dominican Republic, Uruguay and Venezuela.

Other States belong to IIDM as affiliate members: USA, Canada, UK, France, Germany and Italy.

IIDM is a consultative member to IMO, UNCTAD, UNCITRAL, CAN – the Andean Community of Nations, COCATRAN - the Commission of Central America for Maritime Transport, CIP - the Inter American Commission of Ports and CMI.

⁵⁷ F. Berlingieri, *On Arrest of Ships*, IV ed., Vol. II, cited, p. 326.

⁵⁸ There it is said: *"The UK Freight Demurrage and Defence Association Ltd is a legal costs insurer and represents the owners and charterers of approximately 4,000 ships of some 192.4 million grt. In terms of arrests these are mostly viewed from the viewpoint of an unpaid third party who requires security for a claim. Both common law and civil law recognise that such a claimant may well be entitled to security if there is a risk that the only asset departs from a jurisdiction before payment is made. The argument goes that requiring counter security to be provided, would be unfair to the claimant. There is in our view, however, a clear difference between claims by an unpaid supplier in a remote port, and a fundamental dispute between two parties with a particular agenda. What about cases involving corporate malfeasance? What if it involves unfair steps taken by the claimant in order to obtain control of an asset? In those circumstances should normal arrest rules apply? Our view is no. In this instance, a wholly different set of circumstances is in play and the normal approach should not apply. The validity of the valuation of an asset is crucial. In this case (the "Alkyon") the valuation triggered a default under the loan agreement, which was in all other respects a fully compliant loan, leading to the ship's arrest and its subsequent sale. In such a circumstance, why would a cross undertaking in damages not be appropriate? The bargaining position of the proponents is entirely different and in those circumstances, shouldn't the wrongful party be protected in some way? Not all shipowners have fleets of ships trading internationally. If the company truly is a one ship owning company (in the same way as a sole trader) and a dispute develops what is there to protect the shipowner against an arrest which proves to be wrongful? If the dispute is not of a P&I nature, security for such a claim has to come directly from the shipowner. That may not be straightforward, particularly if that ship produces the shipowner's sole revenue stream. Depending on the circumstances of the dispute and the depths of its*

Coming to the first Questionnaire of the CMI, there were responses of thirty one National Maritime Law Associations to Question II, which was: *'To what extent is a claimant required under your national law to provide security in order to obtain an order for arrest or, subsequently, to maintain an arrest?'*

With regard to security being required as a condition of the arrest or, at least, with the relating decision being left to the full discretion of the Court, the results⁵⁹ seem to be that this is the case in twenty two national laws, applying civil law systems.

The position in France ought to be mentioned. When the 1952 Arrest Convention applies, the mere allegation of a maritime claim among those as listed in art. 1.1 of the Convention is sufficient for the claimant to be granted with the arrest of a ship by the French Courts⁶⁰.

This has made the leading French literature to concur with the decision of the English Court of Appeal in the "Alcyon", observing that a claimant has the *'veritable'* right to arrest of ship, subject only to the claim called upon being a maritime one⁶¹.

No countersecurity is instead required under the common law systems of Australia, New Zealand, Hong Kong, the UK and the USA; with Ireland and Nigeria requesting security for costs, Canada contemplating that a claimant might be called upon to provide security at any stage in the procedure and with security not being usually required in Israel.

pocket, the claimant is potentially able to extinguish a legitimate wrongful arrest claim without any exposure to itself. Can that be right or just? Cases relating to the arrest of assets can be difficult but the parties involved should be treated in an even handed manner. If an asset can be arrested without counter security being required in appropriate cases, how can justice be seen to be done. The UK Defence Club would respectfully request that the concerns set out above are discussed and taken into account in the future deliberations of the CMI in relation to liabilities for wrongful arrest."

⁵⁹ in CMI website, under "work→Liability for wrongful arrest" and in CMI Yearbook 2015, p. 300.

⁶⁰ Cour de Cassation 5 October 2010, n. 09-13092 the "Blue Shadow C", D.M.F., 2010, p. 917; Cour de Cassation 8 March 2017, n.15-24571, the "Enigma", D.M.F. p. 721.

⁶¹ P. BONASSIES: *"L'armateur don't le navire fait l'objet d'une saisie conservatoire ne peut demander la mise en place d'une contre-garantie par le saisissant"*, D.M.F., 2020, 64. Professor BONASSIES concludes his remarks noting: *"Dès lors, marquer quelque limite à son droit, par exemple en lui imposant la constitution d'une contre-garantie, aboutirait à la négation de ce droit. Le droit français, par des voies différentes et plus simples, rejoint donc bien les conclusions du droit anglaise, tells qu'exprimées dans l'arrêt Alcyon"*.

In Italy the allegation of a maritime claim must be supported with documents offering *prima facie* evidence regarding the ground and size of the claim. For a review of Italian law on arrest of ships and on the preconditions to an arrest: G. BERLINGIERI, *Arrest of Vessels, Italy – Part I*, Maritime Law Handbook 2019, Kluwer Law International.

Out of the responses there are six from Ibero American countries, whose position is considered in this article together with that of other Ibero American countries. In all these fourteen jurisdictions it appears that security is either required or left to the discretion of the Judge.

As to the 1999 Arrest Convention, it would have deserved a wider number of ratifications or accessions, as it certainly constitutes an improvement to that of 1952⁶²; the reference is made to its art. 3.3 which, as stated by Professor Francesco Berlingieri⁶³, *'eliminates the abuses of article 3 (4) of the 1952 Arrest Convention, and in particular of the unfortunate addition to the text of the last sentence, that are continuously taking place'*.

Perhaps what prevents additional acceptance, at least among the UE Member States, lies in the exclusive external competence of the European Union in the matter of jurisdiction. In fact, as provided by art. 71 of EU Regulation 1215/2012 it is not possible for Member States to become parties to a Convention containing rules on jurisdiction as it is the case with art. 7 of the 1999 Arrest Convention⁶⁴.

⁶² For a table of comparison between the 1952 and 1999 Conventions, F. Berlingieri, *On Arrest of ships*, VI ed., Vol. I, cited, p. 405; F. Berlingieri, *"The 1952 and 1999 Arrest conventions. A comparison"*, *Dir. Mar.*, 2012, p. 367.

A Conference was organized by the Italian Maritime Law Association the 27 June 2011 in Genoa, on the occasion of the coming entry into force of the 1999 Arrest Convention, titled *Arrest of ships: a comparison between the 1952 and 1999 Conventions*. The conference proceedings are published in *Dir. Mar.*, 2011, p. 1141.

The speakers, included S. La China, Professor Emeritus of civil procedural law at the University of Genoa, who made a presentation titled: *Arrest of ships, a risky precautionary procedure: beware of damages*.

⁶³ F. Berlingieri, *On Arrest of Ships*, Vol. II, VI ed., cited, p. 102.

⁶⁴ To possibly overcome the issue of jurisdiction, Spain, at the time of its accession on 28 March 2002, reserved the right to exclude the application of the Convention in the case of ships not flying the flag of a State party, in accordance with art. 10, paragraph I (b) of the Convention. For an analysis R. Espinosa Calabuig, *¿ Podía España ratificar el Convenio de Ginebra 12 de marzo de 1999 Sobre embargo preventivo de buques ?* *Anuario de Derecho Marítimo*, Vol. XXX Barcelona p. 275. And also G. Berlingieri, *Recognition of Foreign Judicial Sales of Ships – Study relating to Liability for Wrongful Arrest*, 2015, Christmas Conference of the Spanish Maritime Law Association, website of the Italian M.L.A. www.aidim.org → Documents; C.E. Tuo, *Jurisdiction and effectiveness of decisions on conservative arrest: between Regulation Brussels I and International Conventions*, *Dir. Mar.*, 2011, p. 1220; S. M. Carbone (edited by), *Brussels 1A and Conventions on particular matters*, Aracne, 2017, p. 242.

Finally and with regard to literature, among that cited⁶⁵ [50-56] the Court of Appeal, claiming that there is no consensus, quotes passages of Professor Martin Davies when responding⁶⁶ to Sir Bernard Eder, and of D. J. Cremean⁶⁷.

The literature has been recently enriched by Professor A. M. Tettenborn, with his article “*Ship Arrest and undertaking in damages*”⁶⁸. And let us also add Professor Francesco Berlingieri⁶⁹.

8. Prospects of higher uniformity

The drafting of rules on liability for wrongful arrest capable of ample international acceptance has always proved to be quite an exercise.

No much surprise anyway: behind every article of a Convention there is invariably a history of lively and passionate discussions.

The peculiarity with liability for wrongful arrest is that it continues to be at the center of the attention.

What is argued in England turns around a number of issues, ten according to Sir Bernard Eder⁷⁰. However it seems that much concentrates on the question whether the Court has power or discretion to require security from the arrestor to have the arrest of a ship granted or maintained.

⁶⁵ foot notes n. 27 and 44.

⁶⁶ Tulane Maritime Law Journal (2013) p. 137.

⁶⁷ “...there is nothing inherently wrong in that test [i.e., that in *The Evangelismos*]...” [1998] LMCLQ, p. 9.

⁶⁸ [2019] LMCLQ, p. 167. There it is said: “*It is respectfully submitted that the result in *The Alkyon* is actually correct and welcome*”. After offering there reasons, Professor Tettenborn concludes: “*In short, any hardship caused by the denial of protection to an arrest victim is largely theoretical rather than practical, and more than balanced by the need to ensure efficient enforcement of maritime liabilities. One reason for the attractiveness of England as an arrest-friendly jurisdiction has always been its refusal to demand security or an undertaking in damages. In so far as this can be done without causing serious injustice, there is no reason whatever not to continue the practice*”.

An imposing response came from Sir Bernard Eder in *Arresting Ships: The Need for Change*, cited, p. 12 - who notes: “*However, I would respectfully suggest that the fact a bad law is not causing much harm or injustice in practice is not, one might think, much of a reason for maintaining it still saying that the continuance of such bad law is welcome*”.

⁶⁹ B. Eder, *Arresting Ships: The need for Change*, cited, p. 8: “*If I might add, it is perhaps of some interest to note that Prof. Francesco Berlingieri, surely one of the greatest international shipping lawyers in recent times, changed his mind on this topic as a result of reading my article: see his book, *International Maritime Conventions, Vol 2* footnote 129*”. There: “*The author of this book expressed a different opinion in *Arrest of Ships*, p. 441, paras 18.85-18.86, but after reading the article by Sir Bernard Eder, ‘Wrongful Arrest of ships: a time for change’, Tulane Maritime Law Journal (2013) 115, he has reconsidered the position and came to a different conclusion*”. It is noted that the opinion of Professor Berlingieri was expressed when talking about the jurisdiction on the merits.

⁷⁰ In *Arresting ships. The need for change*, cited, p. 1. See also: B. Eder, *Liability for wrongful arrest of ships - Introductory remarks*, cited, p. 328.

Eight considerations are made by the Court of Appeal in the ‘Alkyon’ to support the *status quo*.

It would certainly be of no benefit to examine what has been observed by the Court of Appeal in relation to the meaning or to the aim of arrest of ships in common law.

It is therefore just noted that it may perhaps be difficult to accept what in the second consideration⁷¹, about security likely to becoming a routine if owners’ appeal were successful.

In fact it is thought that there is no much habituality in the law, which is one of its fascinating aspects. Arrest of ships should be considered on a case by case basis, with the Court having the amplest discretion in ordering the arrestor to post security, either when granting the arrest or at a subsequent stage.

I really find it difficult to understand that security may be considered not easy to reconcile with the possibility to proceed only *in rem*.

Coming to the eighth consideration⁷² and refraining from entering into the issue of the system of caution in CPR, it sounds inconceivable that the granting of security may disturb the routine of P&I Clubs to provide letters of undertakings. If the cover extends to the arrest claim, there seem to be no reason why P&I Clubs should change

⁷¹“Secondly, should Owners’ appeal succeed in this case, it is overwhelmingly likely that the requirement of a cross-undertaking would become routine; as Teare J. explained (at [48] – [52] of the judgment), there is nothing unusual about the present case. If the requirement of a cross-undertaking in damages did routinely become the price of arresting or maintaining a maritime arrest, “... the stakes in any *in rem* action would become vertiginously high”: Prof. Davies, “A Reply to Sir Bernard Eder”, supra. That is bound to have a “chilling effect” (in the words of Prof. Davies) and to constitute a deterrent to the use or threatened use of the right of arrest, even in apparently meritorious cases. That damages would not necessarily be payable pursuant to the cross-undertaking, is to miss the point; it is the risk that the undertaking will be enforced that counts”. Moreover, there would be an obvious and particular need to address the position of arrest (for example) at the behest of the crew of a vessel or suppliers of necessities (as underlined by Teare J., at [52])”.

⁷²: “Eighthly, so far as the maritime industry and the CPR are concerned, arrangements and systems are in place - without as remarked, any apparent significant discontent – premised on the settled, existing state of the law and practice. As explained by Teare J. (at [52]), P&I Clubs and hull underwriters routinely give undertakings either to avoid arrest or to secure release from arrest. Any disturbance of these practical, commercial arrangements should not lightly be embarked upon. Additionally, the current system of cautions contained in CPR r. 61.7 (dating back ultimately to the caveat procedure in the 1855 Rules, noted by Teare J (at [45]), provides a means by which arrest can be avoided by shipowners, over and above the giving of private undertakings”.

their routine, which stay indifferent to the possibility of security being ordered to the arrestor in other jurisdictions.

In any case security imposed on the arrestor does not mean that a letter of undertaking by the P&I Club of the shipowner is not required any further. In fact it would be needed to have the arrest lifted if the security by the arrestor is provided.

The seventh consideration is also worth of being considered, and in fact it was reviewed in the preceding § 7, and it was not shared.

Concluding, either generally on security with arrest of ships and with particular reference to this seventh consideration, it is believed that pressure for a change does exist indeed. Time has therefore come for the common law Countries to put to an end their isolation, thus allowing their Courts to take decisions with no constraints and without being bound to follow precedents dating back in time.

Although this change will possibly assist the process of unification, we are really debating about a domestic issue which pertains to common law Countries. It is interesting, however, in fact of great importance, to note that the English Court of Appeal suggested that the attitude of the Industry is important to take into account in addition to the literature and to other law systems.

Talking now in terms of possible improvement in the wording existing in the International Conventions, this is really not an easy exercise.

I am personally not that much enthusiastic with the wording in art. 6 of the 1999 Arrest Convention and I concur with those who considered the term '*unjustified*' ambiguous.

The debate at the 1952 CMI Conference in Naples and at the subsequent Diplomatic Conference was quite interesting.

Everything being considered, I would favour what was approved at the Conference in Naples, which includes the word '*security*', which was subsequently deleted at the Diplomatic Conference: "*Article 6. All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or*

other security furnished to release or prevent the arrest of a ship, or whether he shall be required himself to furnish guarantee to secure the payment of such damages or costs, shall be determined by the law of the Contracting State in whose jurisdiction the arrest is made or applied for”.

However something ought to be added with regard to the degree of liability.

It is believed that the arrestor should be liable in damages if it is proved that he did not use a standard due diligence or, using similar words, a normal, or reasonable diligence. Personally I find the wording in art. 96.2 of the Italian code of civil procedure, qualifying the behaviour capable of considering the arrestor liable in damages, to be appealing, namely the acting without the *‘normal prudence’*. That is equivalent to reasonable diligence, which is simple negligence, but I would rather have all the civil systems, at least, use the same term.

The rule in the “Evangelismos” is in any event too much in favour of the arrestor, (it is so wrong and unjust to hold that those of the “Hind” acted in good faith) whilst strict liability seems to be really too rigid and unbalanced in favour of the party against which the arrest is sought.

It is said that a compromise leaves no one happy. However good compromises are the key to unification of maritime law.