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CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

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NEWS FROM THE INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATION

NEWS FROM IMO AND UNCTAD

The International Convention on Arrest of Ships, 1999

On 12 March 1999 the United Nations / International Maritime Organization Diplomatic Conference convened in Geneva has adopted a new International Convention on Arrest of Ships.

The new Convention follows the structure of the CMI Lisbon Draft in which the provisions of the 1952 Convention have been rearranged in a much clear and orderly manner and the obscurity of some of them, in particular those of article 3, has been eliminated.

After the list of the maritime claims and the definitions of certain terms used in the Convention in article 1, all the provisions on the conditions for the arrest, which were scattered in various articles of the 1952 Convention, have been assembled in article 2.

The provisions on the relationship between the claim and the ship or ships that may be arrested, on the release from arrest and on the right of rearrest, are contained, in a logical sequence, in articles 3, 4 and 5.

There follow provisions on wrongful arrest (article 6), on jurisdiction on the merits (article 7) and, lastly, on the scope of application (article 8).

The maritime claims (Article 1)

Adoption of a closed list.

At the CMI Lisbon Conference in 1985 the proposal was made to replace the list of maritime claims with a general definition of maritime claims. It was in fact pointed out that the closed list of the 1952 Convention had appeared unsatisfactory both because certain claims of a maritime nature (such as claims for commissions of agents and brokers and for insurance premiums) had been omitted and because new types of claims (such as claims for environmental damage) had materialized. Since a minority still favoured the closed list, or in any event a list of specific maritime claims, a compromise was arrived at, consisting in adding to the general definition the list of specific maritime claims, the former being linked with the latter by the words "such as".

During the sessions of the JIGE the majority was in favour of the open list. At the Diplomatic Conference the position surprisingly appeared to be the opposite: the majority in fact supported the closed list approach, mainly on the ground that an open list would have caused great uncertainty and would have left too great a freedom to the Courts, thereby adversely affecting uniformity. It was appreciated that new technological developments could in the future give rise to new types of maritime claims and it was suggested to take care of this problem by providing a mechanism for the amendment of the list.

An attempt was made to find a compromise between the majority in favour of the closed list and the minority in favour of the open list by suggesting to add at the end of the list the general description of maritime claims contained in the chapeau or a reference to other claims of a similar nature of those previously listed, but it failed. At the end, however, the idea behind such proposal was accepted, but only in respect of environmental claims, by adding at the end of subparagraph (d) the words "and damage, costs, or loss of a similar nature to those identified in this subparagraph (d)".

Individual maritime claims

Mention will be made only of the amendments and additions as respects the maritime claims listed in article 1(1) of the 1952 Convention.

Subparagraph (a). The wording had been changed in order to bring it in line with that of article 4(1)(e) of the 1993 MLM Convention but it was subsequently amended by deleting the word "physical" before "loss" and the words "other than loss of or damage to cargo, containers and passengers effects carried on the ship" because the loss in respect of which a maritime claim should exist is not only physical and claims in respect of loss of or damage to cargo and passengers effects are specifically mentioned amongst the maritime claims. Although probably the claims covered by this subparagraph are only tort claims, the definition is certainly very wide; much wider than the corresponding definition under the 1952 Convention.

Subparagraph (b). The text of the 1952 Convention has been changed in order to adapt it to that of article 4(1)(b) of the 1993 MLM Convention.

Subparagraph (c). The words "or any salvage agreement" were added in the Lisbon Draft in order to include claims arising out of a salvage agreement in cases where no salvage operation takes place. The words "including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment" have been added during the Diplomatic Conference. Originally reference was made to article 14 of the 1989 Salvage Convention, but then, in accordance with the principle that reference to other Conventions should be avoided, it was decided to describe the principle underlying article 14.

Subparagraph (d). The description of environmental claims, which in the CMI Lisbon Draft was limited to the removal or attempted removal of a threat of damage and to preventive measures, had been expanded by the JIGE so to include also losses incurred, or likely to be incurred, by third parties. Proposals were made during the Diplomatic Conference with a view to further expanding the description of environmental damage and finally a consensus was reached on the text proposed by the United States delegation, consisting in the addition to the JIGE draft of the specific reference to occurrences described in other conventions as follows:

- damage or threat of damage caused by the ship to the environment, coastline or related interest: this text is derived from UNCLOS article 211(1) except that in UNCLOS reference is made to the "marine environment" but the word "marine", existing in the US proposal, was deleted;
- measures taken to prevent, minimize or remove such damage: this wording is based on the definition of "preventive measures" in article 1(7) of the CLC 1969;
- compensation for such damage: "such damage" is that referred to in the previous two sentences;
- costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken: this wording is taken from the definition of pollution damage as amended by article 2(1) of the 1992 Protocol to the CLC;
- losses incurred or likely to be incurred by third parties in connection with such damage: this wording existed in the JIGE text;
- damage, costs, or loss of a similar nature to those identified in this subparagraph (d): as previously indicated, the concept of "opening" the list in order to cover possible future new types of claim was accepted by the Conference only in relation to claims for environment damage.

Subparagraph (e). The suggestion made by the CMI in the Position Paper to use the same wording of article 2(1)(d) of the 1976 LLMC Convention was accepted by the Conference except that the word "recovery" was added. In connection with subparagraph (d) it had been suggested by some delegations that mention ought also to be made of the claims relating to costs incurred for the preservation of a ship abandoned by its owners but it was correctly decided that this type of claims should be placed elsewhere. It must be noted, however, that now in this subparagraph mention of an "abandoned ship" is made twice: first in connection with costs or expenses relating to the raising, removal, destruction or the rendering harmless of an abandoned ship and, secondly, in connection with a quite opposite action, that of the preservation of such ship. The concept of abandonment is not the same in both cases: in the first case in fact the "abandoned ship" is the ship abandoned by the crew which, therefore, may become a danger to other ships; in the second case the same conclusion cannot hold, since reference is also made to the maintenance of the crew of the abandoned ship. It follows that this time the intention is to refer to a ship abandoned by her owners.

Subparagraph (g). The only change as respects subparagraph (f) of the 1952 Convention is the addition of the word "passenger".

Subparagraph (l). The description of the supplies is now wider, and includes provisions, bunkers, containers as well as services. Also their purpose has been widened by the reference to the preservation of

the ship, in addition to the operation and maintenance.

Subparagraph (m). The word "reconstruction" has been added, following the suggestion of the CMI, in order to follow more closely the description of the right of retention under article 7(1)(b) of the 1993 MLM Convention.

Subparagraph (n). In the 1952 Convention only "deck charges and dues" were mentioned in article 1(1)(l) together with (claims arising out of) construction, repair and equipment. Reference to port, canal and other waterway dues has been added since claims in respect of such dues are secured by a maritime lien under the 1993 MLM Convention.

Subparagraph (o). The wording of this maritime claim has been amended in order to adapt it to that of the corresponding maritime lien under the 1993 MLM Convention.

Subparagraph (p). The CMI in its Position Paper had pointed out that the wording of this subparagraph was unnecessarily cumbersome and, also, included claims unlikely to materialize, such as claims in respect of disbursements made by shippers. It suggested, therefore, to adopt a much simpler description of these claims, such as "disbursements made in respect of the ship". This proposal was adopted by the Conference, with only some drafting amendments.

Subparagraph (q). This is a new maritime claim.

Subparagraph (r). This also is a new maritime claim.

Subparagraph (u). Mortgages and hypothèques (and now charges) are included in the list not as much in consideration of the nature of the claim secured thereby (which may not necessarily be maritime), but rather in consideration of the nature of the security. The holder of the security, though normally may enforce it by means of the seizure and forced sale of the ship, needs sometimes to make recourse to a provisional measure such as the arrest in order to prevent the sailing of the ship and gain time for the subsequent seizure. The CMI in its Position Paper had pointed out that it was not correct to refer to *registered* mortgages and "hypothèques" and to *registrable* charges, thereby indicating that only claims related to registered mortgages and "hypothèques" are maritime claims whilst for other charges it is sufficient that they may be "registrable" but do not need to be actually registered. The CMI therefore suggested to replace the word "registrable" in respect of charges with "registered". The Conference agreed that the difference was not justified, but decided to delete any reference to registration in order to extend this maritime claim so to include also equitable mortgages. The effect of the deletion is clearly wider, since now claims arising out of a "hypothèque" prior to its registration are included, as well as all claims arising out of a charge of the same nature. The word "registrable" (charge) had been used in order to adopt the same language of the 1993 MLM Convention in which it had the purpose of including charges of a nature similar to the mortgage and the "hypothèque" which, however, are named differently in certain legal systems; provided they are registrable as mortgages and "hypothèques". The deletion of the word "registrable", however, does not entail any change of substance in the type of charges in respect of which arrest of a ship is permissible, since such charges must have the "same nature" of mortgages and "hypothèques".

Subparagraph (v). This is a new maritime claim.

Definition of arrest (Article 1(2))

The words "as a conservatory measure", which appeared both in the Lisbon Draft and in the JIGE Draft, have been deleted for the reason that the word "conservatory" has not, in English, the meaning of the word "conservatoire" in French. Those words, which do not exist in the 1952 Convention, had been added in order to make clear that the notion of arrest does not include actions taken in order to enforce a judgment. They, however, were superfluous, for the notion of arrest is made clear both by its purpose – to secure a maritime claim – and by the express statement that it does not include seizure.
The reference to the execution of an arbitral award has been deleted because it has been considered to be superfluous, in view of the general reference, after "judgment", to "other enforceable instrument".

Other definitions (Article 1(3)-(5))

The definition of "person" has remained practically unaltered. The definition of "claimant" has been slightly altered by replacing the words "who alleges that a maritime claim exists in his favour" with the words "asserting a maritime claim". The definition of "Court" is new.

Powers of arrest (Article 2)

In this article there are assembled all the provisions of the 1952 Convention relating to the arrest of a ship. The most significant difference between article 2 of the new Convention and the Lisbon and JIGE Drafts is the deletion of the paragraph concerning the arrest of a ship ready to sail. A provision in this respect exists in the 1952 Convention and its origin may be traced in the provision of article 215 of the French Code de Commerce according to which a ship, when "prêt à faire voile" could not be arrested anymore. At Lisbon it had been deemed advisable to permit arrest of a ship even after she had sailed and, therefore, the words "or is sailing" were added after the words "is ready to sail". Objections were raised during the sessions of the JIGE to such addition, on the ground that the arrest of a ship which is sailing may be prejudicial to her safety. On the other hand it was pointed out that arrest of ships within the territorial waters of a State is permitted by UNCLOS article 28(3). The CMI in its Position Paper suggested to delete this provision and thus to leave to national law the issue of arrest of ships ready to sail or sailing. This

proposal was accepted and, therefore, article 2(3) was deleted.

Paragraph 1 corresponds to article 4 of the 1952 Convention.

Paragraph 2 corresponds to the first part of article 2 of the 1952 Convention.

Paragraph 3 sets out in a positive and express manner the principle, already clearly implied in article 7(2) of the 1952 Convention, that the Court of the place where the ship lies is competent for the arrest even if it is not competent for the merits.

Paragraph 4 corresponds to the second paragraph of article 6 of the 1952 Convention. The CMI in its Position Paper had pointed out that it was not clear from the wording of the 1952 Convention whether the claimant must prove that a security is justified and that article 6 of the 1952 Convention has been interpreted differently in different jurisdictions. It was therefore suggested to provide that the law of the State in which the arrest of a ship or its release is applied for shall determine the circumstances in which arrest or release from arrest may be obtained and the procedure relating thereto. This proposal was supported by several States, but the majority preferred the JIGE Draft in which the text of the 1952 Convention was reproduced, without any clear explanation of the reasons of such decision.

Relationship between the claim and the ship (Article 3)

Under the heading "Exercise of the right of arrest" article 3 sets out the rules governing the relationship between the claim and the ship or ships that may be arrested.

Paragraph 1. The Conference has adopted in paragraph 1 the text suggested by the CMI in its Position Paper, in which the various situations are arranged in a logical sequence.

First, the basic rule according to which a ship may be arrested when the claim is against the owner of that ship is set out in subparagraph (a). There follow then the exceptions:

- Sub-paragraph (b) provides that a ship may be arrested in respect of a claim against the demise charterer. In this case, however, the right of arrest is subject to the conditions set out in paragraph 3.
- Sub-paragraph (c) permits arrest of a ship when the claim is based upon a mortgage, or a hypothèque or a charge of the same nature.
- Sub-paragraph (d) permits arrest of the ship in respect of a claim relating to ownership or possession.
- Finally, sub-paragraph (e) permits arrest of the ship when the claim is secured by a maritime lien on that ship. This has been the most controversial provision. In fact at Lisbon it had been agreed that the right to arrest a ship, irrespective of the claim being against the owner or another person, should be limited to the claims secured by one of the maritime liens at that time listed in the draft of a new Convention on Maritime Liens and Mortgages, approved by the Lisbon Conference and, consequently, such maritime liens were also listed in the draft Arrest Convention. In view, however, of the compromise adopted in the 1993 MLM Convention, whereby States Parties are permitted to grant under their laws other maritime liens, the proposal was made by the delegation of the United States, supported by other delegations, to permit the arrest also when the claim is secured by a maritime lien recognized by the law of the State where the arrest is requested. The CMI in its Position Paper supported this proposal and pointed out that, if it were accepted, there would be no need to list the maritime liens set out in the 1993 MLM Convention, since if the Convention has been ratified by the State where the arrest is requested and has come into force, its provisions would become part of the law of that State. The CMI therefore suggested the adoption of a very simple provision, wherein reference is only made to the maritime liens recognized by the law of the State where the arrest is requested, provided, however, the claim arises against the owner, demise charterer, manager or operator of the ship. This proposal was unanimously accepted, save that the majority favoured the replacement of the word "recognized" by the word "granted" in order to avoid the application of the private international law rules of that State. This proposal met with two objections. The first was that by preventing the application of the national rules of private international law the Convention would entail the obligation of States Parties to change such rules. The second was that in common law countries maritime liens are not "granted", in that they are not created by statute. In the attempt to find a compromise on the first issue the suggestion was made to add a provision to the effect that States Parties would be permitted to apply their domestic private international law rules but such suggestion was not adopted. The second issue was instead solved by adding the words "or arises under" after "granted".

Paragraph 2. Paragraph 2 of the JIGE Draft reproduced the provision of the Lisbon Draft on the arrest of sisterships. In view, however, of the evolution in several countries of the jurisprudence relating to the situations in which it is permitted to pierce the corporate veil, the CMI deemed it convenient to recommend, in its Position Paper, that is should be made clear that the Convention does not prevent the Courts of States Parties to pierce the corporate veil when this is permitted by the *lex fori*. However the UK delegation at the Conference made a more far reaching proposal, suggesting that express provisions be included in the Convention in this respect, and that arrest be permissible of a ship not owned by the person against whom the claim has arisen when it is "controlled" by such person. This proposal was, however, rejected by the great majority of the delegations who at the same time supported

the text of the JIGE Draft which reproduced the text of the Lisbon Draft. This prevented the final consideration of the more modest – but useful – proposal of the CMI, which had already been favourably received by the majority of the delegations.

Paragraph 3. Article 3(4) of the 1952 Convention contains a rather obscure provision on the arrest of ships in respect of claims against the demise and other charterers. In fact, after having provided in its first sentence that a ship may be arrested in respect of a claim against the demise charterer, it states in the second sentence that such rule "shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship". At Lisbon it was agreed first that arrest should be permissible only in respect of claims against the demise charterer and, secondly, that even in such case, arrest should be permissible only if under the law of the State where the arrest is demanded a judgment in respect of such claim can be enforced against that ship. Arrest of a ship in respect of claims against a demise charterer is, therefore, only permissible in the States where an action *in rem* in respect of such claim is permissible even when the claim is not secured by a maritime lien.

Release from arrest (Article 4)

The provisions on the release of a ship arrested in a State Party are based on those of the 1952 Convention.

The proposal made by the CMI to specify that the amount of the security should not exceed the value of the ship was finally accepted, in consideration of the fact that the security replaces the ship, and that the claimant cannot, in case of enforcement of his claim through the forced sale of the ship, obtain more than the proceeds of such sale.

The CMI deemed it convenient to regulate also the case of the security being provided in a State Party in respect of a ship arrested in a non-Party State. Two situations were envisaged: first that where the ship is not released after the security has been provided in a State Party and, secondly, that where the ship is released upon securities being provided both in the non-Party State in which the ship has been arrested and in a State Party. It was provided that in the former case the security given in the State Party must be released; and that in the latter case it must be released to the extent that it exceeds either the amount of the claim or the value of the ship, whichever is the lower. This provision was adopted by the JIGE and then by the Conference, save that they were divided into two separate paragraphs.

Rearrest and multiple arrest (Article 5)

Article 3(3) of the 1952 Convention prohibits a second arrest of the same ship or the arrest of another ship except where the security has been released or "there is other good cause for maintaining the arrest". It was deemed convenient by the CMI to specify in a separate article (article 5) the cases in which rearrest is permissible and to regulate separately the arrest of other ships. Three situations in which rearrest or multiple arrest is permissible have been envisaged: a) when the amount of the security is inadequate; b) when the guarantor is not financially reliable; c) when the ship has been released with the consent of the claimant, provided he acted on reasonable grounds, or when the ship has been released and the claimant could not prevent the release.

The provisions of the Lisbon Draft have been adopted by the JIGE and now by the Diplomatic Conference.

Liability for wrongful arrest (Article 6)

At the 1951 CMI Conference in Naples the questions whether the Convention should expressly require that the claimant must provide security for any loss which may be incurred by the owner of the ship and should, also, expressly regulate the liability of the claimant for wrongful arrest were debated at length and it was finally decided that these questions should be mentioned but left to be decided by the *lex fori*. The same discussion took place at Lisbon, where the same solution was adopted; the provision which was drafted was, however, more detailed and mentioned separately, though in the same terms, the cases in which the provision of security may be required by the Court and the cases in which liability may be established.

In addition, the Lisbon Draft provided that when the Court of another State or an arbitral tribunal is competent for the merits, the proceedings relating to liability for wrongful arrest pending before the Court of the State in which the arrest has been effected may be stayed pending decision on the merits. The CMI draft was adopted by the JIGE except that the reference to the case of the arrest being unjustified was the subject of discussion and consequently the words "or unjustified" were placed in square brackets. At the Diplomatic Conference the suggestion was made to delete such words, on the ground that it was difficult to conceive situations where the arrest could be unjustified without being wrongful. The observer for the CMI mentioned as an example the situation where the need for a security does not exist, in view of the sound financial conditions of the owner of the ship. Finally the words "or unjustified" were retained.

A much more relevant discussion took place in respect of the question whether the provision of countersecurity by the claimant should be made compulsory, rather than left to the discretion of the Court. The proposal was in fact made to replace in paragraph 1 the words "The Court *may*...impose upon the claimant...the obligation to provide security..." with the words "The Court *shall*...impose upon the claimant...", but was not adopted and the text of paragraph 1 was left unchanged.

Jurisdiction on the merits of the case (Article 7)

Article 7 of the new Convention deals with the same issues regulated by article 7 of the 1952 Convention. Whilst, however, in the 1952 Convention jurisdiction on the merits, if it does not exist under the law of the country in which the arrest is made, is granted only in respect of claims arising in that country or concerning the last voyage as well as in respect of a very limited number of specified maritime claims, whenever arisen, the new Convention has granted generally, in respect of all maritime claims, jurisdiction on the merits to the Courts of the State in which the arrest has been made or security given unless, of course, the parties have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction or to arbitration.

The only amendment made to the Lisbon Draft relates to the deletion of the case where security is provided to prevent the arrest, on the ground that in such case, contrary to that of security given to release the ship from arrest, the security may be provided in a State different from that in which the arrest has been effected.

Also the other provisions of article 7 reproduce the corresponding provisions of the CMI Lisbon Draft.

Paragraph 2 does not exist in the 1952 Convention and provides that the Courts of the State in which the arrest has been made or security has been given to release the ship may refuse to exercise jurisdiction on the merits when such refusal is permitted by the law of that State and a Court in another State accepts jurisdiction. This provision has been added in order to cover the case of refusal to exercise jurisdiction on the basis of the doctrine of *forum non conveniens.*

Paragraph 3, similarly to the 1952 Convention, provides that in the cases where a Court of the State where the arrest has been made does not have jurisdiction or refuses to exercise jurisdiction on the merits such Court may, or upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal. The only material difference as respects the 1952 Convention is that now all cases in which a Court of the State in which the arrest is made does not have jurisdiction on the merits or refuses to exercise such jurisdiction are covered by the same provision, whilst in the 1952 Convention when the Court does not have statutory jurisdiction, the order of a period within which proceedings on the merits must be brought is obligatory, and when the lack of jurisdiction is due to the parties having agreed to submit the dispute to the Courts of another State or to arbitration such order is discretional. The difference is due to the fact that now the Courts of the State where the arrest has been made have always statutory jurisdiction on the merits save that the parties have agreed otherwise or such Courts refuse to exercise jurisdiction.

Paragraph 4 provides, similarly to paragraph 3 of article 7 of the 1952 Convention, that if proceedings are not brought within the time so ordered, the ship arrested or the security given must be released.

Paragraph 5 is new. The 1952 Convention, in order to ensure the enforcement of a foreign judgment in the cases where the Courts of the State where arrest is made have no jurisdiction on the merits, provides that the security given in order to release the ship must require that it is given as security for the satisfaction of any judgment that may eventually be pronounced by a Court having jurisdiction. Apart from the lack of any reference to arbitration awards, this provision does not cover the case where no guarantee is given and the judgment must be enforced on the ship itself. For this reason the CMI Lisbon Draft provided that if proceedings are brought within the specified time limit, a final judgment issued by a competent Court or any final award shall be recognized and given effect with respect to the arrested ship or to the security unless the proceedings brought before such Court or arbitration tribunal do not satisfy the general requirement of due process of law. This provision was adopted by the JIGE. Subsequently, however, the CMI realised that the words "due process of law" could not have a precise equivalent in certain jurisdictions and, therefore, suggested in its Position Paper to adopt the same language of article 10(1) of the CLC 1969. The Conference accepted the CMI proposal but added to the text suggested by the CMI the condition, which was implied anyhow, that the recognition must not be against public policy adding in parenthesis the words "ordre public" in order to make entirely clear what is meant by public policy.

Scope of application (Article 8)

The 1952 Convention regulates separately its application to ships flying the flag of Contracting States and to ships flying the flag of non-Contracting States. However it is not entirely clear whether all the provisions of the 1952 Convention or only article 1(1) apply to ships flying the flag of non-Contracting States. The global application of the uniform rules is instead clearly provided in article 8 of the new Convention.

Paragraph 1 differs from the corresponding provision of the Lisbon Draft only because the word "seagoing" has been deleted. The Convention therefore applies to all ships whether seagoing or not. Also the other provisions of this article are taken from the Lisbon Draft.

Paragraph 2 excludes from the scope of application of the Convention ships owned or operated by a State and used only on Government non-commercial service. The text has been amended as respects the CMI and JIGE Drafts in order to use the same wording of article 13(2) of the 1993 MLM Convention, except that a reference to "naval auxiliary" has been added.

The provision of paragraph 3 already exists in the 1952 Convention, where it is placed in article 2. The present place is much more logical, since the rule that

the Convention does not affect the rights of public authorities to detain or prevent from sailing any ship has the effect of limiting the scope of application of the Convention.

Paragraph 4 clarifies the relationship between the uniform rules on arrest and the domestic rules of the States Parties on bankruptcy and other similar proceedings. The words used in the Lisbon Draft, and now adopted by the Diplomatic Conference, are such as to cover any type of liquidation proceedings.

In turn paragraph 5 clarifies the relationship between the provisions of the Convention and those of a limitation convention and provides that the former shall not affect the latter. Quite logically this rule applies only in respect of international conventions on limitation and national laws implementing them: domestic rules on limitation in fact cannot prevail over uniform rules on arrest.

Paragraph 6 excludes from the scope of application of the Convention the situation where the most relevant elements (nationality of the ship and habitual residence or principal place of business of the claimant) are linked with the State in whose jurisdiction the arrest is demanded. This provision, which is taken literally from article 8(4) of the 1952 Convention and includes its subsequent paragraph 5, is obsolete since, contrary to other recent conventions (e.g. the 1976 LLMC and the 1993 MLM Conventions), it limits the global character of the new Arrest Convention).

Non-creation of maritime liens (Article 9)

Article 9 repeats a provision already existing in article 9 of the 1952 Convention the purpose of which is that of clarifying that it is not intended to create any maritime lien. In the 1952 Convention the English text of this provision differed significantly from the French text but now the two texts are identical and the wording is simpler and clearer.
In the JIGE Draft (as in the Lisbon Draft) this provision was incorrectly included in article 8 which regulates the scope of application but then, on the suggestion of the CMI, it was moved to a separate article.

Reservations and declarations (Article 10)

Article 10(1) allows States Parties to exclude the application of the Convention to:

(a) ships which are not seagoing: as previously indicated, the word "seagoing" has been deleted in article 8(1) and, therefore, similarly to the 1976 LLMC Convention, States Parties are granted the right to exclude the application of uniform rules in respect of ships which are not seagoing;

(b) ships not flying the flag of a State Party: article 8(3) of the 1952 Convention permits to States Parties to provide that a ship flying the flag of a non-Party State may be arrested both in respect of a maritime claim and in respect of any other claim for which the national law permits arrest. The CMI in its Position Paper had suggested to reinstate such provision but the Conference has deemed more convenient to allow States Parties to wholly exclude such ships from the scope of application of the Convention;

(c) claims in respect of disputes as to ownership or possession of the ship: these are claims of a special character, since their object is not payment of a sum of money and in some jurisdictions may be secured by a different kind of arrest; their exclusion from the scope of application of the uniform rules is also permitted under the 1952 Convention and several States have availed themselves of such option.

Paragraph 2 of article 10 allows States Parties, who are also parties to a treaty on navigation on inland waterways, to declare that the rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in article 7 of the 1999 Arrest Convention. This provision was inserted following a request of the Swiss delegation in order to allow States Parties to the revised Rhine Navigation Convention of 1868 to apply the provisions of such Convention. A similar provision existed in article 7(1) of the 1952 Arrest Convention.

States with more than one system of law (Article 13)

Article 13 provides that if a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. This provision was added to the text of the Convention following a proposal of the delegation of Hong Kong China.

FRANCESCO BERLINGIERI

International Convention on Arrest of Ships, 1999

The States Parties to this Convention,
Recognizing the desirability of facilitating the harmonious and orderly development of world seaborne trade,
Convinced of the necessity for a legal instrument establishing international uniformity in the field of arrest of ships which takes account of recent developments in related fields,
Have agreed as follows:

Article 1
Definitions

For the purposes of this Convention:
1. "Maritime Claim" means a claim arising out of one or more of the following:
(a) loss or damage caused by the operation of the ship;
(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
(c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
(d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);
(e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
(h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;
(i) general average;
(j) towage;
(k) pilotage;

Convention Internationale de 1999 sur la Saisie Conservatoire des Navires

Les États parties à la présente Convention,
Considérant qu'il est souhaitable de faciliter le développement harmonieux et ordonné du commerce maritime mondial,
Convaincus de la nécessité d'un instrument juridique établissant une uniformité internationale dans le domaine de la saisie conservatoire des navires, qui tienne compte de l'évolution récente dans les domaines connexes,
Sont convenus de ce qui suit :

Article premier
Définitions

Aux fins de la présente Convention :
1. Par "créance maritime", il faut entendre une créance découlant d'une ou plusieurs des causes suivantes:
a) pertes ou dommages causés par l'exploitation du navire;
b) mort ou lésions corporelles survenant, sur terre ou sur eau, en relation directe avec l'exploitation du navire;
c) opérations de sauvetage ou d'assistance ainsi que tout contrat de sauvetage ou d'assistance, y compris, le cas échéant, pour indemnité spéciale concernant des opérations de sauvetage ou d'assistance à l'égard d'un navire qui par lui-même ou par sa cargaison menaçait de causer des dommages à l'environnement;
d) dommages causés ou risquant d'être causés par le navire au milieu, au littoral ou à des intérêts connexes; mesures prises pour prévenir, réduire ou éliminer ces dommages; indemnisation de ces dommages; coût des mesures raisonnables de remise en état du milieu qui ont été effectivement prises ou qui le seront; pertes subies ou risquant d'être subies par des tiers en rapport avec ces dommages; et dommages, coûts ou pertes de nature similaire à ceux qui sont indiqués dans le présent alinéa d);
e) frais et dépenses relatifs au relèvement, à l'enlèvement, à la récupération, à la destruction ou à la neutralisation d'un navire coulé, naufragé, échoué ou abandonné, y compris tout ce qui se trouve ou se trouvait à bord de ce navire, et frais et dépenses relatifs à la conservation d'un navire abandonné et à l'entretien de son équipage;
f) tout contrat relatif à l'utilisation ou à la location du navire par affrètement ou autrement;
g) tout contrat relatif au transport de marchandises ou de passagers par le navire, par affrètement ou autrement;
h) pertes ou dommages subis par, ou en relation avec, les biens (y compris les bagages) transportés par le navire;
i) avarie commune;
j) remorquage;
k) pilotage;

(l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
(m) construction, reconstruction, repair, converting or equipping of the ship;
(n) port, canal, dock, harbour and other waterway dues and charges;
(o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
(p) disbursements incurred on behalf of the ship or its owners;
(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
(s) any dispute as to ownership or possession of the ship;
(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
(u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;
(v) any dispute arising out of a contract for the sale of the ship.

2. "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.
3. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
4. "Claimant" means any person asserting a maritime claim.
5. "Court" means any competent judicial authority of a State.

Article 2
Powers of arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected.
2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.
3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be

l) marchandises, matériels, approvisionnement, soutes, équipements (y compris conteneurs) fournis ou services rendus au navire pour son exploitation, sa gestion, sa conservation ou son entretien;
m) construction, reconstruction, réparation, transformation ou équipement du navire;
n) droits et redevances de port, de canal, de bassin, de mouillage et d'autres voies navigables;
o) gages et autres sommes dus au capitaine, aux officiers et autres membres du personnel de bord, en vertu de leur engagement à bord du navire, y compris les frais de rapatriement et les cotisations d'assurance sociale payables pour leur compte;
p) paiements effectués pour le compte du navire ou de ses propriétaires;
q) primes d'assurance (y compris cotisations d'assurance mutuelle) en relation avec le navire, payables par le propriétaire du navire ou par l'affréteur en dévolution ou pour leur compte;
r) frais d'agence ou commissions de courtage ou autres en relation avec le navire, payables par le propriétaire du navire ou par l'affréteur en dévolution ou pour leur compte;
s) tout litige quant à la propriété ou à la possession du navire;
t) tout litige entre les copropriétaires du navire au sujet de l'exploitation ou des droits aux produits d'exploitation de ce navire;
u) hypothèque, "mortgage" ou droit de même nature sur le navire;
v) tout litige découlant d'un contrat de vente du navire.

2. Par "saisie", il faut entendre toute immobilisation ou restriction au départ d'un navire en vertu d'une décision judiciaire pour garantir une créance maritime, mais non la saisie d'un navire pour l'exécution d'un jugement ou d'un autre instrument exécutoire.
3. Par "personne", il faut entendre toute personne physique ou morale ou toute société de personnes, de droit public ou de droit privé, y compris un État et ses subdivisions politiques.
4. Par "créancier", il faut entendre toute personne alléguant une créance maritime.
5. Par "tribunal", il faut entendre toute autorité judiciaire compétente d'un État.

Article 2
Pouvoirs de saisie

1. Un navire ne peut être saisi, ou libéré de cette saisie, que par décision d'un tribunal de l'État partie dans lequel la saisie est pratiquée.
2. Un navire ne peut être saisi qu'en vertu d'une créance maritime, à l'exclusion de toute autre créance.
3. Un navire peut être saisi aux fins d'obtenir une sûreté, malgré l'existence, dans tout contrat considéré, d'une clause attributive de compétence judiciaire ou arbitrale, ou de toute autre disposition, prévoyant de soumettre la créance maritime à l'origine de la saisie à

adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

4. Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

Article 3
Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

(b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or

(c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or

(d) the claim relates to the ownership or possession of the ship; or

(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4
Release from arrest

1. A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has

l'examen au fond du tribunal d'un État autre que celui dans lequel la saisie est pratiquée, ou d'un tribunal arbitral, ou d'une clause prévoyant l'application de la loi d'un autre État à ce contrat.

4. Sous réserve des dispositions de la présente Convention, la procédure relative à la saisie d'un navire ou à sa mainlevée est régie par la loi de l'État dans lequel la saisie a été pratiquée ou demandée.

Article 3
Exercice du droit de saisie

1. La saisie de tout navire au sujet duquel une créance maritime est alléguée peut être pratiquée si

a) la personne qui était propriétaire du navire au moment où la créance maritime est née est obligée à raison de cette créance et est propriétaire du navire au moment où la saisie est pratiquée; ou

b) l'affréteur en dévolution du navire au moment où la créance maritime est née est obligé à raison de cette créance et est affréteur en dévolution ou propriétaire du navire au moment où la saisie est pratiquée; ou

c) la créance repose sur une hypothèque, un "mortgage" ou un droit de même nature sur le navire; ou

d) la créance est relative à la propriété ou à la possession du navire; ou

e) il s'agit d'une créance sur le propriétaire, l'affréteur en dévolution, l'armateur gérant ou l'exploitant du navire, garantie par un privilège maritime qui est accordé ou applicable en vertu de la législation de l'État dans lequel la saisie est demandée.

2. Peut également être pratiquée la saisie de tout autre navire ou de tous autres navires qui, au moment où la saisie est pratiquée, est ou sont propriété de la personne qui est obligée à raison de la créance maritime et qui, au moment où la créance est née, était:

a) propriétaire du navire auquel la créance maritime se rapporte; ou

b) affréteur en dévolution, affréteur à temps ou affréteur au voyage de ce navire.

Cette disposition ne s'applique pas aux créances relatives à la propriété ou à la possession d'un navire.

3. Nonobstant les dispositions des paragraphes 1 et 2 du présent article, la saisie d'un navire qui n'est pas propriété d'une personne prétendument obligée à raison de la créance ne peut être autorisée que si, selon la loi de l'État où la saisie est demandée, un jugement rendu en vertu de cette créance peut être exécuté contre ce navire par une vente judiciaire ou forcée de ce navire.

Article 4
Mainlevée de la saisie

1. Un navire qui a été saisi doit être libéré lorsqu'une sûreté d'un montant suffisant et sous une forme satisfaisante a été constituée, sauf dans le cas

been arrested in respect of any of the maritime claims enumerated in article 1, paragraphs 1 (s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

2. In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.

3. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

4. If a ship has been arrested in a non-party State and is not released although security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the Court in the State Party.

5. If in a non-party State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:
(a) the claim for which the ship has been arrested, or
(b) the value of the ship,
whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.

6. 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.

où la saisie est pratiquée en raison des créances maritimes énumérées aux alinéas s) et t) du paragraphe 1 de l'article premier. En ce cas, le tribunal peut permettre l'exploitation du navire par la personne qui en a la possession, lorsque celle-ci aura constitué une sûreté d'un montant suffisant, ou réglé de toute autre façon la question de la gestion du navire pendant la durée de la saisie.

2. Si les parties intéressées ne parviennent pas à un accord sur l'importance et la forme de la sûreté, le tribunal en détermine la nature et le montant, qui ne peut excéder la valeur du navire saisi.

3. Aucune demande tendant à la libération du navire contre la constitution d'une sûreté ne peut être interprétée comme une reconnaissance de responsabilité ni comme une renonciation à toute défense ou tout droit de limiter la responsabilité.

4. Si un navire a été saisi dans un État non partie et n'est pas libéré malgré la constitution d'une sûreté concernant ce navire dans un État partie relativement à la même créance, la mainlevée de cette sûreté est autorisée par le tribunal de l'État partie, par ordonnance rendue sur requête.

5. Si, dans un État non partie, le navire est libéré contre la constitution d'une sûreté suffisante concernant ce navire, la mainlevée de toute sûreté constituée dans un État partie relativement à la même créance est autorisée par ordonnance si le montant total de la sûreté constituée dans les deux États dépasse:
a) soit le montant de la créance au titre de laquelle la saisie a été pratiquée;
b) soit la valeur du navire;
la moins élevée des deux devant prévaloir. Cette mainlevée n'est toutefois autorisée par ordonnance que si la sûreté constituée est effectivement disponible dans l'État non partie et librement transférable au profit du créancier.

6. Toute personne qui a constitué une sûreté en vertu des dispositions du paragraphe 1 du présent article peut, à tout moment, demander au tribunal de réduire, modifier ou annuler cette sûreté.

Article 5
Right of rearrest and multiple arrest

1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:
(a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or
(b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or

Article 5
Droit de nouvelle saisie et saisies multiples

1. Lorsque, dans un État, un navire a déjà été saisi et libéré ou qu'une sûreté a déjà été constituée pour garantir une créance maritime, ce navire ne peut ensuite faire l'objet d'aucune saisie fondée sur la même créance maritime, à moins que:
a) la nature ou le montant de la sûreté concernant ce navire déjà constituée en vertu de la même créance ne soit pas suffisant, à condition que le montant total des sûretés ne dépasse pas la valeur du navire; ou
b) la personne qui a déjà constitué la sûreté ne soit ou ne paraisse pas capable d'exécuter tout ou partie de ses obligations; ou

(c) the ship arrested or the security previously provided was released either:
   (i) upon the application or with the consent of the claimant acting on reasonable grounds, or
   (ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:
(a) the nature or amount of the security already provided in respect of the same claim is inadequate; or
(b) the provisions of paragraph 1 (b) or (c) of this article are applicable.

3. "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.

Article 6
Protection of owners and demise charterers of arrested ships

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.

c) la mainlevée de la saisie ou la libération de la sûreté ne soit intervenue:
   i) soit à la demande ou avec le consentement du créancier agissant pour des motifs raisonnables,
   ii) soit parce que le créancier n'a pu par des mesures raisonnables empêcher cette mainlevée ou cette libération.

2. Tout autre navire qui serait autrement susceptible d'être saisi en vertu de la même créance maritime ne peut être saisi à moins que:
a) la nature ou le montant de la sûreté déjà constituée en vertu de la même créance ne soit pas suffisant; ou
b) les dispositions du paragraphe 1 b) ou c) du présent article ne soient applicables.

3. La "mainlevée" aux fins du présent article exclut tout départ ou toute libération du navire de nature illégale.

Article 6
Protection des propriétaires et affréteurs en dévolution de navires saisis

1. Le tribunal peut, comme condition à l'autorisation de saisir un navire ou de maintenir une saisie déjà pratiquée, imposer au créancier saisissant ou ayant fait saisir le navire l'obligation de constituer une sûreté sous une forme, pour un montant et selon des conditions fixées par ce tribunal, à raison de toute perte causée par la saisie susceptible d'être subie par le défendeur et dans laquelle la responsabilité du créancier peut être prouvée, notamment mais non exclusivement, à raison de la perte ou du dommage éventuels subis par le défendeur par suite:
a) d'une saisie abusive ou injustifiée; ou
b) d'une sûreté excessive demandée et constituée.

2. Les tribunaux de l'État dans lequel une saisie a été pratiquée sont compétents pour déterminer l'étendue de la responsabilité éventuelle du créancier à raison de pertes ou dommages causés par la saisie d'un navire, notamment mais non exclusivement, de ceux qui seraient subis par suite:
a) d'une saisie abusive ou injustifiée; ou
b) d'une sûreté excessive demandée et constituée.

3. La responsabilité éventuelle du créancier, visée au paragraphe 2 du présent article, est déterminée par application de la loi de l'État où la saisie a été pratiquée.

4. Au cas où le litige est, conformément aux dispositions de l'article 7, soumis à l'examen au fond d'un tribunal d'un autre État ou d'un tribunal arbitral, la procédure relative à la responsabilité du créancier prévue au paragraphe 2 du présent article peut être suspendue dans l'attente de la décision au fond.

5. Toute personne qui a constitué une sûreté en vertu des dispositions du paragraphe 1 du présent article peut à tout moment demander au tribunal de réduire, modifier ou annuler cette sûreté.

Article 7
Jurisdiction on the merits of the case

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

2. Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:
(a) does not have jurisdiction to determine the case upon its merits; or
(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article,
such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

4. If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.

5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:
(a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and
(b) such recognition is not against public policy (*ordre public*)

6. Nothing contained in the provisions of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

Article 8
Application

1. This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.

Article 7
Compétence sur le fond du litige

1. Les tribunaux de l'État dans lequel une saisie a été pratiquée ou une sûreté constituée pour obtenir la libération du navire sont compétents pour juger le litige au fond, à moins que les parties, de façon valable, ne conviennent ou ne soient convenues de soumettre le litige au tribunal d'un autre État se déclarant compétent, ou à l'arbitrage.

2. Nonobstant les dispositions du paragraphe 1 du présent article, les tribunaux de l'État dans lequel une saisie a été pratiquée, ou une sûreté constituée pour obtenir la libération du navire, peuvent décliner leur compétence si le droit de cet État le leur permet et si le tribunal d'un autre État se reconnaît compétent.

3. Lorsqu'un tribunal de l'État dans lequel une saisie a été pratiquée ou une sûreté constituée pour obtenir la libération du navire:
a) n'est pas compétent pour statuer au fond sur le litige; ou
b) a décliné sa compétence en vertu des dispositions du paragraphe 2 du présent article,
ce tribunal peut et, sur requête, doit fixer au créancier un délai pour engager la procédure au fond devant un tribunal compétent ou une juridiction arbitrale.

4. Si, au terme du délai fixé conformément au paragraphe 3 du présent article, la procédure au fond n'a pas été engagée, la mainlevée de la saisie ou de la sûreté constituée est, sur requête, autorisée par ordonnance.

5. Si la procédure est engagée avant le terme du délai fixé conformément au paragraphe 3 du présent article, ou si la procédure devant un tribunal compétent ou un tribunal arbitral d'un autre État est engagée en l'absence de fixation d'un délai, toute décision définitive prononcée à l'issue de cette procédure est reconnue et prend effet à l'égard du navire saisi ou de la sûreté constituée pour prévenir la saisie du navire ou obtenir sa libération, à condition que:
a) le défendeur ait été averti de cette procédure dans des délais raisonnables et mis en mesure de présenter sa défense; et
b) cette reconnaissance ne soit pas contraire à l'ordre public.

6. Aucune des dispositions du paragraphe 5 du présent article ne limite la portée d'un jugement ou d'une sentence arbitrale étrangers rendus selon la loi de l'État où la saisie du navire a été pratiquée ou une sûreté constituée pour en obtenir la libération.

Article 8
Application

1. La présente Convention est applicable à tout navire relevant de la juridiction d'un État partie, quel qu'il soit, et battant ou non pavillon d'un État partie.

2. This Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

3. This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

4. This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

5. Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.

6. Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9
Non-creation of maritime liens

Nothing in this Convention shall be construed as creating a maritime lien.

Article 10
Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following :

(a) ships which are not seagoing;
(b) ships not flying the flag of a State Party;
(c) claims under article 1, paragraph 1 (s).

2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in article 7 of this Convention.

2. La présente Convention n'est pas applicable aux navires de guerre, navires de guerre auxiliaires et autres navires appartenant à un État ou exploités par lui et exclusivement affectés, jusqu'à nouvel ordre, à un service public non commercial.

3. La présente Convention ne porte atteinte à aucun des droits ou pouvoirs, dévolus par une convention internationale, une loi ou réglementation interne à un État ou à ses administrations, à un établissement public ou à une autorité portuaire, de retenir un navire ou d'en interdire le départ dans le ressort de leur juridiction.

4. La présente Convention ne porte pas atteinte au pouvoir d'un État ou tribunal de rendre des ordonnances applicables à la totalité du patrimoine d'un débiteur.

5. Aucune disposition de la présente Convention ne porte atteinte à l'application de conventions internationales ni d'aucune loi interne leur donnant effet, autorisant la limitation de responsabilité dans l'État où une saisie est pratiquée.

6. Aucune disposition de la présente Convention ne modifie ou ne concerne les textes de loi en vigueur dans les États parties relativement à la saisie d'un navire dans la juridiction de l'État dont il bat pavillon, obtenue par une personne ayant sa résidence habituelle ou son principal établissement dans cet État, ou par toute autre personne qui a acquis une créance de ladite personne par voie de subrogation, de cession, ou par tout autre moyen.

Article 9
Non-création de privilèges maritimes

Aucune disposition de la présente Convention ne peut être interprétée comme créant un privilège maritime.

Article 10
Réserves

1. Un État peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou à tout moment par la suite, se réserver le droit d'exclure du champ d'application de la présente Convention:

a) les bâtiments autres que les navires de mer;
b) les navires ne battant pas le pavillon d'un État partie;
c) les créances visées à l'alinéa s) du paragraphe 1 de l'article premier.

2. Un État qui est aussi partie à un traité sur la navigation intérieure, peut déclarer, au moment de la signature, de la ratification, de l'acceptation ou de l'approbation de la présente Convention ou de l'adhésion à celle-ci, que les dispositions de ce traité concernant la compétence des tribunaux et la reconnaissance et l'exécution de leurs décisions prévalent sur les dispositions de l'article 7 de la présente Convention.

Article 11
Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

Article 12
Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the Headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:
(a) signature without reservation as to ratification, acceptance or approval; or
(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

Article 13
States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has two or more systems of law with regard to arrest of ships applicable in different territorial units, references in this Convention to the Court of a State and the law of a State shall be respectively construed as referring to the Court of the relevant territorial unit within that State and the law of the relevant territorial unit of that State.

Article 14
Entry into force

1. This Convention shall enter into force six months following the date on which 10 States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for

Article 11
Dépositaire

La présente Convention est déposée auprès du Secrétaire général de l'Organisation des Nations Unies.

Article 12
Signature, ratification, acceptation, approbation et adhésion

1. La présente Convention est ouverte à la signature des États au Siège de l'Organisation des Nations Unies, à New York, du 1er septembre 1999 au 31 août 2000. Elle reste ensuite ouverte à l'adhésion.

2. Les États peuvent exprimer leur consentement à être liés par la présente Convention par:
a) signature sans réserve quant à la ratification, l'acceptation ou l'approbation; ou
b) signature sous réserve de ratification, d'acceptation ou d'approbation, suivie de ratification, d'acceptation ou d'approbation; ou
c) adhésion.

3. La ratification, l'acceptation, l'approbation ou l'adhésion s'effectuent par le dépôt d'un instrument à cet effet auprès du dépositaire.

Article 13
États ayant plus d'un régime juridique

1. S'il possède deux ou plusieurs unités territoriales dans lesquelles des régimes juridiques différents sont applicables pour ce qui est des matières traitées dans la présente Convention, un État peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'applique à l'ensemble de ses unités territoriales ou seulement à une ou plusieurs d'entre elles, et il peut modifier cette déclaration en présentant une autre déclaration à tout moment.

2. La déclaration est notifiée au dépositaire et précise expressément les unités territoriales auxquelles s'applique la Convention.

3. Dans le cas d'un État partie qui possède deux ou plusieurs régimes juridiques concernant la saisie conservatoire des navires applicables dans différentes unités territoriales, les références dans la présente Convention au tribunal d'un État et à la loi ou au droit d'un État sont considérées comme renvoyant, respectivement, au tribunal et à la loi ou au droit de l'unité territoriale pertinente de cet État.

Article 14
Entrée en vigueur

1. La présente Convention entre en vigueur six mois après la date à laquelle 10 États ont exprimé leur consentement à être liés par elle.

2. Pour un État qui exprime son consentement à être lié par la présente Convention après que les

entry into force thereof have been met, such consent shall take effect three months after the date of expression of such consent.

Article 15
Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one-third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article 16
Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by deposit of an instrument of denunciation with the depositary.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the depositary.

Article 17
Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT Geneva this twelfth day of March, one thousand nine hundred and ninety-nine.
IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

conditions de son entrée en vigueur ont été remplies, ce consentement prend effet trois mois après la date à laquelle il a été exprimé.

Article 15
Révision et amendement

1. Le Secrétaire général de l'Organisation des Nations Unies convoque une conférence des États parties pour réviser ou modifier la présente Convention, à la demande d'un tiers des États parties.

2. Tout consentement à être lié par la présente Convention exprimé après la date d'entrée en vigueur d'un amendement à la présente Convention est réputé s'appliquer à la Convention telle que modifiée.

Article 16
Dénonciation

1. La présente Convention peut être dénoncée par l'un quelconque des États parties à tout moment à compter de la date à laquelle elle entre en vigueur à l'égard de cet État.

2. La dénonciation s'effectue au moyen du dépôt d'un instrument de dénonciation auprès du dépositaire.

3. La dénonciation prend effet un an après la date à laquelle le dépositaire a reçu l'instrument de dénonciation ou à l'expiration de tout délai plus long énoncé dans cet instrument.

Article 17
Langues

La présente Convention est établie en un seul exemplaire original en langues anglaise, arabe, chinoise, espagnole, française et russe, chaque texte faisant également foi.

FAIT À Genève, le douze mars mil neuf cent quatre-vingt-dix-neuf.
EN FOI DE QUOI, les soussignés, dûment autorisés à cet effet par leurs gouvernements respectifs, ont apposé leur signature à la présente Convention.

IMO Legal Issues*

Dr. Balkin has treated us to a most interesting and carefully researched history of the IMO Legal Committee and its relationship with the CMI. With the creation of the Legal Committee in 1967 part of the effort to harmonise private international maritime law was transferred from the private enterprise of CMI to the public sector of the IMO. This has resulted in a substantial shift of emphasis for reasons which I shall explain.

Members of the CMI are the 50 or so National Maritime Law Associations created according to the strict rules set out in the CMI Constitution. Membership of National Associations, in order to qualify for membership of the CMI, must be "open to persons (individuals or bodies corporate) who are either involved in maritime activities or are specialists in maritime law. Member associations should endeavour to present a balanced view of the interests represented in their association". This reflects what would now be called the "mission statement" of the founders of the CMI in 1896. They went on to specify that no maritime law should be promulgated which did not have input from shipowners, merchants, underwriters, average adjusters, bankers and other persons interested in maritime trade. They stated that once those in the trade had expressed their views it was then, and only then, the duty of the maritime lawyers to determine what the consensus was and devise an instrument which would achieve uniformity.

It is important to understand the method of work which has been adopted by the CMI since its foundation. Once an area of the law has been identified as being suitable for a harmonising instrument, a small International Working Group is appointed by the CMI to work on the project. This IWG produces a questionnaire which is circulated to all member associations seeking advice on the national law on the topic under examination. From the responses received the IWG will prepare a draft instrument and an International Sub-Committee will then be set-up and hold a series of meetings to which every national MLA is invited to send a representative. Ultimately the work product of the International Sub-Committee in the form of a draft convention or code, will be debated at a full CMI Conference and a final text will be produced for submission direct to a Diplomatic conference or to the IMO Legal Committee for further consideration.

This method of work has the undoubted advantage that those who undertake the drafting process do so on the basis of a clear knowledge of national law on the subject in a large number of maritime nations. The resulting instrument is therefore more likely to be widely acceptable because it will be based on an understanding of national laws and will be designed to produce a harmonising law which creates the minimum number of conflicts with those national laws.

It would be wrong of me to stand here at 4 Albert Embankment, the headquarters of the IMO, and criticise, the work methods of the Legal Committee. However I will just highlight the difference in work method which people should, I believe, understand. Delegates to IMO Legal Committee meetings are generally speaking drawn from shipping ministries or ministries of justice in member states. Often their agenda is political and the projects which they propose do not necessarily stem from a simple desire to harmonise international maritime law. There is a tendency for a national government to identify a problem in the maritime sector and discuss this problem with one or two other like minded governments. These sponsoring governments will then prepare a paper for submission to the Legal Committee which outlines the problem and frequently appends a draft instrument designed to tackle the problem which has been identified. The vital difference between this instrument and one produced by the CMI method of work outlined above is that it is not based on a careful analysis of national laws in the area under examination. Nor is there any input, before drafting starts from a wide range of people within the shipping trades and practising maritime lawyers. I will take the risk of saying in public that I think that this lack of basic research into national laws before drafting starts often shows in the quality of the instrument which is ultimately produced and may also be reflected in the level of ratification.

I note with interest that when the Legal Committee was first set up in 1967 following the "*Torrey Canyon*" incident it formulated a work method to deal with the legal issues. Member Governments were requested to assist the Committee by providing a summary of relevant national legislation and regulatory practice to be used as the basis for future discussion. This suggests that the Committee understood the importance of a knowledge of national laws, on the subject under review, before any drafting took place. Perhaps the Legal Committee should consider reverting to this practice whilst recognising that it would lengthen the whole process.

There is another subtle difference between the current batch of instruments under consideration by the Legal Committee and their predecessors based upon work undertaken by the CMI. The CMI has always been interested in harmonisation of private

*Paper delivered at the Conference organized jointly by the Center for Oceans Law and Policy - University of Virginia and IMO.

international law. A large number of the instruments produced by the IMO Legal Committee have been instruments of public international law masquerading as an instrument of private international law. To take a very simple example the 1910 Salvage Convention which was drafted by the CMI regulates relations between salvors and those to whom they render salvage services. The 1989 Salvage Convention (which is based on a draft prepared by the CMI at its conference in Montreal in 1981) updates the 1910 Convention but also, for reasons of public policy, specifies in article 14 that the well established no cure-no pay rule will not apply where a salvor has contributed towards the prevention of oil pollution but has received no remuneration because no property has been saved. This is clearly a public international law provision inserted in a private international law convention. I have no problem with these "hybrid" conventions but I think that we should all be aware that the IMO Legal Committee agenda tends towards imposing regulations and requirements (i.e. serving a political agenda) whereas the CMI has always tended to produce instruments designed to harmonise existing national laws governing relations between private individuals.

Having said all this the message I wish to convey is that if the Legal Committee wishes to produce instruments designed to harmonise maritime law in the private international law field it should revert to its old CLC work method which will produce instruments based upon a careful analysis of national laws. There is undoubtedly room for more co-operation in this context between the CMI and the IMO Legal Committee. I believe that things are changing and I certainly hope that the CMI will continue to be used by the IMO Legal Committee for what it can do best i.e. preliminary work on an instrument of harmonisation which will be based upon a proper analysis of existing national laws and which will, in consequence, be more likely to be adopted by states parties. If the political agenda dictates that the instrument contains provisions which are regulatory in nature these can always be added at the Legal Committee stage. May I also make a plea for simpler Conventions leaving more discretion to States parties and for more discussion regarding the form of the instrument to be used – it need not be a Convention.

I seem to have taken up a fair proportion of my allotted time in dealing with what I might describe as the political agenda. I would like to spend a few moments talking about a particular aspect of the Legal Committee's work which interests me. This concerns the new liabilities imposed on shipowners and their insurers.

Traditionally no responsible shipowner has allowed his vessel to go to sea without carrying two distinct types of insurance. Firstly the hull and machinery of the vessel will be insured against loss or damage. Secondly the shipowner will have insured himself against liabilities which may arise out of the operation of the ship. Much of this liability insurance has traditionally been placed with Protection & Indemnity Clubs run on a mutual basis.

It has been a fundamental principle of this type of liability insurance that the shipowner remains primarily liable to the claimant but is indemnified by the insurer in respect of claims which he has been forced by legal judgment or otherwise to pay. This is the "pay to be paid" principle which has been upheld by the English Courts most recently in the "*Padre Island*" case. An important feature of this type of insurance is that the claim for indemnity is subject to the terms of the contract of insurance. If the liability insurer has a defence under the terms of the insurance contract his obligation to indemnify the shipowner ceases. In theory if the shipowner does not possess sufficient assets to meet the claim, this could mean that the claimant does not get paid. Where the claimant is an individual or corporation this can cause financial hardship. Where the claimant is a government or government department it can cause a political storm. National Governments do not like to find themselves in the situation where with a perfectly legitimate claim they do not get paid for reasons beyond there control. And Governments at the end of the 20th Century do like to be in control!

It is this thinking which informed the drafters of the Civil Liability Convention of 1969 when they inserted a provision whereby the owner of a tanker is required to maintain insurance or other financial security up to the amount of the limits of liability prescribed in the Convention to cover liability for pollution damage. Further the CLC provides that "any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security". Thus for the first time the indemnity principle of liability insurance was violated.

If those in the insurance industry thought that the CLC was a one-off case they were sorely mistaken. This was, as some predicted at the time, merely the thin end of the wedge. The HNS Convention of 1996 contains a similar violation of the indemnity principle and the Legal Committee now has before it three instruments all of which seek to remove the fundamental principle of indemnity insurance. Thus the draft Wreck Removal Convention which is currently under discussion would require (by article IV) the owner of a ship flying the flag of a state party "to maintain insurance or other financial security to cover liability under the convention" and article XI(9) provides that claims may be brought "directly against the insurer".

Equally the draft Convention on Compensation for Pollution from Ships' Bunkers provides, by article 7 that the "ship owner ... shall be required to maintain insurance or other financial security ... to cover liability for pollution damage under this convention". Article 7 (8) of the draft Convention provides that claims for pollution damage may be pursued "directly against the insurer". If the Bunker

Convention and the WRC are eventually agreed and come into force widely this will represent two further nails in the coffin of the "pay to be paid" principle.

The third project, under review at the IMO Legal Committee at this time, started as a proposal that all shipowners should carry evidence of liability insurance or other security for all types of claim likely to arise out of maritime operations. It quite quickly became apparent that it would be very difficult to impose such a compulsory insurance requirement without defining in very clear terms what the liabilities were against which the shipowners should be required to carry insurance. Put another way you cannot have a compulsory liability insurance requirement without establishing a comprehensive liability regime. Because of this fundamental difficulty the Legal Committee decided to concentrate on producing an instrument which would require the owners of passenger carrying vessels to maintain insurance or other financial security for claims for loss of life or personal injury to passengers.

As originally drafted the protocol to the 1974 Athens Convention, which was to incorporate this compulsory insurance requirement for passengers, provided that "the carrier shall maintain insurance or other financial security... to cover the liability of the carrier under this convention" and went on to provide that claims for compensation might be "brought directly against the insurer..". So here is yet another example of the CLC wedge continuing to undermine the "pay to be paid" principle.

In the course of the debate regarding protection of passengers the CMI suggested that an alternative method of protecting the position of passengers would be to require the owners of all passenger carrying vessels to take out personal accident insurance (PAI) for the benefit of passengers. This would create a direct contractual relationship between the passenger and the personal accident insurer enabling the carrier to step back from the need to deal directly with passenger claims and leaving it to the insurance company, issuing the personal accident insurance policy, to deal direct with the claiming passenger. The CMI suggested that one of the advantages of this proposal was that the personal accident insurer would have no defences against a passenger claim in contrast to the situation were the matter was dealt with by way of liability insurance where, as previously explained, the liability insurer can use any defences available to him under the liability insurance cover. Of course no similar solution would be available to solve the insurance problems arising under the WRC and Bunker Conventions.

I should mention, for completeness, that the idea of a compulsory insurance regime for all maritime claims, with the now familiar characteristic of direct action against the insurer, has not been totally abandoned. A number of Government delegations at the 78th Session of the Legal Committee suggested that a Code should be published by IMO which would specify the minimum recommended standards for shipowners responsibilities in respect of maritime claims against which they should obtain insurance. As previously indicated most responsible shipowners would not allow their ships to go to sea without adequate liability cover and the feeling is that this suggested Code whilst creating no problems for the responsible shipowner might, on the other hand, do nothing to ensure that the irresponsible shipowner started to buy liability insurance.

Discussion on these fascinating topics will continue at the next session of the IMO Legal Committee in April. I have only picked one aspect of these discussions which seemed to me to be worth highlighting for the good reason that it will have a fundamental effect on the form and cost of insurance which the insurance market will have to offer to shipowners. I suggest that this is an issue which has not been properly addressed to date.

PATRICK GRIGGS

NEWS FROM THE EUROPEAN COMMISSION

INTERMODAL LIABILITY

The CMI was invited to attend a meeting, or "hearing", on intermodal liability at the European Commission (Directorate-General VII Transport) on 19th January 1999. I was asked to represent the CMI at the hearing as Chairman of the International Working Group on Issues of Transport Law. 33 participants attended representing about 14 organisations.

First some background. Task Force Transport Intermodality, which was set up by the Commission in 1995, carried out consultations with the industry. As a result of its report intermodal liability was earmarked by the Commission as an area which needed further examination. The Commission followed this up in its Communication on "Intermodality and intermodal freight transport in the EU". The Commission then requested a group of legal experts from European Universities to make an enquiry into the area of intermodal freight liability and, more specifically, the adverse effects of the absence of a uniform intermodal liability regime on the further development of freight intermodalism in the European Union. This group, consisting of Regina Asariotis, H.-J Bull, Malcolm Clarke, Professor Rolf Herber, Professor Aliki Kiantou-Pambouki, D. Moran-Bovio, Professor Jan Ranberg,

Professor Ralph de Wit and Professor Stefano Zunarelli, produced a draft report dated July 1998. This draft report was circulated with the papers for the hearing.

An additional reason for the hearing was said to be the proposal to amend US COGSA 1936. The papers for the hearing stated that the US MLA draft included extra-territorial dimensions and that the Commission had transmitted its concerns in fora such as the Consultative Shipping Group and the EU-USA Forum on Freight Intermodalism.

The aims of the hearing were stated to be to gather the views of industry representatives on intermodal liability, to discuss the industry's views on the proposed revision to the US COGSA 1936 and to identify possible strategies. Organisations which had expressed an interest in attending were invited to submit a written statement built around a questionnaire. This questionnaire together with the Statement submitted on behalf of the CMI, will be published in the 1999 CMI Yearbook.

The Chairman, Mr. Wim Blonk, opened the hearing by explaining that development of intermodal transport was important in the context of the globalisation of economies. It would improve flexibility and the competitiveness of shippers. The Commission supported the concept of "sustainable mobility", which meant using the transport infrastructure in a more efficient way. The Task Force had produced a "diagnosis report" which was an inventory of the problems facing the development of intermodal transport. A number of obstacles to its development had been identified. Some of these problems could easily be solved by the industry, but the three principal obstacles were:

1. The lack of liberalisation in the railway sector.
2. The lack of standardisation.
3. The lack of an intermodal liability regime.

The Chairman went on to say that solving the third problem at European level would not be a complete answer. Consequently discussions had been held with the United States, Canada and Mexico and the Central and Eastern European countries.

As regards the bill to revise US COGSA 1936, representatives of the industry had written to the Commissioner and a number of political and legal problems had been identified. The Commission's concerns had been signalled to Capitol Hill the previous week.

Regina Asariotis then made a presentation of the draft report. She began by outlining the current legal liability framework. She emphasised that no uniform regime governed liability for loss, damage or delay. The framework consisted of a complex jigsaw of international conventions, diverse national laws and standard term contracts such as FIATA FBL 1992. More than one regime might apply and different rules governed liability for delay. She identified four particular problems. First liability varied in incidence and extent depending on the applicable regime, the modal stage where loss or damage occurred and the causes of such loss or damage. Second liability was fragmented and could not be assessed in advance. Third the current regulation of liability was too complex and therefore not cost effective. Fourth there was a proliferation of national solutions. She then outlined past attempts at unification, including the 1980 UN Convention on International Multimodal Transport of Goods and the 1992 UNCTAD ICC Model Rules for Multimodal Transport Documents. She pointed out that both systems gave precedence to mandatory national and international law and that both systems were complex. The aim of any possible future regulation must be to produce liability rules which were compatible with existing regimes, cost effective and acceptable to the transport industry. To achieve compatibility with existing regimes liability should be in excess of established minimum levels. To achieve cost effectiveness the rules should be simple and transparent, should cover loss damage and delay, should operate irrespective of the modal stage where loss occurred or the causes of a loss, and should concentrate the transit risk on the carrier. Commercial acceptability would be achieved by adopting a non-mandatory "default" system which enabled a carrier who did not wish to assume extensive liability to opt out. Adherence to the regime would be a matter of commercial decision making. The function of the law in this area was to facilitate trade; there was no significant public policy consideration.

The representatives of the various organisations were then asked to make their statements, not all of whom had submitted written Statements.

The Chairman concluded the hearing by attempting to summarise his personal impressions. The lack of an intermodal liability scheme was considered by the industry to be one of the major problems in the way of developing intermodal transport. There was a wish on the shippers' side to solve it, but the reaction from the transport side was more diverse. The railways were aware that there was a problem and the suggestion had been made that the UNCTAD/ICC Rules should be promoted. There was a reluctance amongst the shipowners to open a Pandora's box, but nevertheless they were aware that there was a problem and they were willing to continue discussions. Some representatives were in favour of a voluntary scheme and some were in favour of a regional solution, but words of warning had been given against this.

The official Minutes of the hearing state that it was agreed that the Commission would examine the costs for the industry of the absence of a uniform intermodal liability arrangement as well as simulate the economic impact of both a general use of the UNCTAD/ICC Rules and the introduction of a new voluntary intermodal regime. A steering committee consisting of not more than five members from organisations which attended the hearing will monitor progress and give input to the Commission.

STUART BEARE