

# International Congress of Maritime Arbitrators XVIII

## Vancouver, 15 May 2012

### Maritime Arbitration and Arrest of Ships

*by Francesco Berlingieri*

#### 1. Introduction

I think I met Cedric for the first time when I went to his office in Sloane Street, in the late sixties. When we discovered that we both loved the sea the feeling that we had something in common changed the atmosphere of our meeting. My wife Anna and I were invited at dinner in his home and met Cora. That was the beginning of a long friendship. I admired and trusted him and it is now a great honor for me to give this lecture, in which I shall consider whether, in case there is between the parties an arbitration agreement, the arbitral tribunal or the courts have jurisdiction in respect of the arrest of a ship one of the parties may seek to enforce either before or during the course of the arbitral proceedings, as well as in respect of all matters connected with such arrest. My analysis will be based on the 1952 Arrest Convention<sup>1</sup> and the 1999

---

<sup>1</sup> International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952. The Convention is in force in the following States: Algeria, Antigua and Barbuda, Bahamas, Belgium, Belize, Benin, Burkina Faso, Cameroon, Central African Republic, China, Hong Kong, Macao, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Denmark, Djibouti, Dominica, Republic of, Egypt, Fiji, Finland, France, France (Overseas Territories), Gabon, Germany, Greece, Grenada, Guyana, Guinea, Haiti, Haute-Volta, Holy Seat, Ireland, Italy, Khmere Republic, Kiribati, Latvia, Luxembourg, Madagascar, Mali, Morocco, Mauritania, Mauritius, Namibia, Netherlands, Niger, Nigeria, North Borneo, Norway, Paraguay, Poland, Portugal, Romania, Russian Federation, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sarawak, Senegal, Seychelles, Slovenia, Solomon Islands, Spain, Sudan, Sweden, Switzerland, Syrian Arabic Republic, Tchad, Togo, Tonga, Turks Isles and Caicos, Tuvalu, United Kingdom of Great Britain and Northern Ireland, United Kingdom (Overseas Territories), Zaire.

Arrest Convention<sup>2</sup> as well as on the domestic laws of some States parties to such Conventions and of some States that are not parties to any of them.

## *2. Arbitration agreement and jurisdiction for the arrest of a ship*

### **2.1. Exclusive court jurisdiction under the 1952 and the 1999 Arrest Conventions**

The exclusive jurisdiction of the courts in respect of the arrest of ships is clearly stated in both the 1952 and the 1999 Arrest Conventions.

Article 4 of the 1952 Convention provides that “a ship may only be arrested under the authority of a court or of the appropriate judicial authority of the Contracting State in which the arrest is made”. Although such wording seems to draw a distinction between “court” and “judicial authority”, this is only due to an incorrect translation into English of the original French text (the first draft was in fact in the French language only) that reads as follows: “d’un tribunal ou de toute autre autorité judiciaire” and the words “toute autre autorité judiciaire” were added in order to include judicial authorities that in certain countries would not be qualified as “court” or “tribunal”.<sup>3</sup> The jurisdiction of the courts in respect of arrest is subsequently confirmed by article 7(3), wherein it is provided that if the parties have agreed to submit the (merits of) the dispute to the jurisdiction of a particular court other than that within whose jurisdiction the arrest was made or to arbitration, the court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

---

<sup>2</sup> International Convention on Arrest of Ships, Geneva, 12 March 1999. The Convention has entered into force on 14 September 2011 between the following States: Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain, Syrian Arab Republic.

<sup>3</sup> F. Berlingieri, *Arrest of Ships*, 5<sup>th</sup> ed., 2011, p. 317. It is significant that article 2.1 of the 1999 Arrest Convention refers only to court but defines court in article 1(5) as follows: “‘Court’ means any competent judicial authority of a State”.

## 2.2. The scope of application of the Conventions

The rules on the scope of application of the 1952 Convention are set out in article 8 (1) and (2), respectively for Contracting States and non-Contracting States. Pursuant to article 8 (1) the provisions of the Convention apply to any vessel flying the flag of a Contracting State. In respect of non-Contracting States article 8(2) instead provides that the ships flying their flags may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1(1) as well as of any other claim for which the law of the relevant State permits arrest. Notwithstanding this limited formulation of the rule, from the *travaux préparatoires* it appears that this rule entails that all provisions of the Convention, and not only article 1 (1) that enumerates the maritime claims, apply also to ships flying the flag of non-Contracting States, save the rule in article 2 pursuant to which a ship may only be arrested in respect of the maritime claims enumerated in article 1(1).

The rule set out in article 4, pursuant to which a ship may only be arrested under the authority of a court, therefore applies in all Contracting States in respect of all ships, whether flying the flag of a Contracting State or not.

The only restriction to the scope of application of the 1952 Convention is set out in paragraph 4 of article 8, pursuant to which the domestic rules on arrest of ships continue to apply to the arrest of a ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

However Contracting States are allowed, pursuant to article 8(3), to wholly or partly exclude from the "benefits" of the Convention any government of a non-Contracting State or any person who has not, at the time of arrest, his habitual residence or principal place of business in one of the Contracting States. The meaning of this provision is unclear because it is uncertain which such "benefits" are and in any event the principal of such benefits, that consists of the restriction of the right of arrest to maritime claims, is already generally excluded by paragraph (2) of article 8.

Moreover, it does not appear that any Contracting State has availed itself of the right granted by paragraph (3) or at least has given notice of its decision to the Depositary.

The difference between ships flying the flag of Contracting States and ships flying the flag of non-Contracting States has been eliminated in the 1999 Convention whose article 8(1) provides that the Convention applies to any ship within the jurisdiction of any Contracting State whether or not that ship is flying the flag of a Contracting State. The only restriction to the application of the 1999 Convention is that, as in the 1952 Convention, the 1999 Convention does not apply to the arrest of a ship in the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

### **2.3. Relationship between arbitral proceedings and arrest under the Arrest Conventions**

The relationship between arbitration proceedings and arrest of the ship may vary according to whether the arrest precedes the arbitration proceedings or is applied for during such proceedings.

In both the 1952 and the 1999 Arrest Conventions the sequence between arrest and proceedings on the merits is assumed to be that the arrest comes first and the proceedings on the merits follow. That appears clearly from article 7 of the 1952 Convention which in its paragraph (1) sets out the cases in which the courts have jurisdiction on the merits and in its paragraph (2) provides that if the court within whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits, the bail or other security given to procure the release of the ship shall provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a court having jurisdiction so to decide. Similarly article 7 of the 1999 Convention provides in its paragraph (1) that 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. It then provides in its paragraph (3) that if the court of the State

where the arrest has been effected or security provided to obtain the release of the ship does not have jurisdiction to determine the case upon its 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.

That, however, does not entail that the claimant may not apply to the competent court for the arrest of a ship owned by the defendant during the course of the arbitral proceedings. The statement in article 4 that a ship may only be arrested under the authority of a court of the State in which the arrest is made is in fact general. The extension of the rule also to the arrest made in the course of judicial or arbitral proceedings is supported by the provision in article 3 (3) of the 1952 Convention pursuant to which a rearrest or a subsequent arrest of a sister ship is permitted when the bail or other security has been finally released or if there is other good cause. In fact there is no time limit for a subsequent arrest and, therefore, it may be applied for also after the commencement of the proceedings on the merits, within the time limit reference to which is made in article 7(3). This view holds also in respect of the 1999 Convention, article 5 of which regulates generally rearrest or multiple arrest.

Article 2(1) of the 1999 Convention contains a provision similar to that in article 4 of the 1952 Convention. It provides in fact that "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".

Therefore in the States parties to the 1952 or the 1999 Arrest Convention the existence of an arbitration agreement should not affect the jurisdiction of the courts.

When the Convention does not apply, it is necessary to consider the rules in force in the national law of the relevant State. It appears however advisable to extend such investigation to as many maritime countries as possible, whether or not they are parties to one of the Arrest Conventions, in view of the fact that only certain States parties to the 1952 and 1999 Arrest Conventions have given them the force of law and that in those States

that have done so the scope of their application may differ.

Such investigation will be made separately in respect of the law in States parties to the 1952 Convention, in States parties to the 1999 Convention and in States not parties to any of the two Conventions.

#### **2.4. The position in certain States parties to the 1952 Arrest Convention**

##### *Belgium*<sup>4</sup>

The Convention was ratified on 10 April 1961 pursuant to law of 24 March 1961, published in the Belgian official journal on 19 July 1961 and the Convention acquired force of law in Belgium as from 10 October 1961. The provisions of the Arrest Convention have not been incorporated in the Loi Maritime Belge, but rather in chapter VII of the Code Judiciaire titled "La saisie conservatoire sur les navires et bateaux".

Article 1467 of the Code Judiciaire provides that the judge competent for arrest (*juge de saisies*) may authorise the arrest of ship and article 1395 provides that all applications for arrest shall be made to the *juge de saisies*. It appears, therefore, that only the *juge de saisies* is competent for the arrest of ships.

##### *Caribbean Jurisdictions*<sup>5</sup>

In most Caribbean jurisdictions there is still in force the English Administration of Justice Act 1956.<sup>6</sup> Only courts are competent on all matters pertaining to the arrest of ships. Arbitral tribunals have no such power.

---

<sup>4</sup> Information on Belgian law has been kindly provided by Professor Benoît Goemans, founding partner of Goemans, De Scheemaecker Advocaten, benoit.goemans@GDSadvokaten.be.

<sup>5</sup> Information on the law in the Caribbean jurisdictions has been kindly provided by Mr. Rupert Steer, Solicitor (England & Wales), Director, Cariconsult International Limited, cconsult@caribsurf.com.

<sup>6</sup> For further particulars on the position in the English Caribbean jurisdictions see F. Berlingieri, *Arrest of Ships*, *supra* note 3, p. 34.

### *China-Hong Kong*<sup>7</sup>

With letter dated 4 June 1997 the Embassy of the People's Republic of China in Belgium informed the Minister of Foreign Affairs of Belgium that the 1952 Arrest Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. The position in Hong Kong is similar to that in England, since the High Court Ordinance contains rules on arrest based on those of the English Senior Courts Act 1981.<sup>8</sup> Pursuant to its section 12A only the Court of First Instance has jurisdiction in respect of arrest of ships. Section 20(1) of the Arbitration Ordinance provides that article 8 of the UNCITRAL Model Law on International Commercial Arbitration has effect and subsection (6) so provides:

(6) In the case of Admiralty proceedings:

(a) the reference of the parties to arbitration and an order for the stay of those proceedings may, despite subsections (1) and (5), be made conditional on the giving of security for the satisfaction of any award made in the arbitration; or

(b) if the court makes an order under subsection (5) staying those proceedings, the court may (where property has been arrested, or bail or other security has been given to prevent or obtain release from arrest, in those proceedings) order that the property arrested, or the bail or security given, be retained as security for the satisfaction of any award made in the arbitration.

Section 45 then provides for the Court's power to grant interim measures upon application by a party, such measures being those set out in article 17 of the UNCITRAL Model Law, in which under paragraph (2)(c) reference is made to the provision of any means of preserving assets out of which a subsequent award may be satisfied.

---

<sup>7</sup> Information on the law in force in Hong Kong has been kindly provided by Mr. Ernest Yang, Partner DLA Piper Hong Kong, [ernest.yang@dlapiper.com](mailto:ernest.yang@dlapiper.com).

<sup>8</sup> For further information see F. Berlingieri, *Arrest of ships*, *supra* note 3, p. 30.

### *Croatia*<sup>9</sup>

Croatia succeeded on 8 October 1991 to Yugoslavia, that had given the force of law to the Convention. The exclusive power of courts to issue orders of arrest of ships is implied in section 16 of the Arbitration Act 2001, pursuant to which in the absence of other stipulations by the parties, the arbitral tribunal may order any of the parties to adopt the measures the tribunal will consider to be required in respect of the dispute and if the party to whom the order is given does not comply the other party may apply to the competent court for the enforcement of the order of the arbitral tribunal. The general power of the courts in respect of arrest of ships is set out in article 951 of the Maritime Code 2004.<sup>10</sup>

### *Denmark*<sup>11</sup>

Most of the provisions of the Convention have been incorporated into the Danish Maritime Code. The rules on arrest of ships are contained in articles 91–96 of that code. They supplement the general rules on arrest contained in articles 627–640 of the Administration of Justice Act. Competent for the issuance of orders of arrest is the department of the courts called “Fogedretten” (Bailiff’s Court). Although there is no express provision to the effect that only courts may order arrest of ships, there is no doubt that that is the case and that consequently arbitral tribunals are not competent. Therefore in connection with a dispute that must be settled by arbitration the party that wants to arrest a ship must apply to the competent court and then must within seven days sue the owner in order to obtain the

---

<sup>9</sup> Information on Croatian law has been kindly provided by Dr. Marija Pospisil Miler, PhD, Lecturer of Maritime Law at Faculty of Law, University of Rijeka, [mpmiller@pravri.hr](mailto:mpmiller@pravri.hr).

<sup>10</sup> Article 951(1) so provides (translation by Dr. Marija Pospisil Miler):

Prior to commencement or during the course of the court proceedings or of the administrative proceedings the court may, for the purpose of securing the monetary claim of the claimant, order on the request of the claimant any provisional measure by which the purpose of securing the claim may be achieved, including the prohibition of selling or otherwise disposing of the ship by taking the ship into custody or by arresting the ship in accordance with the provisions of the Enforcement Proceedings Act, unless otherwise stipulated by this Code.

<sup>11</sup> Information on Danish law has been kindly provided by Mr. Bent Nielsen, [bn@helsinghus.dk](mailto:bn@helsinghus.dk).



validation of the arrest.

*Egypt*<sup>12</sup>

In Egypt the Convention was given the force of law by the Act of the Council of Ministers No. 135 of 1955, pursuant to a decree of the President of the Republic of 17 February 1954. Egypt has adopted, with certain modifications, the UNCITRAL Model Law on International Commercial Arbitration in its original 1985 text and even if its article 17 is less specific than that of the revised 2006 edition of the Model Law, nevertheless it empowers the arbitral tribunal "to order any party to take such interim measure of protection the arbitral tribunal may consider necessary"; that rule has been deemed to imply the power of the tribunal to issue orders of arrest, including arrest of ships. The question whether when the 1952 Arrest Convention applies the power of arrest of the arbitral tribunal may still be exercised does not appear to have been considered yet by the courts.

*Finland*<sup>13</sup>

Finland has given effect to the Convention by incorporating most of its provisions into its Maritime Code. Pursuant to chapter 7, § 1 of the Code of Judicial Procedure only courts may order the arrest of a ship.

*France*<sup>14</sup>

The Convention has been enacted into the French legal system through its publication by Decree of 4 January 1958, No. 14. However it does not appear to be settled whether the Convention or the domestic law of 3 January 1967, supplemented by a decree of 27 October 1967, applies in

---

<sup>12</sup> Information on Egyptian law has been kindly provided by Dr. Nader Ibrahim, Associate Professor of Commercial and Maritime Law, Associate Dean for Research and Graduate Studies, College of International Transport & Logistics, Arab Academy for Science, Technology and Maritime Transport, Alexandria, nader.ibrahim@yahoo.com.

<sup>13</sup> Information on Finnish law has been kindly provided by Professor Peter Wetterstein, Dr. iur., Professor of Private Law, Director of the Institute of Maritime and Commercial Law, Åbo Akademi University, peter.wetterstein@abo.fi.

<sup>14</sup> Information on French law has been kindly provided by Prof. Pierre Bonassies, pierre.bonassies@wanadoo.fr.

respect of ships flying the flag of non Contracting States.<sup>15</sup>

Article XI of the Arbitration Rules of the Chambre Arbitrale Maritime of Paris provides that the arbitrators:

may render any interim procedural award, order any temporary or conservatory measures (including the power to order the hearing of witnesses) which shall be provisionally enforceable if need be; they have the widest powers, even of their own motion, to investigate all matters capable of enabling them to appreciate and decide. They may require the parties to produce the elements of proof they hold.

However the arrest of ships is not included in the “temporary or conservatory measures” mentioned therein since the jurisdiction of French courts in respect of arrest of ships has been confirmed by article 1468 of the Code de Procédure Civile as amended by the Décret No. 2011–48 of 13 January 2011 “portant réforme de l’arbitrage”. That article in fact provides that the arbitral tribunal may order any provisional or conservative measures it will consider advisable but that only the State is competent to order arrests and judicial securities.<sup>16</sup>

#### *Germany*<sup>17</sup>

Pursuant to the ratification of the Convention, approved by law of 21

---

<sup>15</sup> F. Berlingieri, *Arrest of Ships*, *supra* note 3, p. 24. There have been two conflicting judgments of the Cour de Cassation in this respect: a judgment of 26 October 1999, *Flota Mercanta Grancolombiana v. Nireus Navigation Co. Ltd.*, (2000) DMF 709 in favour of the application of the domestic law and a judgment of 30 October 2000, *Petredex Ltd. v. DK Line*, (2000) DMF 1012 that held that only the Convention applies. For a comment see Bonassies, (2002) DMF, Hors-série no. 5 at no. 44 and Bonassies-Scapel, *Droit Maritime*, II ed., 2010, p. 409.

<sup>16</sup> Its wording is as follows: Le Tribunal arbitral peut ordonner aux parties, dans les conditions qu’il détermine et au besoin à peine d’astreinte, toute mesure conservatoire ou provisoire qu’il juge opportune. Toutefois, la juridiction de l’Etat est seule compétente pour ordonner des saisies conservatoires et sûretés judiciaires. Le tribunal peut modifier ou compléter la mesure provisoire ou conservatoire qu’il a ordonnée.

<sup>17</sup> Information on German law has been kindly provided by Dr. Klaus Ramming, Rechtsanwalt, Lebuhr & Puchta, Hamburg, klaus.ramming@lebuhr.de.

June 1972, the provisions of the Convention have acquired the force of law. But the scope of application of its provisions is restricted by § 23 of the Code of Civil Procedure (*Zivilprozess Ordnung*), that makes the arrest of ships conditional to the court being competent to decide on the merits of the case and requires, in respect of ships that do not fly German flag, including, therefore, ships flying the flag of Contracting States, that the person liable for the claim has assets in Germany.<sup>18</sup>

Pursuant to § 1041 of the Code of Civil Procedure the arbitral tribunal may, unless the parties have provided otherwise, issue orders for provisional or protective measures (that include arrest), but such orders are not enforceable unless their enforceability is declared by a court.<sup>19</sup> However the power of arbitral tribunals to issue orders of arrest is not exclusive, since pursuant to § 1033 the courts also remain competent to issue orders of arrest either before or after the commencement of arbitral proceedings.<sup>20</sup> The question whether these provisions, that have been enacted in 1997, are applicable also when the arrest of a ship is subject to the 1952 Arrest Convention has not yet been considered by the courts, but is it likely that their application should be restricted to situations in which the arrest is not subject

---

<sup>18</sup> F. Berlingieri, *Arrest of Ships*, *supra* note 3, p. 24.

<sup>19</sup> Para. 1041 of the *Zivilprozess-Ordnung* so provides:

§ 1041 Maßnahmen des einstweiligen Rechtsschutzes

(1) Haben die Parteien nichts anderes vereinbart, so kann das Schiedsgericht auf Antrag einer Partei vorläufige oder sichernde Maßnahmen anordnen, die es in Bezug auf den Streitgegenstand für erforderlich hält. Das Schiedsgericht kann von jeder Partei im Zusammenhang mit einer solchen Maßnahme angemessene Sicherheit verlangen.

(2) Das Gericht kann auf Antrag einer Partei die Vollziehung einer Maßnahme nach Absatz 1 zulassen, sofern nicht schon eine entsprechende Maßnahme des einstweiligen Rechtsschutzes bei einem Gericht beantragt worden ist. Es kann die Anordnung abweichend fassen, wenn dies zur Vollziehung der Maßnahme notwendig ist.

(3) Auf Antrag kann das Gericht den Beschluss nach Absatz 2 aufheben oder ändern.

<sup>20</sup> Para. 1033 of the *Zivilprozess-Ordnung* so provides: § 1033 Schiedsvereinbarung und einstweilige gerichtliche Maßnahmen Eine Schiedsvereinbarung schließt nicht aus, dass ein Gericht vor oder nach Beginn des schiedsrichterlichen Verfahrens auf Antrag einer Partei eine vorläufige oder sichernde Maßnahme in Bezug auf den Streitgegenstand des schiedsrichterlichen Verfahrens anordnet.

to the Convention.

*Greece* <sup>21</sup>

The Convention has acquired the force of law pursuant to its ratification.

Arrest of a ship as security for a claim may be ordered by the competent court on the petition of the claimant in accordance with the provisions of the Code of Civil Procedure (articles 682, 691, 709, 713). Pursuant to article 691 upon filing the petition the court may, on its own motion or following a request by the claimant, issue a provisional order, which remains in force until the issuance of the final decision. Such provisional order is issued with a view to preserving the actual and legal status of the debtor's ship.

In so far as the power of arbitral tribunals to order the arrest of ships is concerned, the position differs according to whether the arbitration is national or international. In the first case, where Greek law applies on the merits and the proceedings are governed by the Greek Code of Civil Procedure (art. 867–903), pursuant to article 889(1) the arbitral tribunal does not have the authority to order, revoke or reform “security measures” nor does it have such power prior to and in the course of the arbitral proceedings. In the second case instead, in which the arbitral proceedings are governed by law 2735/1999, pursuant to its article 17(1) unless the parties to the arbitration have agreed otherwise the arbitral tribunal has concurrent jurisdiction with the ordinary courts to order any security measure it deems necessary in relation with the subject matter of the arbitration. However, the enforcement of a decision of an arbitral tribunal must be requested by the interested party to the competent court. The power of an arbitral tribunal to order the arrest of property is only limited to

---

<sup>21</sup> Information on Greek law has been kindly provided by Professor Anthony Antapassis, Professor Emeritus of Commercial Law in the Faculty of Law of the University of Athens and an advocate to the Hellenic Supreme Court, Phd of Law Faculty of Athens with distinction (1976), antalblaw@ath.forthnet.gr.

property owned by a party of the arbitral proceedings, because its power arises out of the arbitration agreement. In any case, and as provided in article 9 of the above law, ordinary courts are always competent to order security measures related to the subject matter of the arbitration either before the commencement or during the course of the arbitral proceedings and if an issue is raised in respect of the power of the court, it is the court that is competent to decide.

The right of arrest may not however be the subject of an arbitration agreement. Article 685 of the Code of Civil Procedure provides in fact that “no arbitration agreement is valid in cases concerning security measures”, and, therefore, it is not permissible to the parties to submit to the decision of an arbitral tribunal whether one of them is entitled to arrest a ship owned by the other.

#### *Ireland*

Ireland has given the force of law to the Convention with the Jurisdiction of Courts (Maritime Conventions) 1989.

Under Irish Law an arbitrator has no power to order the arrest of a ship. An application must be made to the court, which can be done on an ex-parte basis, but must make clear that arbitration proceedings have commenced and that the arrest warrant sought is for the purposes of detaining a ship as security for any decision given by the arbitral tribunal.

In order to seek the arrest of a ship, an application must be made to the Irish High Court of Admiralty, who has the power to order the detention of a ship under Order 64 of the Rules of the Superior Courts, as long as that ship is within Irish territorial waters and the procedure for the arrest has been adhered to. It is within the court's power to arrest a ship pending the outcome of an arbitration. The court's jurisdiction in admiralty proceedings (*in rem*) to order a ship's arrest arises from a claim in relation to any matter covered under article 1(1) of the 1952 Arrest Convention.

#### *Italy*

Italy has enacted the Convention into its legal system through an order of execution and therefore the Convention has the force of law. The absence of

jurisdiction of arbitral tribunals in respect of the arrest of any asset, including ships, is confirmed by article 818 of the Code of Civil Procedure (CCP) that so provides:

818. *Protective measures.* Arbitrators cannot grant arrests, nor other protective measures, save a different statutory rule.

and no different rule exists in Italian law.

Article 25 of the Arbitration Rules of the Chamber of National and International Arbitration of Milan so provides in its paragraph 2:

2. The Arbitral Tribunal may issue urgent and interim measures of protection, also of an anticipatory nature, that are not prohibited by mandatory provisions applicable to the proceedings.

and therefore article 818 is such a mandatory rule.

*Netherlands* <sup>22</sup>

The Convention has been implemented by giving it force of law. Pursuant to article 94 of the Constitution its provisions supersede those of the domestic law in case of conflict. No conflict however exists, since article 700 of the Code of Civil Procedure provides that in order to effect the arrest or attachment of any property leave is required from the injunction judge of the court within whose district the property is located.

*Nigeria* <sup>23</sup>

Under the Nigerian Admiralty Jurisdiction Act 1991 only the Federal High Court can order the arrest of a ship. If an arrest has been obtained before the arbitral proceedings are commenced, the Court is entitled by section 10 of the Act to stay proceedings and refer the parties to arbitration. The Court, however, will retain control over the arrested ship or over the security provided for its release.

---

<sup>22</sup> Information on Dutch law has been kindly provided by Mr. Taco van der Valk, President of the Netherlands Maritime and Transport Law Association, tvandervalk@akd.nl.

<sup>23</sup> Information on Nigerian law has been kindly provided by Mr. Louis Mbanefo, MA. LL.M (Cantab) B.L (Middle Temple) Senior Advocate of Nigeria, info@mbanefolaw.com.

*Norway* <sup>24</sup>

The Convention has been implemented by means of the incorporation of some of its provisions in the Maritime Code and some others in the Act on Enforcement of Claims<sup>25</sup>. According to general rules<sup>26</sup> courts have jurisdiction over ships and have exclusive competence to order their arrest.

*Poland* <sup>27</sup>

Under Polish law both the courts and the arbitral tribunals may grant protective measures, including arrest. It is not settled, however, whether when the 1952 Convention applies arbitral tribunals may be competent. In any event a practical reason for applying to the court lies on the fact that while an order of arrest issued by a court is immediately enforceable, the enforcement of an order of arrest issued by an arbitral tribunal requires the prior exequatur of the judicial authority and a certain amount of time may elapse prior to the exequatur being obtained.

*Portugal* <sup>28</sup>

The Convention has been enacted in Portugal in its original text through its publication in the Official Journal. In the Portuguese law of procedure there is no general rule restricting to courts the competence for ordering an arrest of a ship. However, Portuguese jurisprudence has always held that only courts have the power to order the arrest of property as a protective measure because every kind of deprivation of the use of one's property is an act of sovereignty and is based on the *jus imperii* of the State. Furthermore, the Portuguese Code of Civil Procedure (CCP) provides that

---

<sup>24</sup> Information on Norwegian law has been kindly provided by Mr. Karl-Johan Gombrii, President of the Comité Maritime International, kjgombrii@nordisk.no.

<sup>25</sup> For further information see F. Berlingieri, Arrest of Ships, *supra* note 3, p.31.

<sup>26</sup> Arrest of assets is governed by sections 33–2 to 33–10 of the Dispute Act of 17 June 2005.

<sup>27</sup> Information on Polish law has been kindly provided by Dr. Krzysztof Kochanowski, Polish Maritime Law Association, kris@mar-consult.com.

<sup>28</sup> Information on Portuguese law has been kindly provided by Adv. Alexandra von Bohm-Amolly, lawyer belonging to the group AMYA Law Firm and practicing at the Lisbon office as a senior partner, LL.M. in Public Law (Lisbon University) and a graduation in Maritime Business, alecky@mail.telepac.pt.

the rules governing pledge — and all other rules referring to the executive procedure are applicable to arrest and since executive proceedings are restricted to State courts, every similar proceeding should be equally restricted to courts. The definition of arrest in article 406 CCP as the right of judicial apprehension of property<sup>29</sup> confirms this. There is also a practical reason for the restriction of the jurisdiction on arrest to courts: only courts may enforce an arrest of private property.

### *Russian Federation*

The rules of the Merchant Shipping Code of 1999 on arrest of ships are based on the 1999 Arrest Convention and pursuant to article 388 the power of arrest is granted both to the courts and the arbitral court or arbitral tribunal. Article 12(1) of the Rules of the Maritime Arbitration Commission instituted by law of 7 July 1993 so provides:

At the request of a party the arbitral tribunal may order any party to take such interim measures of protection in respect of the subject matter of the dispute as it considers necessary.

### *Slovenia* <sup>30</sup>

Article 945 of the Maritime Code provides that provisional measures in respect of ships, including arrest, may be authorised by the court prior to and during a civil or administrative procedure. Although arbitration is not expressly mentioned, it appears that it is impliedly included and, therefore, arbitral tribunals have no jurisdiction in respect of such provisional measures.

---

<sup>29</sup> Article 406 CCP so provides:

1. O credor que tenha justificado receio de perder a garantia patrimonial do seu crédito pode requerer o arresto dos bens do devedor.
2. O arresto consiste numa apreensão sudicia de bens, à qual são aplicáveis as disposições relativas à penhora, em tudo quanto não contrariar o perfeitado nesta subsecção.

<sup>30</sup> Information on Slovenian law has been kindly provided by Dr. Mitja Grbec, LL. M., Private Consultant and Lecturer at the Faculty of Maritime Studies and Transportation (University of Ljubljana), President of the Maritime Law Association of Slovenia, mitja.grbec@gmail.com.



### Sweden<sup>31</sup>

Sweden has enacted the Convention by enacting in part its provisions in Law 1993:103 on Arrest of Ships. Only courts are competent in respect of arrest of ships.

### United Kingdom-England and Wales

The 1952 Arrest Convention, when ratified, was not given the force of law in England and Wales, in Scotland and in Northern Ireland.<sup>32</sup> In England and Wales certain provisions of the Convention have been enacted in the Supreme Court Act 1981, now renamed Senior Courts Act 1981. Such provisions consist mainly of article 1(1) and article 3. The relevant provision of the Act is s. 21 that regulates the jurisdiction of the High Court in respect of actions *in personam* and *in rem* and in so far as actions *in rem* are concerned, sets out the cases in which such action may be brought against a ship. It appears, therefore, that arrest of a ship is only conceivable in connection with proceedings in Admiralty and the connection with arbitration proceedings has materialized when a claimant has begun two proceedings, an action *in rem* in which a ship of the defendant is arrested and arbitration proceedings under the arbitration clause in the contract with the owners of the ship. The problem that has arisen is whether the court action should be stayed and the ship or the security given consequently released. Such problem was considered by the Admiralty Court in three cases, all decided by Brandon J. (as he then was). In the first, *The Cap Bon*,<sup>33</sup> Brandon J., after having stated that there was a long line of authorities to the effect that the bringing of two sets of

---

<sup>31</sup> Information on Swedish law has been kindly provided by Professor Johan Schelin, Associate Professor at the Axel Ax:son Johnson Institute for Maritime and Transport Law, Department of Law, Stockholm University, johan.schelin@juridicum.su.se.

<sup>32</sup> It has been held, however, in *The "Nordglint"* [1987] 2 Lloyd's Rep. 470, at p. 479 that an English Court, in applying the terms of the Civil Jurisdiction and Judgments Act 1982 and the 1968 Jurisdiction Convention to English proceedings must have regard to the full terms of the jurisdiction which has been recognized as being possessed by the United Kingdom Courts in the 1952 Arrest Convention.

<sup>33</sup> [1967] 1 Lloyd's Rep. 543.

proceedings in respect of the same matter was *prima facie* vexatious, held that unless the plaintiffs served a statement of claim within 21 days, the action would stand dismissed and the bail released. In the second, *The Golden Trader*,<sup>31</sup> the basis of his decision was similar: he in fact held<sup>35</sup> that the Court had no jurisdiction to keep the ship under arrest in order to provide the charterers with security for an award in the arbitration. It is interesting to note that he considered the provisions in article 7(2) of the 1952 Arrest Convention<sup>36</sup> and after the analysis of the authorities came to the conclusion<sup>37</sup> that the method adopted by article 7 (called "retention method") was at that time not available. But then in the third case, *The "Rena K"*,<sup>38</sup> he held that there was nothing in the Arbitration Act 1975 which obliges the Court, whenever it grants a stay of an action *in rem* in which security has been obtained, to make an order for the unconditional release of such security and that it was a matter for the discretion of the Court what order it should make with regard to such security.

---

<sup>31</sup> [1974] 1 Lloyd's Rep. 378.

<sup>35</sup> At p. 556.

<sup>36</sup> He so stated (at p. 381):

The domestic law of this country intended to give effect to the 1952 Arrest Convention is the 1956 Act, (see *The Banco* [1971] p. 137; [1971] 1 Lloyd's Rep. 49). By that Act the High Court in England was given jurisdiction on the merits in respect of every claim which is a maritime claim under the Convention, (see art. 1 of the Convention and s. 1(1) of the 1956 Act). The result of that is that there cannot at present be any case in which, where a ship has been arrested in the Admiralty Court in respect of a maritime claim, that Court will not also have jurisdiction on the merits, and it follows that there can never at present be a case where it will be appropriate to use the procedure contemplated by par. (2) of art. 7, even if such procedure were available. Whether that will still be the situation when and if effect is given by domestic legislation to the European Judgment Convention, 1968, remains to be seen.

There is, however, nothing in the 1956 Act, or the general law of England, to prevent parties from agreeing to submit the disputed maritime claim to the jurisdiction of a foreign Court or to arbitration. It follows, that there can readily be cases of which the present one is an example, in which the use of the procedure contemplated by pars. (3) and (4) of art. 7 would be appropriate, if it were available. The question, however, is whether under English law as it has developed until now, that procedure is available for use in such cases. In order to answer that question it is necessary to examine the authorities which I shall now do.

<sup>37</sup> At p. 384.

<sup>38</sup> [1978] 1 Lloyd's Rep. 545.

The opinion of Brandon J. was not approved by the Court of Appeal in "*The Vasso*"<sup>39</sup> in which Goff L.J. (as he then was) so stated:

However, on the law as it stand at present, the Court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings.

The matter has now been settled by the Arbitration Act 1996 which so provides in its s.11:

(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest:

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

## **2.5. The position in States parties to the 1999 Arrest Convention and in States that have adopted its provisions in their domestic laws**

Of the ten States parties to the 1999 Convention<sup>40</sup> reference will be made below to Spain. Since, however, the provisions of the 1999 Convention have been enacted, with minor changes, in China, in the States parties to the Comunidad Andina (Bolivia, Columbia, Ecuador and Peru), in Turkey and in Venezuela, reference will also be made in this section, in addition to Spain, to China, Peru and Turkey.

---

<sup>39</sup> [1984] 1 Lloyd's Rep. 235.

<sup>40</sup> *Supra*, note 3.

## Spain<sup>41</sup>

Spain has implemented the Convention through its publication in the Spanish Official Journal and, therefore, the Convention has the force of law. Within its scope of application only courts have jurisdiction for the arrest of ships. Although Spain has made the reservation, permitted by article 10 (1) (b), to exclude the application of the Convention to ships not flying the flag of a State Party, it appears that, according to the majority opinion, the reservation is not automatically implemented unless an ad hoc provision is adopted. In any event notwithstanding such reservation a Decree-Law has been issued on 26 August 2011 pursuant to which a new article has been added in the *Disposiciones Finales* of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) that provides for the application of the Convention also in respect of ships of non-Contracting States.<sup>42</sup>

The jurisdiction of courts in respect of provisional measures, generally stated in article 22(5) of the Spanish Ley Organica del Poder Judicial,<sup>43</sup> is confirmed by the provisions of the Law of Civil Procedure. Article 722,

---

<sup>41</sup> Information on Spanish law has been kindly provided by Professor Manuel Alba Fernández, Associate Professor of Commercial Law, Private Law Department, Carlos III University of Madrid, malba@der-pr.uc3m.es.

<sup>42</sup> Such article so provides:

Disposición final vigésima sexta. Embargo preventivo de buques.

1. La medida cautelar de embargo preventivo de buques se regulará por lo dispuesto en el Convenio Internacional sobre el embargo preventivo de buques, hecho en Ginebra el 12 de marzo de 1999, por lo dispuesto en esta disposición y, supletoriamente, por lo establecido en esta ley.

Lo dispuesto en el Convenio Internacional sobre el embargo preventivo de buques, hecho en Ginebra el 12 de marzo de 1999 y en esta disposición se aplicará también a los buques que enarbolan pabellón de un Estado que no sea parte en dicho Convenio.

2. Para decretar el embargo preventivo de un buque bastará que se alegue el crédito reclamado y la causa que lo motive. El tribunal exigirá en todo caso fianza en cantidad suficiente para responder de los daños, perjuicios y costas que puedan ocasionarse.

3. Hecho el embargo, la oposición sólo podrá fundarse en el incumplimiento de los requisitos previstos en el Convenio Internacional sobre el embargo preventivo de buques.

<sup>43</sup> Article 22 of the Ley Organica so provides in its relevant part:

En el orden civil, los Juzgados y Tribunales españoles serán competentes:

5. Cuando se trate de adoptar medidas provisionales o de aseguramiento respecto de personas o bienes que se hallen en territorio español y deban cumplirse en España.

which is part of the general rules applicable to the *medidas cautelares* (provisional measures), regulates such measures when requested, in connection with arbitral proceedings, prior to the commencement of and during such proceedings and provides that a request may be made to the court both when the arbitration takes place in Spain and abroad.<sup>44</sup> However pursuant to article 23 of the Ley de Arbitraje (Arbitration Law) of 2003 unless otherwise agreed by the parties the arbitral tribunal may, on request of one of the parties, adopt the provisional measures it deems necessary in connection with the subject matter of the dispute, but competent for the enforcement of such measures is the court, to which the parties may directly address their request. The position is clarified in the last paragraph of Part V of the *Exposición de Motivos*.<sup>45</sup>

---

<sup>44</sup> Article 722 so provides:

Medidas cautelares en procedimiento arbitral y litigios extranjeros.

Podrá pedir al Tribunal medidas cautelares quien acredite ser parte de convenio arbitral con anterioridad a las actuaciones arbitrales. También podrá pedir las quien acredite ser parte de un proceso arbitral pendiente en España; o, en su caso, haber pedido la formalización judicial a que se refiere el artículo 15 de la Ley 60/2003, de 23 de diciembre, de Arbitraje; o en el supuesto de un arbitraje institucional, haber presentado la debida solicitud o encargo a la institución correspondiente según su Reglamento.

Sin perjuicio de las reglas especiales previstas en los Tratados y Convenios o en las normas comunitarias que sean de aplicación, también se podrá solicitar de un Tribunal español por quien acredite ser parte de un proceso jurisdiccional o arbitral que se siga en un país extranjero la adopción de medidas cautelares si se dan los presupuestos legalmente previstos salvo en los casos en que para conocer del asunto principal fuesen exclusivamente competentes los Tribunales españoles.

<sup>45</sup> The following statement is made in the last paragraph of Part V of the *Exposición de Motivos*:

El artículo 23 incorpora una de las principales novedades de la Ley: la potestad de los árbitros para adoptar medidas cautelares. Dicha potestad puede ser excluida por las partes, directamente o por remisión a un reglamento arbitral; pero en otro caso se considera que la aceptan. La Ley ha considerado preferible no entrar a determinar el ámbito de esta potestad cautelar. Obviamente, los árbitros carecen de potestad ejecutiva, por lo que para la ejecución de las medidas cautelares será necesario recurrir a la autoridad judicial, en los mismos términos que si de un laudo sobre el fondo se tratara. Sin embargo, si dentro de la actividad cautelar cabe distinguir entre una vertiente declarativa y otra ejecutiva, esta Ley les reconoce a los árbitros la primera, salvo acuerdo en contrario de las partes. Esta Norma no deroga ni restringe la posibilidad, prevista en los artículos 8 y 11 de esta Ley y en la Ley de Enjuiciamiento Civil, de que la parte interesada inste de la autoridad judicial la adopción de medidas cautelares. Las potestades arbitral y judicial en materia cautelar son alternativas y concurrentes, sin perjuicio del juego del principio de buena fe procesal.

*China*<sup>46</sup>

China, although not a party to the Arrest Conventions, has enacted most of the rules of the 1999 Convention in its Special Maritime Procedure Law of 25 December 1999, article 14 of which so provides:

Preservation of a maritime claim shall not be affected by a jurisdiction or arbitration agreement between the parties to an action in respect of a maritime claim.

Therefore the court within whose jurisdiction the ship is at the relevant time will be competent for the arrest even if the jurisdiction on the merits of the claim pertains to a foreign court or an arbitral tribunal. This provision is very similar to that in article 7(3) of the 1952 and of the 1999 Arrest Conventions.

The exclusive jurisdiction of the courts in respect of protective measures, including arrest is confirmed by the Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC), as amended, and by the Arbitration Rules of the China Maritime Arbitration Commission (CMAC). Article 21(1) of the CIETAC Arbitration Rules so provides:

Where a party applies for conservatory measures pursuant to the laws of the People's Republic of China, the secretariat of CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law.

Article 23 of the CMAC Arbitration Rules so in turn provides:

When a party applies for preservation of a maritime claim or preservation of other property, the Arbitration Commission shall submit the party's application to the maritime court or other people's court at the place of the respondent's domicile or at the place where the property is located. Where a party applies for preservation of a maritime claim or

---

<sup>46</sup> Information on Chinese law has been kindly provided by Mr. Henry Hai Li, Senior Partner of Henry & Co. Law Firm, Vice-President of China Maritime Law Association, professor at Dalian Maritime University, [henryhaili@yahoo.com.cn](mailto:henryhaili@yahoo.com.cn).

preservation of other property before commencement of arbitration proceedings, he shall, according to the provisions of the Special Maritime Procedure Law of the People's Republic of China or other relevant provisions, submit the application directly to the maritime court or other people's court at the place of the property subject to preservation.

The above provisions are in line with article 28 of the China Arbitration Law which came into force on 1<sup>st</sup> September 1995, that so provides:

If a party applies for property preservation, the Arbitration Commission shall submit the party's application to the People's Court in accordance with the relevant provisions of the Civil Procedure Law.

Of course the decision on the merits will be made by the arbitral tribunal on the basis of the applicable law.<sup>47</sup>

*Peru*<sup>48</sup>

The new Peruvian Arbitration Law, adopted by Legislative Decree No. 1071 published on 28 June 2008 and entered into force on 1 September 2008 gives generally to the arbitral tribunal authority to issue provisional

---

<sup>47</sup> Article 18 of the new Chinese law on the law applicable to foreign related matters adopted on 28 October 2010 and entered into force on 1 April 2011 provides that the parties to an arbitration agreement may chose the law applicable to the disputes subject to arbitration. However article 4 provides that mandatory provisions of Chinese law prevail in case of conflict. The above provisions are quoted below:

Article 4. If there are mandatory provisions on foreign-related civil relations in the laws of the People's Republic of China, these mandatory provisions shall directly apply.

第4条 中华人民共和国法律对涉外民事关系有强制性规定的,直接适用该强制性规定。

Article 18. The parties concerned may choose the laws applicable to arbitral agreement by agreement. If the parties do not choose, the laws at the locality of the arbitral authority or of the arbitration shall apply.

第18条 当事人可以协议选择仲裁协议适用的法律。当事人没有选择的,适用仲裁机构所在地法律 或者仲裁地法律。

<sup>48</sup> Information on Peruvian law has been kindly provided by Mr. Percy Urday, Lawyer, LL. M. (London), purday@murdayab.com

protective measures<sup>49</sup> upon application of the parties to the arbitration proceedings. Pursuant to article 47(4) of that law prior to the constitution of the arbitral tribunal petitions for interim reliefs may be submitted to a court, but the party who has applied for such relief must commence arbitration proceedings within ten days. Once the arbitral tribunal is constituted any of the parties may apply for the transfer of the file to the arbitral tribunal.<sup>50</sup>

However all rules of the 1999 Arrest Convention have been incorporated into Decisión No. 487 of the Comunidad Andina of which Peru is a member, the other members being Bolivia, Columbia and Ecuador, and article 37 of the Decisión so provides:

37. Sólo se podrá embargar un buque o levantar su embargo por resolución de un tribunal de un País Miembro en el que se haya practicado el embargo.

This provision, which is similar to that in article 2(1) of the 1999 Arrest Convention, impliedly excludes the jurisdiction of arbitral tribunals on arrest of ships and in view of the special character of the Decisión, it appears that its provisions prevail over those of the general Arbitration Law.

---

<sup>49</sup> The term used by the law is "medida cautelar" which is defined in article 47(2) of the law. From the definition it appears that arrest is included. Article 47(2)(c) in fact includes the *medidas cautelares* "que proporcione algún medio para preservar bienes que permitan ejecutar el laudo subsiguiente".

<sup>50</sup> Article 47(5) of the Arbitration law so provides:

Constituido el tribunal arbitral, cualquiera de las partes puede informar a la autoridad judicial de este hecho y pedir la remisión al tribunal del expediente del proceso cautelar. La autoridad sudicia está obligada, bajo responsabilidad, a remitirlo en el estado en que se encuentre, sin perjuicio de que cualquiera de las partes pueda presentar al tribunal arbitral copia de los actuados del proceso cautelar. La demora de la autoridad judicial en la remisión, no impide al tribunal arbitral pronunciarse sobre la medida cautelar solicitada, dictada o impugnada. En este último caso, el tribunal arbitral tramitará la apelación interpuesta bajo los términos de una reconsideración contra la medida cautelar.



### Turkey <sup>51</sup>

Until the entry into force of the new Commercial Code on 1 July 2012, pursuant to article 6 of the International Arbitration Act No. 4686 of 21 June 2001 an arbitral tribunal has authority to issue orders of arrest. However arrest of ships by an arbitral tribunal will no longer be permitted when the new Commercial Code (CC) will enter into force, for its article 1354, which is based on article 2(3) of the 1999 Arrest Convention, provides that courts have exclusive jurisdiction in respect of arrest of ships and article 1356 eliminates any possible uncertainty by stating that courts have jurisdiction also if by virtue of a jurisdiction or arbitration clause in any relevant contract, or otherwise, the maritime claims in respect of which the arrest is requested is to be adjudicated in a State other than that in which the arrest is to be effected or is to be subject to arbitration. Nor will there be a possible conflict between article 1354 CC and article 414 of the new Code of Civil Procedure that came into force on 1 October 2011, pursuant to which arbitral tribunals have the power to issue injunctions and provide for evidence conservation, for that rule does not specifically mention arrest and, therefore, the specific rule in article 1354 CC will prevail.

### Venezuela <sup>52</sup>

Article 92 of the *Ley de comercio marítimo*, in which almost all provisions of the 1999 Arrest Convention have been incorporated, defines arrest of ships as “toda inmovilización... impuesta como medida cautelar per resolución d’un tribunal de la jurisdicción especial acuática” ( any immobilization ... imposed as provisional measure pursuant to a decision of the Special Aquatic Jurisdiction). Although that provision appears to entail that if the merits of a dispute are submitted to arbitration, a warrant of arrest

---

<sup>51</sup> Information on Turkish law has been kindly provided by Dr. Kerim Atamer, Dr. iur. (Hamburg 1999), Director of the Dr. Nusret-Semahat Arsel Research Center for International Business Law and Associate Professor for Maritime, Insurance and Transport Law at the Koc University; e-mail: katamer@ku.edu.tr.

<sup>52</sup> Information on Venezuelan law has been kindly provided by Dr. Wagner Ulloa, Lawyer, Matheus & Ulloa, Abogados, wagner.ulloa@matheus-ulloa.net.

may be issued only by a tribunal of the Jurisdicción Acuática, pursuant to article 26 of the Ley de Arbitraje Comercial the arbitral tribunal has the power to arrest the subject matter of the litigation.<sup>53</sup> However the arbitral tribunal may not enforce the protective measures and must for that purpose seek the assistance of the court.<sup>54</sup>

## **2.6. The position in some States not parties to either the 1952 or the 1999 Arrest Convention**

### *Argentina*<sup>55</sup>

Pursuant to article 753 of the Código Procesal Civil y Comercial de la Nación the arbitral tribunals are not allowed to order interim protective measures.<sup>56</sup> The rules on the arrest of ships are set out in the Código de Comercio and competent for the issuance of a warrant of arrest is the Federal Court in whose jurisdiction the ship must be arrested.

### *Australia*<sup>57</sup>

Although Australia is not a party to the Arrest Convention 1952, or indeed 1999, it has an Admiralty Act 1988 which is based on the Arrest Convention 1952. That gives a right to arrest ships for claims that come

---

<sup>53</sup> Article 26 so provides:

Salvo acuerdo en contrario de las partes, el tribunal arbitral podrá dictar las medidas cautelares que considera necesarias respect del objeto en litigio.

<sup>54</sup> Article 28 of the Ley de Arbitraje Comercial so in fact provides:

El tribunal o cualquiera de las partes con aprobación del tribunal arbitral podrá pedir asistencia al tribunal de primera instancia competente para la evacuación de las prueba necesarias y para la ejecución de las medidas cautelares que se soliciten. El tribunal atenderá dicha solicitud dentro del ámbito de su competencia y del conformidad con las normas que le sean aplicables.

<sup>55</sup> Information on Argentinean law has been kindly provided by Dr. Alberto Cappagli, Lawyer, President of the Argentine Maritime Law Association, Partner of Marval, O'Farrell & Mairal ACC@marval.com.ar.

<sup>56</sup> Article 753 of the Code so provides:

753. *Medidas de ejecución.* Los árbitros no podrán decretar medidas compulsorias, ni de ejecución, Deberán requerirlas al juez y éste deberá prestar el auxilio de su jurisdicción para la más rápida y eficaz sustanciación del proceso arbitral.

<sup>57</sup> Information on Australian law has been kindly provided by Mr. Stuart Hetherington, Partner of Colin Biggers & Paisley, swl@cbp.com.au.

within the descriptions in section 4(2) of a “proprietary maritime claim” or in section 4(3) of a “general maritime claim”, both of which largely replicate article 1(1) of the 1952 Arrest convention, although there are some additional claims identified, such as claims for the enforcement of an arbitral award, claims for an insurance premium or a mutual insurance call, and claims for interest in respect of any of the other claims identified in those two subsections.

Pursuant to section 10 jurisdiction in respect of Admiralty actions *in rem* is conferred on the Federal Court and on the Supreme Courts of the Territories and pursuant to section 14 a proceeding shall not be commenced as an action *in rem* against a ship or other property except as provided in the Act. These provisions indicate quite clearly, therefore, that arbitral courts have no power to arrest a ship.

That is confirmed by section 29, pursuant to which in circumstances in which a ship is arrested but the claim which gives rise to the arrest is one which should be determined by arbitration (or by a court of a foreign country), the court may order that the proceedings are stayed on condition that the ship or property be retained by the court as security for the satisfaction of any award or judgment made in an arbitration or a foreign proceeding. A shipowner can of course put up security to enable the ship to be released and that security would then be available to meet any arbitration award or foreign judgment<sup>58</sup>.

---

<sup>58</sup> Section 29(1) so provides:

Where:

(a) it appears to the court in which a proceeding commenced under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Australia or elsewhere) or by a court of a foreign country; and

(b) a ship or other property is under arrest in the proceeding; the court may order that the proceeding be stayed on condition that the ship or property be retained by the court as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.

### *Brazil*<sup>59</sup>

Only courts may order the arrest of ships and, therefore, if during arbitration one of the parties wishes to seek security by arresting a ship, an application must be made to the competent court.

### *Canada*<sup>60</sup>

Canada has incorporated in its legislation the Uncitral Model Code on International Commercial Arbitration of 1985. Pursuant to article 17 of that Code an arbitral tribunal has the power to order interim measures of protection but this does not include the power to order the arrest of a ship. Arrest of a ship where the merits of a dispute must be submitted to arbitration should be considered from the standpoint of the arbitral tribunal and from that of the court. As regards the former, article 9 of the Code provides that it is not incompatible with an arbitration agreement for a party to request from a court of competent jurisdiction an interim measure of protection either before or during arbitration proceedings. The arrest of a ship for the primary purpose of obtaining security for arbitration has been held to be permissible in *Atlantic Lines & Navigation Company Inc v. The Ship "Didymi"*,<sup>61</sup> *Frontier International Shipping Corp. v. Tavros (The)*<sup>62</sup> and *Cyber Sea Technologies Inc. v. Underwater Harvester*.<sup>63</sup>

### *Chile*<sup>64</sup>

The position in Chile is peculiar, since pursuant to article 120 of the

---

<sup>59</sup> Information on Brazilian law has kindly been provided by Adv. Walter de Sa Leitao, Petrobras, Rio de Janeiro, [saleitao@petrobras.com.br](mailto:saleitao@petrobras.com.br).

<sup>60</sup> Information on Canadian Law has kindly been provided by Mr. Christopher J. Giaschi, Giaschi & Margolis, [giaschi@AdmiraltyLaw.com](mailto:giaschi@AdmiraltyLaw.com).

<sup>61</sup> [1985] 1 F.C. 240 (T.D.), [1988] Vol. 1, Lloyd's Law Reports, 97.

<sup>62</sup> Canadian Legal Information Institute ( [www.canlii.org/en/ca/fct/doc/1999/1999canlii9389/1999canlii9389.html](http://www.canlii.org/en/ca/fct/doc/1999/1999canlii9389/1999canlii9389.html) ).

<sup>63</sup> Canadian Legal Information Institute ( [www.canlii.org/en/ca/fct/doc/2002/2002fct794/2002fct794.html](http://www.canlii.org/en/ca/fct/doc/2002/2002fct794/2002fct794.html) ). The Federal Court so stated ( in paragraph 23 ): "Returning to an earlier concept, a vessel will not be released from arrest merely because the underlying dispute is being arbitrated. Moreover, the jurisdiction of the court may be invoked primarily to obtain security for arbitration".

<sup>64</sup> Information on Chilean law has been kindly provided by Dr. José Tomás Guzmán Salcedo, Lawyer, Average Adjuster, Professor of Maritime & Insurance Law, [jtomasguzman@jguzmanycia.cl](mailto:jtomasguzman@jguzmanycia.cl).

Código de Comercio all disputes arising out of acts, facts or contracts relating to maritime commerce and navigation, including insurance must be submitted to arbitration.<sup>65</sup> It is settled in Chile that arbitral tribunals have the same status as courts and that arbitrators are public officials. Consequently arbitral tribunals have the power to issue orders of arrest on application of one of the parties to arbitration proceedings,<sup>66</sup> the assistance of the court being only required, pursuant to article 635 of the Code of Civil Procedure, for the enforcement of the order. Only if the claimant wishes to seek the arrest of a ship prior to the commencement of arbitration proceedings, he may, pursuant to article 1207 of the Código de Comercio,<sup>67</sup> apply to a court.<sup>68</sup>

#### *Japan*<sup>69</sup>

Article 2(1) of the Civil Provisional Remedies Act of 22 December 1989 provides that courts have jurisdiction in respect of the issuance of temporary restraining orders and article 6 provides that the jurisdiction of the courts is exclusive. Article 37(1) provides that the court which has

---

<sup>65</sup> Article 120 so provides in its first paragraph:

El conocimiento de toda controversia que derive de hechos, actos o contratos a que dé lugar el comercio marítimo o la navegación, incluidos los seguros marítimos de cualquier clase, será sometido a arbitraje.

<sup>66</sup> An analysis of the status of arbitral tribunals and of their jurisdiction with regard to provisional or protective measures, including arrest of ships has been made by abogado Julio Guzmán Jordán on request of the Cámara de Comercio de Santiago and is published by the Chamber of Commerce under the title "Arbitraje y Medidas Precautorias".

<sup>67</sup> Article 635 of the Código de Procedimiento Civil so provides in its third paragraph:

Sin embargo cuando el cumplimiento de la resolución arbitral exija procedimientos de apremio o el empleo de otras medidas compulsivas, o cuando haya de afectar a terceros que no sean parte en el compromiso, deberá ocurrirse a la justicia ordinaria para la ejecución de lo resuelto.

<sup>68</sup> Article 1207 of the Código de Comercio so provides:

Cuando se soliciten medidas prejudiciales, sean preparatorias, precautorias o probatorias, o retenciones especiales, antes de estar constituido el tribunal arbitral, el interesado podrá ocurrir ante el juzgado competente en materia civil que estuviere de turno o ante el tribunal al que especialmente asignen competencia normas de este Libro. Lo anterior, sin perjuicio de la prosecución del pleito ante el tribunal arbitral previamente designado o que deba designarse para conocer de la controversia, si las partes no hubieren optado por la jurisdicción ordinaria.

<sup>69</sup> Information on Japanese law has been kindly provided by Professor Tomotaka Fujita, Professor of Law, Graduate Schools for Law and Politics, University of Tokyo, tfujita@j.u-tokyo.ac.jp.

issued a temporary restraining order shall, upon request of the obligor or of the obligee, set out a reasonable time limit for the commencement of an action on the merits that, pursuant to article 37(2), may be of two weeks or more. Reference to arbitration is then made in article 37(5) which provides inter alia, that where an arbitral tribunal is competent for the merits, the action is deemed to be commenced when the arbitration proceedings are commenced. Temporary restraining orders include provisional "seizure", regulated in chapter III of the Act and article 48 regulates the "provisional seizure" of ships, which corresponds to arrest or "*saisie conservatoire*".

However interim protective measures may also be issued by an arbitral tribunal. Article 24 of the Arbitration Law of 2003 so in provides:

#### 24. Interim Protective Measures

1. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the tribunal may consider necessary in respect of the subject matter of the dispute.

2. The arbitral tribunal may order any party to provide appropriate security in connection with such measure as prescribed in the preceding paragraph.

But even if an arbitral tribunal is given the power to issue interim protective measures, that does not exclude the jurisdiction of the courts, to which the parties to arbitration proceedings may apply. Article 15 of the Arbitration Law so in fact provides:

#### 15. Arbitration Agreement and Interim Measures by Court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure in respect of any civil dispute which is the subject of the arbitration agreement.

It appears that, although probably arrest of a ship must be deemed to be included in the notion of interim protective measure under article 24 of

the Arbitration Law, it is unusual that a party that wants to obtain the arrest of a ship as security to a dispute subject to arbitration applies to the arbitral tribunal. The reason is in all likelihood that the arbitral tribunal may not enforce an order of arrest, and, therefore the assistance of a court is required, with consequent delays that may adversely affect the possibility of timely obtaining the security.

*Malaysia*

Only courts are competent to order the arrest of ships. If a party in arbitration proceedings wishes to seek security for his claim he must apply to the court. S. 11 of the Arbitration Act 2005, as amended by the Arbitration (Amendment) Act 2011 so provides in its relevant part:

11. Arbitration agreement and interim measures by High Court

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:

(e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

Where an action has been brought in Admiralty in respect of a matter subject to arbitration, s. 10 of the Arbitration Act 2005, as amended, provides that on application of a party the court will stay the proceedings and if property had been arrested, will order that such property be retained as security for the satisfaction of any award given in arbitration.

*Mexico*<sup>70</sup>

Arrest of ships is regulated in articles 268 – 274 of the Ley de Navegación y Comercio Marítimos and all the provisions clearly indicate

---

<sup>70</sup> Information on Mexican law has been kindly provided by Dr. Ignacio Melo, President of the Maritime Law Association of Mexico, Senior Partner of Melo & Melo Attorneys, imelo@melo-melo.com.mx.

that arrest is a protective measure that can only be obtained through a court. That is expressly confirmed by article 274, which in its last paragraph so provides: <sup>71</sup>

Será competente para conocer del embargo precautorio el Juez del Distrito del lugar donde se encuentre la embarcación o del puerto de desembarque de las mercancías, según sea el caso.

*Singapore* <sup>72</sup>

Only the High Court may issue warrants of arrest. The arbitral tribunals have the power to order that the defendant furnishes security for a claim and that may include an order to the respondent not to remove a ship out of Singapore waters, in which event the defendant, if he wants to employ the ship, must furnish alternative security of equal value. However the order of the arbitral tribunal may not be enforced.

*South Africa* <sup>73</sup>

Arbitral tribunals have no power of arrest. Article 21 of the Arbitration Act 42 of 1965 so provides:

21. General powers of the court

(1) For the purposes of and in relation to a reference under an arbitration agreement, the court shall have the same power of making orders in respect of:

---

<sup>71</sup> An amended code, with the same title and layout is presently being considered by the Maritime Commission of the Congress. The chapter on arrest (embargo precautorio) differs from that presently in force because it is based on the provisions of the 1999 Arrest Convention, the ratification of which by Mexico is presently under consideration. Article 274, quoted above, has become article 322 and is worded as follows:

Será competente para decretar el embargo precautorio de un buque, el Tribunal que tenga competencia objetiva para conocer de la pretensión principal, o el del puerto o lugar en que se encuentre el buque o aquél al que se espera que el buque arribe, a elección del actor que solicita la adopción de la medida cautelar.

<sup>72</sup> Information on Singaporean law has been kindly provided by Mr. Lawrence Teh, Partner Rodyk & Davidson LLP, lawrence.teh@rodyk.com.

<sup>73</sup> Information on South African law has been kindly provided by Professor John Hare, shiplaw@iafrica.com.



(g) securing the amount in dispute in the reference;

The Admiralty Jurisdiction Act reinforces the power of the court and supplements it in admiralty proceedings by allowing security arrests in relation to arbitration proceedings which are contemplated or which have been commenced in South Africa or abroad.<sup>74</sup>

*United States*<sup>75</sup>

The federal court has jurisdiction for the arrest. Section 8 of the United States Federal Arbitration Act so provides:

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

---

<sup>74</sup> Section 5(3) of the Adm. Jurisdiction Regulation Act of 1983 so provides:

(3) (a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings. (aA) Any property so arrested or any security for, or the proceeds of, any such property shall be held as security for any such claim or pending the outcome of any such arbitration or proceedings. (b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

See also Hare, *Shipping Law and Admiralty Jurisdiction in South Africa*, 2<sup>nd</sup> Edition, p. 43, § 1.10.

<sup>75</sup> Information on United States law has been kindly provided by Mr. John D. Kimball, Blank Rome LLP, JKimball@BlankRome.com.

It was held in *The Anaconda v. American Sugar Refining Co.*<sup>76</sup> that section 8 contemplates that one who has agreed to arbitrate may, nevertheless, prosecute his cause of action in admiralty, and protects his opponent's right to arbitration by court order.<sup>77</sup>

## **2.7. Summary of the position in all States mentioned in paragraphs 2(4), 2(5) and 2(6)**

### *2.7.1 States parties to the 1952 Convention*

In the great majority of the States that I have considered ( Belgium, Caribbean jurisdictions, China, Denmark, Finland, France, Ireland, Italy, Netherlands, Nigeria, Norway, Portugal, Slovenia, United Kingdom) only courts may order the arrest of ships. In some States ( Croatia, Egypt, Germany, Greece, Poland) also arbitral tribunals may order the arrest of ships but their orders are not enforceable ( some doubts exist in Egypt) unless enforcement is granted by a court. It appears, therefore, that that is not in conflict with article 4 of the Convention.

### *2.7.2 States parties to the 1999 Conventions and States that have enacted its provisions in their domestic law*

In Spain, the only State party to the Convention previously considered, also arbitral tribunals may order the arrest of ships but their orders are not enforceable and therefore there does not appear to be a conflict with article 2 (1) of the Convention. As regards the States that have enacted its provisions in their domestic law, in China and Turkey only courts have jurisdiction while in Peru and Venezuela also arbitral tribunals may order the arrest of ships, but the enforcement of the order must be made by a court.

### *2.7.3 States not parties to either the 1952 or the 1999 Convention*

In most of the states that have been considered ( Argentina, Australia,

---

<sup>76</sup> U. S. Fla. 1944, 64 S. Ct. 863, 322 U. S. 42, 88 L. Ed. 1117.

<sup>77</sup> See also *Greenwich Marine, Inc. v. The Alexandra*, S. D. N. Y. 1964, 225 Supp. 671, affirmed 339 F.2d 901; *Penn Tanker Co. of Del. v. C. Z. Rolimpex, Warszawa*, S. D. N. Y. 1961, 199 F. Supp. 716.

Brazil, Canada, Malaysia, Mexico, South Africa and United States) only courts have jurisdiction. In Japan and Singapore the position is the same as that in Peru and Venezuela. In Chile instead the position is reversed: only arbitral tribunals have jurisdiction.

### *3. The linkage between the arbitral proceedings and the arrest proceedings*

The problem of the linkage between arbitral and arrest proceedings does not arise when it is the arbitral tribunal that orders the arrest, as may be the case in Croatia, Egypt, Germany, Greece, Japan, Poland, Peru, Singapore and Venezuela and of course does not arise in Chile, where only arbitral tribunals are competent. It may instead arise if it is a court that orders the arrest and it is appropriate to consider separately the position in case the arrest is applied for prior to or after the commencement of arbitral proceedings.

A preliminary issue, that arises in both cases, is whether by stipulating an arbitration agreement each of the parties has impliedly waived their right to arrest properties of the other party. It is an issue that has been considered in some countries, such as England and Canada and since it may arise also in other countries it may be interesting to consider how English and Canadian courts have settled it.

In England the Admiralty Court has so stated in *The Rena K.* : <sup>78</sup>

... it was suggested for the shipowners that a party to an arbitration agreement should be treated as having, by entering into such an agreement, abandoned the rights which he would otherwise have had to security for any claim covered by the agreement. I do not accept this proposition at all. The choice of forum for the determination of the merits of a dispute is one thing. The right to security in respect of maritime claims under Admiralty law of this country is another.

---

<sup>78</sup> *Supra*, note 38.

In Canada the Federal Court has so stated in *Cyber Sea Technologies, Inc. v. Underwater Harvester Remotely Operated Vehicle*:<sup>79</sup>

Returning to an earlier concept, a vessel will not be released from arrest merely because the underlying dispute is being arbitrated.

The reasons given by the English Admiralty Court are exactly in point and should be of guidance in all jurisdictions.

That issue is impliedly settled under the 1952 and the 1999 Arrest Conventions, that both provide that if the parties have agreed to submit the dispute to arbitration, the court within whose jurisdiction the arrest was made may fix the time within which the claimant shall commence the arbitral proceedings. The same conclusion holds for Turkey, when the new Commercial Code will enter into force (1 July 2012) since its article 1352 reproduces article 2(3) of the 1999 Arrest Convention. It is also settled in the jurisdictions, as is the case for Australia, in which where the merits must be submitted to arbitration, the court may make orders in relation to the ships that had been arrested for the purpose of its preservation.<sup>80</sup>

### **3.1. The linkage in case arrest is applied for prior to the commencement of the arbitral proceedings**

The first question that arises is whether, when arbitral proceedings are commenced, the party that has previously arrested a ship in respect of the claim submitted to arbitration must inform the arbitral tribunal and the person liable on the claim about the arrest and provide details on the arrest

---

<sup>79</sup> *Supra*, note 63.

<sup>80</sup> Section 29(5) of the Admiralty Act 1988 so provides:

Where:

- (a) a ship or other property is under arrest in a proceeding;
- (b) an award or judgment as mentioned in subsection (1) has been made in favour of a party; and
- (c) apart from this section, the award or judgment is enforceable in Australia;

then, in addition to any other proceeding that may be taken by the party to enforce the award or judgment, the party may apply to the court in the stayed proceeding for an appropriate order in relation to the ship or property to give effect to the award or judgment.

proceedings. Although normally the person liable will be aware of the arrest, this may not always be the case, if the ship is not owned by him.<sup>81</sup>

It is suggested that where a ship has been arrested as security for a claim submitted to arbitration, whether or not the person liable is aware of the arrest when arbitration proceedings are commenced, the arrestor has the duty to inform the arbitral tribunal. The commencement of the arbitral proceedings may affect the arrest proceedings if the court has, pursuant to article 7(3) of both the 1952 and the 1999 Arrest Conventions, fixed the time within which the claimant must bring proceedings. Conversely, if the merits of the (maritime) claim in respect of which the arrest has been applied for and has been made is subject to the jurisdiction of an arbitral tribunal, it is that tribunal which is competent to establish whether the alleged (maritime) claim may be allowed or must be rejected. The fact that the claimant has sought and obtained security for the claim submitted to arbitration is something the arbitral tribunal should be aware of.

### **3.2. The linkage in case arrest is applied for after to the commencement of the arbitral proceedings**

When a claimant has brought an action in court it is conceivable that in the course of the proceedings he may wish to seek security by arresting a ship of the defendant, in which event, if the ship he wishes to arrest is not within the jurisdiction of the court in which the proceedings on the merits are pending and one of the Arrest Conventions is in force in the country where that court is situated, he must apply to a court of the country in which the arrest must be effected. A parallel situation may occur in case arbitral proceedings have been commenced: as previously mentioned, by stipulating an arbitration agreement or by commencing arbitral proceedings the claimant has not impliedly waived his right to seeking security by

---

<sup>81</sup> For an analysis of this problem see F. Berlingieri, *Arrest of Ships*, supra note 3, p. 228 et seq.

arresting a ship of the defendant.<sup>82</sup> But the question arises whether, in the jurisdictions in which courts are exclusively competent, the claimant should inform the arbitral tribunal of his intention to apply to the competent court for the arrest. In support of a negative answer to this question it might be said that arrest normally is applied for in *ex parte* proceedings, one of the reasons being that of avoiding the prior knowledge by the owner of the ship of the intention of the claimant, that might entail an attempt by the owner to deviate the ship from its original course. In support instead of an affirmative answer to the question it may be said that if proceedings were pending in court and that court would be competent in respect of the arrest, an application to the court would obviously be required and consequently the arrest would not be considered in *ex parte* proceedings. Although a solution is doubtful, it is thought that except where an express rule exists in the applicable arbitration law providing for the duty of the claimant to inform in advance the arbitral tribunal, an obligation to that effect is hardly conceivable. But also in this case, however, as in that of an arrest prior to the commencement of the arbitral proceedings, the claimant would have a duty, once the arrest is made, to inform the arbitral tribunal.

---

<sup>82</sup> An application to the competent court during the course of arbitration proceedings seems to be admissible in Argentina, Canada (*Atlantic Lines & Navigation Company Inc v. The Ship "Didymi"*), *supra* note 61), China-Hong Kong (*supra*, para. 2.4), Denmark (*supra*, para. 2.3), England (*supra*, para. 2.4), Japan (*supra*, para. 2.6), Norway, Poland, Slovenia (*supra*, para. 2.4), and Turkey (*supra*, para. 2.4) while it may impliedly be excluded in Portugal from article 383.2 and 3 CCP, pursuant to which when an application for arrest is made during the course of proceedings, it must be submitted to the court in which such proceedings have been brought. Article 383 2 and 3 so provide:

1. Requerido antes de proposta a acção, é o procedimento apensado aos autos desta, log que a acção seja instaurada; e se a acção vier a correr noutro tribunal, para aí é remtido o apenso, ficando o juiz da acção com exclusiva competência para os termos subsequentes à remessa.

2. Requerido no decurso da acção, deve o procedimento ser instaurado no tribunal onde esta corre e processado por apenso, a não ser que a acção esteja pendente de recurso; neste caso, a apensação só se faz quando o procedimento estiver findo ou quando os autos da acção principal baixarem à primeira instância.

The same conclusion holds for Nigeria.

#### 4. The provision of security by the claimant

Although there is no express provision in this respect in the 1952 Convention, article 6 by providing that the rules of procedure relating to the arrest of a ship and all matters of procedure which the arrest may entail shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for, clearly implies that that court is competent to order the provision by the claimant of security to cover damages the defendant may suffer as a consequence of arrest when the claimant may be found liable for such damages, as well as to order which party has to bear the cost of the action brought by the claimant in order to obtain a warrant of arrest.<sup>83</sup> And its jurisdiction in this respect is obvious, for the provision of the security is strictly linked with the arrest: if required before the arrest it will consist in a condition for the warrant of arrest becoming effective, while if required within a prescribed time limit after the arrest, it is a condition for the continuing validity of the arrest. Therefore when the 1952 Convention applies only the court that issues the warrant of arrest may have the control over the fulfilment by the claimant of the order requiring him to provide security.

In the 1999 Convention this issue is expressly regulated. Article 6(1) so in fact provides:

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 a 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.

---

<sup>83</sup> In *Frontier International Shipping Corp. v. Tavros*, *supra* note 59, the Federal Court of Canada held that the defendant should be awarded security for the costs of the action brought by the claimant in order to obtain the arrest of the ship of the defendant.

A review of the rules existing in this respect in some States follows.

### Argentina

General rules on the liability for wrongful arrest are set out in article 208 of the Código Procesal Civil y Comercial<sup>84</sup> and security for damages in case of wrongful arrest appears to be a condition for obtaining the *medida precautoria*.<sup>85</sup> In respect of the arrest of ships it appears instead that the decision on the security by the claimant is left to the discretion of the court.<sup>86</sup>

---

<sup>84</sup> Article 208 of the Code so provides:

*Responsabilidad.* -Salvo en el caso de los artículos 209, inciso 1, y 212, cuando se dispusiere levantar una medida cautelar por cualquier motivo que demuestre que el requirente abusó o se excedió en el derecho que la ley otorga para obtenerla, la resolución la condenará a pagar los daños y perjuicios si la otra parte la hubiere solicitado.

La determinación del monto se sustanciará por el trámite de los incidentes o por juicio sumario, según que las circunstancias hicieren preferible uno u otro procedimiento a criterio del juez, cuya decisión sobre este punto será irrecurrible.

<sup>85</sup> Article 199 of the Code so provides:

*Contracautela.* La medida precautoria sólo podrá decretarse bajo la responsabilidad de la parte que la solicitare, quien deberá dar caución por todas las costas y daños y perjuicios que pudiese ocasionar en los supuestos previstos en el primer párrafo del artículo 208.

En los casos de los artículos 210, incisos 2 y 3, 212, incisos 2 y 3, la caución juratoria se entenderá prestada en el pedido de medida cautelar.

El juez graduará la calidad y monto de la caución de acuerdo con la mayor o menor verosimilitud del derecho y las circunstancias del caso.

Podrá ofrecerse la garantía de instituciones bancarias o de personas de acreditada responsabilidad económica.

<sup>86</sup> Article 538 of the Código de Comercio so in fact provides:

*Contracautela.* -El tribunal que decrete alguno de los embargos por créditos marítimos previstos en este capítulo, puede exigir al embargante caución suficiente para responder de los daños y perjuicios que pudiese ocasionar la medida, siempre que la caución exigida no implique convertir en ilusorio el derecho del solicitante a obtener el embargo del buque. A tal efecto tendrá en cuenta la naturaleza del juicio, la solvencia de quien solicite la medida, la necesidad de asegurar su eventual derecho y la de prevenir al mismo tiempo y dentro de lo posible, los perjuicios que aquélla pueda irrogar al embargado por haberse pedido sin derecho y, especialmente, si el buque embargado integra una línea regular de navegación.

Tratándose de créditos comunes, la caución se ajustará a lo que disponga la ley procesal.

El tribunal puede arbitrar las medidas que estime conducentes para evitar trabar la navegación, siempre que se garanticen los derechos del solicitante.



### *Belgium*

The court ( *juge des saisies* ) may order the claimant to provide security, failing which, the arrest becomes null and void.<sup>87</sup>

### *Denmark*

The bailiff's court normally requests the claimant to provide security for his liability for wrongful arrest. Article 94 of the Maritime Code provides that the amount of the security should be equal to five days loss of hire, but the Bailiff may later request the amount to be increased as a condition for maintaining the arrest.

### *Finland*

Pursuant to chapter 3, § 43 of the Enforcement Act of 15 June 2007 the bailiff decides the security that the claimant may be required to provide.

### *Greece*

Pursuant to article 694(1) of the Code of Civil Procedure the Court, when ordering security measures and even on its own motion, may require the claimant to provide security. In the framework of international commercial arbitration where the procedure is governed by law 2735/1999, pursuant to article 17(1)(2) thereof the arbitral tribunal has the power to order any of the parties to provide security in relation to the security measures applied for, although there is still concurrent jurisdiction of the ordinary courts on this matter.

### *Ireland*

Security is not generally required save for an undertaking from the claimant's solicitor to pay the arrest fees and expenses of the Admiralty Marshall who executes the warrant of arrest. This includes daily fees for housing of a watch keeper on board the vessel whilst under arrest and provisions for the crew. The Admiralty Court does however have competence to make an order for security under Order 62(2)(3) of the

---

<sup>87</sup> Article 1467 of the Code Judiciaire so provides: La saisie est non avenue si le saisissant ne produit pas dans le délai fixé les garanties auxquelles le juge peut subordonner l'autorisation qu'il accorde.

## Rules of the Superior Courts.

### *Italy*

Article 669 *undecies* of the Code of Civil Procedure provides that the court when granting a protective measure, including arrest, may, having assessed all circumstances, require the claimant to provide security for damages.

### *Japan*

Article 24(2) of the Arbitration Law provides that the arbitral tribunal may require a party to the arbitration proceedings to provide appropriate security in connection with an interim measure of protection.

### *Netherlands*

Article 701 of the Code of Civil Procedure provides that the injunction judge may grant leave to effect an attachment on condition that security be provided by the claimant for the loss that the attachment may cause for the amount determined by him. It appears, however, that such security is very seldom required. There are no specific rules on jurisdiction in respect of damages for wrongful arrest, but since liability for wrongful arrest is considered as liability in tort, generally the court of the place where the attachment or arrest is made will be considered the court with competent jurisdiction.

### *Norway*

The court has exclusive competence to require, at its discretion, the provision of security by the arrestor for damages the owner of the ship may suffer in case of wrongful arrest.

### *Portugal*

The same rule holds in Portugal, on the ground that it is a fundamental rule the right to dispose of one person's property pertains to such person and arrest affects that right.

### *Russian Federation*

Article 12 of the rules of the Maritime Arbitration Commission provides generally that the arbitral tribunal may require any party to provide appropriate security in connection with interim measures of protection.

### *Turkey*

Once the court has issued an order of arrest the claimant must provide security in order to cover damages in case of wrongful arrest. The amount of the security, that must consist of either a cash deposit or a bank guarantee issued by a bank operating in Turkey, is fixed by the court and the practice has been so far that the amount should be equal to a percentage of the claim such percentage being not less than 10% and not more than 40% of the claim.<sup>88</sup> That practice, however, has been unsatisfactory and article 1363 CC<sup>89</sup> provides that the claimant must provide security in cash or with a bank guarantee in an amount in Turkish currency corresponding to 10,000 SDRs. In the Official Reasons accompanying the new Code it is stated that such guarantee must be provided concurrently with the filing of the application for arrest and will be a condition precedent for consideration of the application by the court. Once the order of arrest is issued, the parties may ask the court to increase or decrease the amount of the security.

### *United Kingdom-England and Wales*

From the Admiralty Form ADM 4 it appears that in order to obtain the execution of a warrant of arrest it suffices that the solicitor representing the claimant personally undertakes to pay on demand the fees of the Marshal and all expenses incurred or to be incurred by him in respect of the arrest or endeavours to arrest the property, its care and custody while under arrest and its release, or endeavours to release it. The lack of any provision on security for wrongful arrest is probably due to the fact that, in the absence of proof of *mala fides* or gross negligence, the claimant is not liable in damages.<sup>90</sup>

---

<sup>88</sup> K. Atamer, *Introduction to the Turkish law of ship arrest*, [1998] IJOSL 144.

<sup>89</sup> The new Commercial Code will enter into force on 1 July 2012.

<sup>90</sup> F. Berlingieri, *Arrest of Ships*, *supra* note 3, p. 386, para. 16.34.

## *Venezuela*

The arbitral tribunal may, pursuant to article 26<sup>91</sup> of the Ley de Arbitraje Comercial, require the party that applies for protective measures, to provide a sufficient security. Since, as previously indicated,<sup>92</sup> the arbitral tribunal must then seek the assistance of the court for the execution of such protective measure, it is thought that should it require security, it would postpone its request to the court until after security will have been provided.

### *5. Security for the release of the ship from arrest*

#### **5.1. Wording of the security**

Article 5 of the 1952 Arrest Convention provides that the court within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished and primarily leaves to the parties the task of agreeing on its nature and amount, save that where the parties are unable to reach an agreement, the court shall determine both the nature and the amount. However subsequently some directions are given in respect of the wording of the security in respect of the situation where the court within whose jurisdiction the ship has been arrested has no jurisdiction to decide upon the merits. Article 7(2) in fact provides that in such case the bail or other security given to procure the release of the ship shall specifically provide that it is given for the satisfaction of "any judgment which may eventually be pronounced by a court having jurisdiction". In this connection no reference is made to arbitral awards, but since they are instead mentioned in the subsequent paragraph (3) in connection with the time by which proceedings on the merits must be commenced, reference to them in paragraph (2) must be deemed to be implied. It is worth noting that article 7(2) does not indicate against whom the judgment (or arbitral award) must be issued in order to

---

<sup>91</sup> *Supra*, para. 2.5, note 49.

<sup>92</sup> *Supra*, para. 2.5.

be enforceable on the security.

Article 4(1) and (2) of the 1999 Convention differ from the provisions of the 1952 Convention only in that article 4(2) sets out a ceiling to the security, such ceiling being the value of the arrested ship. Also in article 7 of the 1999 Convention no mention is made of the purpose of the security but its paragraph 4 provides that if proceedings before the court or arbitral tribunal having jurisdiction on the merits are not brought within the period of time ordered in accordance with the previous paragraph 3, the ship arrested or the security provided shall, upon request, be ordered to be released.

Although article 7(5) differs from article 7(2) of the 1952 Convention in that it provides for the recognition and enforcement of the judgment or arbitral award, like article 7(2) of the 1952 Convention it does not specify against whom the judgment must be issued. The rather loose wording of article 7(2) of the 1952 Convention (the satisfaction of *any* judgment that will be pronounced by a court having jurisdiction) cannot be interpreted in the sense that no matter against whom the judgment is issued, it may be enforced on the security, but rather must be interpreted in the sense that the judgment must be issued against the owner of the ship, except where the claimant may enforce his claim *in rem* against the ship: a situation, however, that is normally restricted to claims secured by a maritime lien. Nor is such restriction in conflict with article 3(4) of the Convention, for that provision only states that a ship may be arrested also where the claim is against the charterer by demise but does not state that that entails the right of the claimant to realize his claim through the forced sale of the ship.

Also in this connection the question arises whether the parties should inform the arbitral tribunal of the failure by the claimant to bring proceedings on the merits within the time ordered by the court in whose jurisdiction the ship has been arrested. It is thought that, even if the release of the ship or of the security from arrest should not normally exert any influence on the decision on the merits, nevertheless it might exert some influence in the conduct of the arbitration and, therefore, the arbitral

tribunal should be informed.

The wording of the security may be of considerable importance, in particular where the right of arrest is challenged by the owner of the ship who is not the person liable in respect of the maritime claim for which the arrest is made. In this connection the provision in article 3(4) of the 1952 Arrest Convention is relevant, since not only it appears to allow the arrest of a ship chartered by demise when the charterer and not the owner is liable in respect of the maritime claim,<sup>93</sup> but then it continues stating that such provision "shall apply to any case in which a person other than the registered owner of the ship is liable in respect of a maritime claim relating to that ship". A provision on the basis of which the courts of various States have allowed the arrest of ships in respect of claims against the time charterer.<sup>94</sup>

The problem therefore arises as to the manner in which security must be worded.<sup>95</sup> Although the claimant may try to obtain that it be worded in

---

<sup>93</sup> For a restricted interpretation of article 3(4) of the 1952 Arrest Convention see F. Berlingieri, *Arrest of Ships*, *supra* note 3, p. 228.

<sup>94</sup> Arrest in respect of maritime claims against the time charterer has been allowed in Italy (Tribunal of Naples 20 December 1995, *Alimar Shipping Co. Ltd. v. Mamidoil Jetoil Greek Petroleum Co. S. A.*, (1997) *Dir. Mar.* 147.

<sup>95</sup> In the Netherlands on request by the Rotterdam Court forms of guarantee have been prepared and are normally in use. That avoids delays in the agreement of the form by the parties. The most recent edition of that form, called "the Rotterdam Guarantee Form 2008" prepared by the Committee Rotterdam Guarantee Form consisting of Messrs. G. M. C. C. Bruyninckx, L. R. Kiers, T. van der Valk and H. van der Wiel is quoted below:

Rotterdam Guarantee Form 2008

The undersigned (...), waiving and renouncing all rights and defences, conferred on guarantors, and in particular the provisions of the articles 7: 852 and 7: 855 Dutch Civil Code, hereby irrevocably declares to bind itself as surety to and in favour of (...) (the Creditor) by way of security for the true and proper payment by (...) (the Principal Debtor) of the amount the Principal Debtor may be found to be indebted to the Creditor by virtue of a judgment (which is not or no longer subject to appeal) rendered against the Principal Debtor by a competent court of law having jurisdiction in the matter hereinafter mentioned, or by virtue of a valid arbitration award which is not or no longer subject to appeal or by virtue of an amicable settlement between the parties, in respect of the principal amount, interest and costs of suit relating to a claim at present estimated by the Creditor at (...) for (...).

such a manner as to enable him to enforce on the ship any judgment he may obtain, even if it is not issued against the owner of the ship, he has no right to make the release conditional to the issuance of a guarantee worded in that way. The guarantee in fact replaces the ship and, therefore, should secure payment to the claimant only if the claimant would have been able

---

The expression "a judgment ( which is not or no longer subject to appeal)" is deemed to include a judgment by default rendered against the Principal Debtor, provided that such judgment has been served upon the undersigned and provided that no appeal has been entered against such judgment within six weeks after that service.

If the Principal Debtor is declared bankrupt or granted a suspension of payment, or if a statutory debt rescheduling scheme has been implemented regarding the Principal Debtor, or the Principal Debtor is in liquidation or liquidated, the Creditor is entitled to bring legal proceedings against the undersigned in order to have the indebtedness of the Principal Debtor ascertained by the Court. In that event, the undersigned undertakes to pay the Creditor the indebtedness of the Principal Debtor as established by a judgment ( which is not or no longer subject to appeal) rendered in those proceedings, subject to the maximum amount set forth hereinafter.

This guarantee is hereby given without any prejudice ( including any question as to statutory limitation of liability and the right to demand a release of this guarantee and/or a reduction of the amount thereof), and for a maximum amount of (...) for the purpose of the release from and/or the prevention of a prejudgment attachment of (...) on account of the above-mentioned claim(s).

This guarantee is governed by the law of the Netherlands. The undersigned and the Creditor submit to the non-exclusive jurisdiction of the competent court of law in Rotterdam for disputes and claims in respect of this guarantee.

This guarantee will expire unless before or within (...) months from the date of signing hereof legal proceedings have been instituted with relation to the aforesaid issue against the Principal Debtor in a competent court of law having jurisdiction in the matter, or against the undersigned, as provided in the third paragraph above, or a deed of compromise has been signed or an appointment of one or more arbitrators has been notified or requested or proposed under an arbitration clause, or an amicable settlement has been concluded between the parties.

This guarantee will also expire if the proceedings before the court or the arbitration proceedings, instituted by the Creditor within the time limit mentioned in the previous paragraph, all have led to a decision, which is not or no longer subject to appeal, that the court or arbitrator(s) lack(s) jurisdiction or that the Creditor has no right to claim or that the claim of the Creditor is dismissed or that the proceedings are struck out for want of prosecution, or if the proceedings have been finally withdrawn by the Creditor without an amicable settlement having been concluded.

to enforce his claim on the ship. That is the appropriate solution adopted in the 1999 Convention, whose article 3(3) so provides:

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.

The question that arises is whether, if an arbitral tribunal is competent in respect of the merits of the claim, the behaviour of the claimant, that has caused collateral damages by requiring a form of security he was not entitled to obtain, and thereby has delayed the release of the ship, a claim of the owner against the charterer by demise for damages and the ensuing costs must be the subject of a decision of the court that has issued the warrant of arrest or rather of the arbitral tribunal to which the claim of the owner has been submitted.

## **5.2. Nature, form and amount of the security**

### *States parties to the 1952 or 1999 Arrest Conventions*

Article 5 of the 1952 Convention provides that the court within whose jurisdiction the ship has been arrested shall permit the release of the ship "upon sufficient bail or other security being furnished". The word "sufficient" is meant to refer to the amount, while the word "bail" ("*caution*" in the French text) refers to the type of the security. The provision in the second paragraph reading:

In default of agreement between the parties as to the sufficiency of the bail or other security, the court or other appropriate judicial authority shall determine the nature and amount thereof.

although it refers the default of agreement only to the "sufficiency" of the bail or other security, then gives power to the court to determine not only the amount but also the nature of the security and that confirms that the word "sufficient" in the first paragraph was meant to refer to the



amount. Therefore the court has the obligation to release the ship if the parties agree on the form and amount of the security while in case of disagreement must at its discretion decide the form and amount of the security but, once security has been provided in the form and amount required, must release the ship.

The words "or other security" that follow the reference to "bail" do not provide any indication on the alternative nature of the security. It appears, however, reasonable to assume that such "other security" should be such as to enable the claimant to obtain payment of his claim at least in the same manner in which he would be able to do by enforcing his claim on the ship. Therefore the security must be enforceable in the same country in which the ship is arrested and the person that provides the security must be solvent. Consequently the claimant is in a better position than that in which he would be if he had to enforce his claim on the ship, because the bankruptcy of the owner of the ship or the possible existence of other creditors having priority in case of forced sale of the ship do not affect him anymore. It appears, therefore, that the claimant would be entitled to refuse (nor the court could allow) securities that are not enforceable in the place of arrest, provided by persons that cannot prove of being in a position to settle the claim. But since, as provided in article 5 of the Convention, the request of release of the ship against the security cannot be construed as an acknowledgment of liability, enforcement of the security is subject to the claimant obtaining a judgment on the merits in his favour. That is confirmed by the provision in article 7(2) pursuant to which if the court within whose jurisdiction the ship was arrested has not jurisdiction on the merits, the bail or other security "shall specifically provide that it is given as security for the satisfaction of any judgment which may be eventually pronounced by a court having jurisdiction so to decide"

Consequently the claimant would not be entitled to require a guarantee payable on demand, nor the court could require such type of security as a condition for the release of the ship.

The court that has issued the warrant of arrest has also the power to fix

the amount of the security. That power is not expressly stated in the 1952 Convention, but it is implied, since article 5 provides that the Court shall permit the release of the ship upon sufficient bail or other security being furnished and that implies that such court has the power to assess the sufficiency of the bail or other security.

Article 4(1) of the 1999 Convention provides that the ship which has been arrested "shall be released when sufficient security has been provided in a satisfactory form". Therefore the two requirements, sufficiency and form, are expressly mentioned, while reference to bail has been dropped. In the absence of an agreement between the parties the court must determine the nature and amount of the security but a ceiling to the amount is indicated: the value of the ship. There is a difference in the description of the matters on which the parties may agree and the matters that in the absence of an agreement must be decided by the court: sufficiency and form in the first case, amount and nature in the second case. While the reference to the amount of the security is obvious, and probably should have been made also in the first part of the sentence in which the subject matter of the agreement between the parties is mentioned, the difference between the reference to the form of the security in the first case and to its nature in the second case is not easy to explain. Nature and form identify two different aspects of the security: *nature* identifies the type of the security: bail, such as bank guarantee or letter of undertaking; *form* identifies either the manner in which the bail is furnished or the text of the guarantee or letter of undertaking. And it is thought that the court should specify both of them.

A review of the securities that are generally considered by the parties follows.

a) Payment into court: this is an expensive type of security which is rather unusual nowadays but of course could not be refused by the claimant.

b) Bank guarantee: a guarantee of a primary bank established in the State in which the arrest has been effected is normally accepted and could

be ordered by the court in case of disagreement;

c) Letter of undertaking of P&I Club: it is very frequently accepted by claimants, but it could be refused, in particular if the Club has not its seat in the country in which the ship has been arrested. Nor could it be considered satisfactory by the court.

d) Undertaking of the solicitors of the defendant that appropriate security will be provided. Such undertaking is accepted in Canada<sup>96</sup> and England.

e) Other types of securities: securities such as mortgages or *hypothèques* on the arrested ship or a sister ship are not usual, but are accepted by courts with the consent of the claimant.

In so far as the amount of the security is concerned, the normal practice is that its amount must cover the reasonable capital amount of the claim plus interest and costs.<sup>97</sup>

Although the arbitral tribunal, that may have jurisdiction on the merits, is not competent in respect of the determination of the nature, form and amount of the security, it may indirectly exert a significant influence on the release of the arrested ship, for it may be in a better position in respect of the assessment of the question whether the arrest is justified, *inter alia* in consideration of the financial position of the defendant, as well as on the question of whether the claim is likely to be successful or not. It is suggested that the manner in which the arbitral tribunal may exert its influence might be, depending on the terms of the arbitration, that of ordering the arrestor to give his consent on the release of the ship at specified conditions.

*States not parties to either the 1952 or the 1999 Arrest Convention*  
*Canada*

It appears that in respect of the form and amount of the security courts

---

<sup>96</sup> *Atlantic Lines & Navigation Company Inc v. The Ship "Didymi"*, *supra* note 58.

<sup>97</sup> In the Netherlands article 705 of the Code of Civil Procedure requires "sufficient security" and article 6:51 of the Civil Code, which, although not directly applicable to the arrest of ships, is deemed to be relevant by analogy.

are flexible and trust the lawyers of the owner. In *Atlantic Lines & Navigation Company Inc v. The Ship "Didymi"*<sup>98</sup> the Federal Court released the ship that had been arrested on the defendants' solicitors undertaking that appropriate security will be provided.

### *Chile*

Article 1236 of the Commercial Code provides that the claimant must indicate the amount and the form of the security he deems sufficient and that in case of disagreement the tribunal decide on the amount of the security that in no case shall exceed the value of the ship.<sup>99</sup>

### *Japan*<sup>100</sup>

Pursuant to article 14 of the Civil Provisional Remedies Act (CPRA) of 22 December 1989, applicable also to arrest of ships, provision of security may be required either prior to the issuance of the temporary restraining order or as a condition for its execution. Article 4(1) of the CPRA provides that the security may consist of a statutory deposit of the required sum, of other securities or any other method specified by the Rules of the Supreme Court. Mention is made in article 2 of such Rules of guarantees by banks or insurers, and letters of undertaking of P&I Clubs are treated as guarantees of insurers.

Although it appears unlikely that a court may require a guarantee for an amount in excess of the value of the ship, there is no express provision to that effect in Japanese law.

---

<sup>98</sup> *Supra*, note 61.

<sup>99</sup> (...) Si la petición se formula simultáneamente con la demanda o en el curso del pleito, el actor indicará en ella su pretensión sobre el monto de la garantía y su forma de constitución. Tan pronto como se hubiere proporcionado la garantía solicitada, el tribunal alzaré el arraigo sin más trámites. Procederá en igual forma si las partes estuvieren de acuerdo sobre dichos respectos. El tribunal podrá también calificar la suficiencia de la garantía que ofrezca el demandado, o dar tramitación incidental a esta materia. En todo caso, el monto de la garantía no podrá exceder al valor de la nave arraigada. La garantía que se otorgue subrogará a la nave como objeto exclusivo del privilegio respectivo.

<sup>100</sup> The information that follows has been kindly provided by Professor Tomotaka Fujita. *Supra*, note 69.

## Turkey

The security to be provided by the owner of the ship in order to obtain the release of his ship from arrest must be either a cash deposit or a bank guarantee. A letter of undertaking of a P&I Club is acceptable only if the claimant agrees. In the new Commercial Code a distinction is drawn between the security covering the value of the ship to which article 1370 applies and security covering the amount of the claim, to which article 1371 applies. In the first case the security may be available also to other creditors of the owner, without prejudice of the rules of the LLMC or CLC Conventions if applicable. In the second case the security is available only to the arrestor.

## 6. Commencement of proceedings on the merits

Article 7(3) of the 1952 Convention provides that if the parties have agreed to submit the dispute to the jurisdiction of a particular court or to arbitration the court within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings. The failure to do so entitles the defendant to apply for the release of the ship or of the security given in order to release the ship. Therefore the fixing of a time limit is at the discretion of the court. Under the 1999 Convention instead the discretionary power of the court becomes a duty if the defendant applies for a time limit being fixed.<sup>101</sup>

If the parties have agreed to submit the dispute to arbitration, the time when proceedings must be deemed to have been commenced must be established in accordance with the rules applicable to that arbitration.

---

<sup>101</sup> Article 7(3) of the 1999 Convention so states:

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.

Such rules may be the rules in force in the place of arbitration or alternatively, in case of institutional arbitration, the relevant rules of such institution. The relevant provisions of some of such institutions are quoted below.

*UNCITRAL Model Law on International Commercial Arbitration, as amended*

Article 21 of the UNCITRAL Model Law so provides:

21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

*International Chamber of Commerce*

Article 4 of the ICC Rules of Arbitration so provides in paragraph 2:

2. The date on which the Request ( of arbitration) is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings

*FRANCE*-Article IV of the Arbitration Rules of the Chambre Arbitrale Maritime of Paris so provides:

The Chambre Arbitrale becomes seized of an arbitration by the request for arbitration made by the claimant, explaining briefly the object of the arbitration and identifying the defendant(s) . The receipt of such a request by the Chambre Arbitrale Maritime validly interrupts any limitation period provided for by law or by contract.

*Italy-Chamber of National and International arbitration of Milan*

Article 10 of the Arbitration Rules so provides:

1. The Claimant shall file a request of arbitration with the Secrestariat.

Although nothing is said in respect of the commencement of the arbitration proceedings, there is no doubt that such date coincides with that of the filing of the request of arbitration, since the subsequent step, set out in article 10 (2), is the forwarding within five days of the request of

arbitration to the defendant.

*Japan*

Article 29 of the Arbitration Law of 2002 so provides:

29. Commencement of Arbitral Proceedings and Interruption of Limitation

1. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular civil law dispute commence on the date on which one party gave the other party notice to refer that dispute to the arbitral proceedings.

2. A claim made in arbitral proceedings shall entail an interruption of limitation.

*Russian Federation-Arbitration Commission at the Chamber of Commerce and Industry*

Article 4 of the Rules of the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation so provides:

1. Arbitration proceedings shall be instituted by filing a statement of claim with the M. A. C. (Maritime Arbitration Commission).

2. The date of filing the statement of claim shall be the date it is handed over to the Commission, and if the statement of claim is sent by post, the date of the postmark of the place of dispatch.

There follow the relevant provisions in the laws of Japan, Turkey and the United Kingdom.

*Turkey*

The claimant must commence proceedings on the merits in the competent court within seven days of the date of arrest, failing which the arrest becomes null and void and the claimant becomes automatically liable for the damages caused by the arrest.<sup>102</sup>

---

<sup>102</sup> K. Atamer, Introduction to the Turkish law of ship arrest, [1998] IJOSL 144.

*United Kingdom-England, Wales and Northern Ireland*

Article 14 of the Arbitration Act 1996 regulates differently the commencement of the arbitral proceedings, also for the purposes of the Limitation Act, on the basis of the manner in which the arbitrator is named. It in fact so provides:

14. Commencement of arbitral proceedings.

(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

*7. Damages for wrongful arrest*

The 1952 Convention does not expressly state which is the authority that has jurisdiction in respect of a claim for damages for wrongful arrest, but only states(in article 6) that the applicable law is that of the State in whose jurisdiction the arrest was made or applied for. But since in the subsequent paragraph of the same article the same wording is used for the rules of procedure relating to the arrest and to all matters of procedure which the



arrest may entail and the judicial authority having jurisdiction is beyond any doubt that of the State in whose jurisdiction the arrest was made, it appears reasonable to infer that also in the previous paragraph the court of competent jurisdiction is that of the State in which the arrest was made. This issue is instead expressly settled in article 6(2) of the 1999 Convention that so provides:

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.

Although it would appear that an arbitral tribunal is not competent in this respect, it is questionable whether the jurisdiction of the court exists irrespective of which person has suffered damages. According to the definition in article 1(4) of the 1952 Arrest Convention “claimant” is the person who alleges that a maritime claim exists in his favour and almost identical is that definition in article 1(4) of the 1999 Arrest Convention. Therefore “claimant” is the person on whose request the ship is arrested and the jurisdiction of the court in respect of damages for wrongful arrest appears to be limited to the claims against that person. However claims may also be brought against other persons.

If, for example, the owner of a ship has bareboat chartered his ship and in turn the bareboat charterer has time chartered the ship to a charterer who has not paid the bunker supplied to the ship that is then arrested by the supplier of such bunker, the claim by the registered owner against the bareboat charterer would be a claim for damages, but not a claim for wrongful arrest within the meaning of the Conventions and, therefore, the registered owner may bring proceedings against the bareboat charterer under the arbitration clause of the bareboat charterparty. That would also be the case if the registered owner has provided security for the release of

the ship: he would be able to claim payment of the cost of the security from the bareboat charterer under the arbitration clause of the bareboat charterparty.

Similarly, the claim of the consignee against the time charterer as carrier for delayed delivery of the cargo would be a claim under the voyage charter party and the consignee would bring proceedings against the time charterer under the voyage charter party arbitration clause.

The jurisdictions in which the courts are competent in respect of damages for wrongful (and unjustified) arrest include Argentina, Denmark, China-Hong Kong, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, Norway and the United Kingdom.

#### *Argentina*

Liability for wrongful arrest is governed by article 208 of the *Código Procesal Civil y Comercial* pursuant to which where, except for the cases mentioned in article 209(1) and 212, a security measure is lifted for a reason that indicates that the claimant abused of or exceeded in the exercise of the rights granted by the law on request of the other party the claimant will be condemned to pay damages.<sup>103</sup>

#### *Australia*

Section 34 of the Admiralty Act 1988 provides that if a party unreasonably and without good cause demands excessive security or obtains the arrest of a ship or other property, that party is liable in damages and that the jurisdiction of a court in which a proceeding was commenced under the Act extends to determining a claim for damages. Since under the

---

<sup>103</sup> Article 208 so provides:

*Responsabilidad.* -Salvo en el caso de los artículos 209, inciso 1, y 212, cuando se dispusiere levantar una medida cautelar por cualquier motivo que demuestre que el requirente abusó o se excedió en el derecho que la ley otorga para obtenerla, la resolución la condenará a pagar los daños y perjuicios si la otra parte la hubiere solicitado.

La determinación del monto se sustanciará por el trámite de los incidentes o por juicio sumario, según que las circunstancias hicieren preferible uno u otro procedimiento a criterio del juez, cuya decisión sobre este punto será irrecurrible.

Act proceedings *in rem* may be commenced in the Federal Court and in the Supreme Courts of the Territories, only those courts would have jurisdiction on claims for wrongful arrest.

#### *Denmark*

The court is competent to decide on liability for wrongful arrest but where the merits of the dispute are submitted to arbitration, the court will await the decision of the arbitral tribunal prior to deciding the issue of damages.

#### *China-Hong Kong*

A case of damages for wrongful arrest, in which however arbitration was not involved, was considered by the High Court in the Admiralty action *in rem* against *The "Hong Ming"*, in which the court found that the conduct of the arrestor had been such as to justify an inquiry into damages suffered by the owners of the ship.<sup>104</sup>

#### *France*

Article 1468 of the Code de Procédure Civile as amended by the Décret No. 2011-48 of 13 January 2011 "portant réforme de l'arbitrage" provides that the arbitral tribunal may order the provisional measures it will consider to be advisable but the State jurisdiction only is competent in respect of arrest and judicial securities.<sup>105</sup>

#### *Germany*

If the arrest is ordered by a court, pursuant to § 945 of the Code of Civil Procedure where the arrest is wrongful the arrestor may be ordered to pay damages resulting from the enforcement of the order of arrest or from

---

<sup>104</sup> *Birnam Lt. and The Owners of the ship or vessel "Hong Ming"*, HCAJ 105/2011.

<sup>105</sup> Article 1468 so provides:

Le Tribunal arbitral peut ordonner aux parties, dans les conditions qu'il détermine et au besoin à peine d'astreinte, toute mesure conservatoire ou provisoire qu'il juge opportune. Toutefois, la juridiction de l'Etat est seule compétente pour ordonner des saisies conservatoires et sûretés judiciaires. Le tribunal peut modifier ou compléter la mesure provisoire ou conservatoire qu'il a ordonnée.

the security provided in order to avoid the arrest.<sup>106</sup>

If instead the arrest is ordered by the arbitral tribunal the corresponding provision of § 1041 (4) applies.<sup>107</sup> However the question would arise whether the claim for damages may be pursued in the pending arbitration, in a separate arbitration or in court and that would depend on the wording of the arbitration agreement.

### *Greece*

Pursuant to art. 703 of the Code of Civil Procedure if the claim on the merits is rejected, the claimant who had requested security measures is bound to pay the damages caused by such security measures, or by the security provided in order to release the subject matter of the security, if he was at fault or his lack of knowledge that his right did not exist was due to gross negligence. Consequently, the shipowner shall be entitled to recover damages for a wrongful arrest, if the fault or the gross negligence of the claimant can be proved. The claim for damages could be the subject of arbitration.

### *Ireland*

In a situation where the court finds that the arrest of a ship was wrongful, the arresting party could potentially be held liable for all costs associated with the arrest, including damages. The Admiralty Court has

---

<sup>106</sup> Para. 945 of the Code so provides:

§ 945 Schadensersatzpflicht

Erweist sich die Anordnung eines Arrestes oder einer einstweiligen Verfügung als von Anfang an ungerechtfertigt oder wird die angeordnete Maßregel auf Grund des § 926 Abs. 2 oder des § 942 Abs. 3 aufgehoben, so ist die Partei, welche die Anordnung erwirkt hat, verpflichtet, dem Gegner den Schaden zu ersetzen, der ihm aus der Vollziehung der angeordneten Maßregel oder dadurch entsteht, dass er Sicherheit leistet, um die Vollziehung abzuwenden oder die Aufhebung der Maßregel zu erwirken.

<sup>107</sup> Para. 1041(4) so provides:

(4) Erweist sich die Anordnung einer Maßnahme nach Absatz 1 als von Anfang an ungerechtfertigt, so ist die Partei, welche ihre Vollziehung erwirkt hat, verpflichtet, dem Gegner den Schaden zu ersetzen, der ihm aus der Vollziehung der Maßnahme oder dadurch entsteht, dass er Sicherheit leistet, um die Vollziehung abzuwenden. Der Anspruch kann im anhängigen schiedsrichterlichen Verfahren geltend gemacht werden.

competence to decide this issue.

### *Italy*

Article 96 of the Code of Civil Procedure provides generally that where the losing party acted in *mala fides* or gross negligence the court on request of the other party shall find it liable in addition to costs also to payment of damages. The basis of liability in respect of provisional measures including arrest is more strict: article 96 in fact provides that if the court finds that the right in connection with which a provisional measure has been enforced did not exist, on request of the party that has suffered loss thereby shall find the claimant who acted without the normal prudence liable for damages.

### *Netherlands*

There are no specific rules in respect of jurisdiction for claims for wrongful arrest. Generally liability for wrongful arrest is dealt with as a question of liability in tort and the place where the arrest is made would be considered as the place where the tort was committed pursuant article 5(3) of Regulation (EC) No. 44/2001 or if that regulation does not apply, article 6(e) of the Dutch Code of Civil Procedure.

### *Norway*

Although courts alone are in principle competent to decide whether an arrest was wrongful or unjustified, liability for wrongful arrest is absolute, irrespective of fault on the part of the arrestor, and, therefore an arbitral tribunal might consider to entertain a claim for damages for an unjustified arrest in a situation where it finds the claim in respect of which the arrest had been made, which was submitted to its jurisdiction, to be without merit. This issue, however, does not appear to have been decided yet.

### *Slovenia*

Article 279 of the Enforcement Security Act provides that the arrestor may be liable for damages if the arrest is not justified. The decision on the possible liability of the arrestor is, however, the subject of separate proceedings and may also be the subject of arbitration.

### *Russian Federation*

Rule 12 of the Rules of Procedure of the Maritime Arbitration Commission so provides:

#### § 12. Interim Measures of Protection

1. At the request of a party the arbitral tribunal may order any party to take such interim measures of protection in respect of the subject matter of the dispute as it considers necessary. The arbitral tribunal may require any party to provide appropriate security in connection with such measures.

That seems to entail that the arbitral tribunal is also competent to award damages in respect of wrongful arrest.

### *Turkey*

The provisions of article 6(2-4) of the 1999 Arrest Convention have been incorporated into article 1361 of the Civil Code (CC) and, therefore, the court that has ordered the arrest has jurisdiction on claims for damages in case of wrongful arrest. Pursuant to article 1361(2) CC in case an arbitral tribunal or a different court is competent for the merits of the claim the court that has issued the order of arrest must stay the proceedings in respect of such claims pending a decision on the merits by such arbitral tribunal or such court.

## *The Rt Hon. Lord Phillips of Worth Matravers*



Lord Phillips read law at King's College, Cambridge and was called to the Bar in 1962, becoming a Queen's Counsel (QC) in April 1978. In 1987 he was appointed as a High Court Judge and in 1995 he became a Lord Justice of Appeal. In January 1999 he was made a Lord of Appeal in Ordinary. From 2000 to 2005 he was Master of the Rolls (head of the civil Court of Appeal) and subsequently became Lord Chief Justice of England and Wales. He was the last Senior Law Lord and then founding President of the Supreme Court of the United Kingdom (October 2009 – October 2012). He presently works as an arbitrator and as President of the Doha International Court and a non-permanent judge on the Court of Final Appeals in Hong Kong, SAR.

