



**United Nations
Conference
on Trade and
Development**

Distr.
LIMITED

TD/B/CN.4/GE.2/L.2
8 December 1994

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Standing Committee on Developing Services
Sectors: Fostering Competitive Services
Sectors in Developing Countries - Shipping
Joint UNCTAD/IMO Intergovernmental Group
of Experts on Maritime Liens and
Mortgages and Related Subjects
Seventh session
Geneva, 5 December 1994
Item 6 of the provisional agenda

**DRAFT REPORT ON THE WORK OF THE SESSIONAL GROUP OF THE JOINT UNCTAD/IMO
INTERGOVERNMENTAL GROUP OF EXPERTS ON MARITIME LIENS AND MORTGAGES
AND RELATED SUBJECTS ON ITS SEVENTH SESSION**

Introduction

1. The Sessional Group noted that it had been requested by the Plenary of the Joint Intergovernmental Group of Experts to deal with agenda item 3, namely consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952.

Item 3 - Consideration of the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952

2. The Sessional Group considered document JIGE(VII)/2, issued by UNCTAD under cover of TD/B/CN.4/GE.2/2 and by IMO under cover of LEG/MLM 29, prepared by the secretariats of UNCTAD and IMO, which outlined possible modifications to the 1952 Arrest Convention that might be required in the light of the adoption of the 1993 MLM Convention. The Group also had before it document JIGE(VI)/3 (TD/B/C.4/AC.8/22-LEG/MLM/22), which included the draft revision of the 1952

Convention prepared by the CMI at its 1985 Lisbon conference (hereinafter "the CMI Draft"). The Group started a preliminary reading of the articles of the Convention, bearing in mind the comments and observations contained in document JIGE(VII)/2 prepared by the secretariats of UNCTAD and IMO.

Article 1: Claims in respect of which a vessel may be arrested

3. Some delegations considered that the list of maritime claims set out in article 1 of the 1952 Convention was incomplete and out of date. They preferred the approach adopted by the CMI Draft, providing for an open-ended list of maritime claims. In the opinion of these delegations, the inclusion of general wording in the "chapeau" enabling an open-ended list of claims reflected a compromise solution for different legal systems. This was considered appropriate, bearing in mind that article 6 of the 1993 MLM Convention allowed States Parties to grant under their law national maritime liens other than those mentioned in article 4, paragraph 1. Unless the list of claims in article 1 of the Arrest Convention became open-ended, there was a risk that a maritime lien granted in accordance with article 6 of the MLM Convention would not be secured by arrest if it was not included in the list in article 1 of the Arrest Convention.

4. Some delegations opposed this. In their view, the list should remain a closed one, in order to ensure that arrest remained an exceptional measure to be used only as a last resort to secure maritime claims. An open list could lead to abusive exercise of the right of arrest in respect of claims of only relative importance. Claims given national maritime lien status under article 6 of the MLM Convention should not necessarily be included in the list, bearing in mind that the matter should be regulated by national law.

5. The Group had a preliminary discussion on several aspects of the list of claims contained in article 1 of the 1952 Arrest Convention and of the CMI Draft in order to introduce amendments needed as a result of the adoption of the 1993 MLM Convention.

6. It was agreed that terminology used in the Arrest Convention in respect of claims with maritime lien status should be closely aligned with that of the 1993 MLM Convention. Bearing in mind article 4, paragraph 1(a) of the MLM Convention, the Group agreed that costs of repatriation should be included in the list of maritime claims in article 1.

7. Some delegations considered that the concept of "bottomry" was out of date and should be excluded from the list of maritime claims. One delegation reserved its position regarding such exclusion.

8. Some delegations expressed views in favour of including in the list claims related to the special compensation provided for in article 14 of the 1989 Salvage Convention. Those delegations accordingly considered that the present text in the CMI Draft (article 1(1)(c)) should be maintained.

9. Other delegations stated they were in favour of excluding such special compensation. In their opinion, the right to arrest should be granted only in respect of liens securing claims for reward for salvage of the vessel.

10. The observer for the Institute of International Container Lessors supported article 1(1) of the CMI Draft, provided it was not taken to mean that containers had to be supplied to a particular ship.

11. In view of the above, the Sessional Group agreed to take the CMI Draft as a basis for discussion and make the amendments required as a result of the adoption of the 1993 MLM Convention.

Article 2: Powers of arrest

12. In the context of article 2(5) of the CMI Draft, one delegation favoured the complete standardization of procedures relating to arrest. This delegation proposed inclusion in the Arrest Convention of a provision for the interlocutory sale of an arrested vessel in appropriate circumstances, such as failure of the owner to post security within a reasonable period of time, or where the costs of maintaining the vessel under arrest were excessive, etc. This proposal was opposed by another delegation which felt that the issue was outside the scope of the Arrest Convention, since the term "arrest", being confined to "conservatory" measures, did not include measures for satisfaction of judgement. The matter, therefore, was governed by the applicable law, and could not be covered under the Arrest Convention.

13. The representative of the International Chamber of Commerce stated that review of the Arrest Convention should go beyond the CMI Draft and take account of the changes brought about by the 1993 Convention on Maritime Liens and Mortgages. He suggested that consideration should be given to interim methods of enforcement and inclusion of provisions in the Arrest Convention to deal with interlocutory methods of enforcement.

14. Most delegations, however, agreed to take the CMI Draft as a basis for discussion, taking into account changes required by the 1993 Convention on Maritime Liens and Mortgages.

Article 3: Vessels that may be arrested

15. Some delegations preferred the approach adopted by the CMI Draft regarding the requirement of personal liability of the owner for the purpose of arrest under the Convention. The text of the 1952 Arrest Convention was considered inadequate, as it did not clearly link arrest with personal liability of the owner. Some delegations, however, considered that national maritime liens granted under article 6 of the 1993 MLM Convention should be given right of arrest under the Arrest Convention, irrespective of personal liability of the owner. Personal liability of the owner should only be required when the claim was not secured by a maritime lien.

16. Some delegations, on the other hand, considered that the approach adopted by the 1952 Arrest Convention was satisfactory. With regard to claims secured by "maritime lien", a number of delegations felt that right of arrest under the Convention should only be given to those claims covered under article 4 of the 1993 MLM Convention and not under article 6. It was not the intention of Article 6 to impose an obligation on other States Parties to recognize and enforce national maritime liens granted in a State Party. It was, however, recognized that some reference should be made to such national liens in the Arrest Convention. One delegation referred to paragraph 27 of document JIGE(VII)/2 (TD/B/CN.4/GE.2/2-LEG/MLM/29) concerning avoidance of a situation when a vessel can be arrested in a State Party but the underlying claim cannot be enforced against that vessel.

17. One delegation proposed amendment of the first sentence of article 3(2) of the CMI Draft to read "(2) Arrest is also permissible of any other ship or ships ...".

18. The representative of the Institute of International Container Lessors (IICL) stated that article 3(1)(d) of the CMI Draft appeared to deal with cases where claims were not secured by "maritime liens" but did not include the case of time charterers. He considered that specific provisions were required to secure suppliers with the right of arrest in such circumstances.

Article 3(3): Right of rearrest and multiple arrest

19. Some delegations preferred the approach adopted by the 1952 Convention whereby a second arrest of a vessel was not permitted. They could not, therefore, support article 5 of the CMI Draft in permitting rearrest and multiple arrest in certain cases. In the view of these delegations, the right of rearrest and multiple arrest should be restricted to exceptional circumstances, such as fraud or misrepresentation, in order to protect the legitimate interests of

shipowners as well as the cargo interests. Paragraph 1(c) of the CMI Draft was criticized in this regard.

20. Other delegations favoured a more flexible approach to cases other than fraud or misrepresentation which would justify a rearrest in respect of the same maritime claim. In this regard mention was made of cases such as collisions where a proper assessment of the claim could only be effected at a later stage, or if the amount of the claim exceeded the value of the arrested vessel, which should give right to the arrest of a sister ship.

21. The Group agreed that this article should be put in brackets for consideration at a later stage, together with alternative proposals which might be submitted by delegations.

Article 6: Wrongful arrest

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

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

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

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

Article 7: Jurisdiction on the merits of the case

26. In reply to a question by one delegation, the observer for the Comité Maritime International (CMI) explained that article 7(1) of the 1952 Convention was a compromise between the view held by common law countries, which considered arrest a means of obtaining jurisdiction, and the opposing view held by civil law countries which required the application of general principles in this

respect. The approach adopted by article 7(1) in giving jurisdiction on merits only in certain cases not being considered satisfactory, the CMI Draft granted general jurisdiction to the courts of the country where the ship was arrested in respect of all claims.

27. One delegation preferred the approach adopted by the 1952 Convention. In its view, the provisions of the 1952 Convention were more consistent with general principles of international maritime law and maritime Conventions such as the Convention on Limitation of Liability. It was further pointed out that granting general jurisdiction to the courts of the country where the ship was arrested would not be equitable.

28. Many delegations expressed support for retaining article 7 of the CMI Draft, whereby jurisdiction was granted to the courts of the forum arresti to determine the case upon its merits unless the parties agreed otherwise, or where the court refused to exercise its jurisdiction and that refusal was permitted by the lex fori and a court of another country accepted jurisdiction.

Article 8: Application to ships of non-contracting States

29. It was noted that article 8(2) of the 1952 Convention had given rise to problems of interpretation in various jurisdictions. The wording of article 8(2) did not make it clear whether the whole of the provisions of the Convention were to apply to ships of non-contracting States, or only article 1 providing for right of arrest in respect of maritime claims. Most delegations preferred the approach adopted by the CMI Draft providing for application of the whole Convention to ships of non-contracting States. The Group agreed that the text of paragraph 2 of the CMI Draft should be amended to correspond with article 13, paragraph 2 of the 1993 MLM Convention.

Article 9: No further maritime lien

30. The Joint Group further considered that article 8(3) of the CMI Draft, providing that nothing in the Convention shall be construed as creating a maritime lien, was in principle acceptable. The second part of article 9 of the 1952 Convention, which referred to the Convention on Maritime Liens and Mortgages, was considered inappropriate, given the existence of three Conventions on the subject.

31. The observer for the CMI explained that reference to creating a right of action had been omitted from the CMI Draft, as it was considered to be outside the scope of the Arrest Convention and could lead to different interpretations in various jurisdictions.