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A Comment on the New International Convention on Arrest of Ships, 1999

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I. INTRODUCTION

Commercial lending in the maritime field is frequently based on a creditor's ability to arrest a ship in rem for unpaid debts.[1] Unfortunately, one of the biggest difficulties in commercial lending to the maritime industry is how to accurately calculate the level of recourse when securing a maritime asset, usually a ship, upon which a lender may recover its debt. There are numerous factors that go into this recourse equation.[2] In addition to these factors, a history of heavily fragmented admiralty courts around the world makes full recovery of a claimant's debt nearly impossible. As a result, it is critical for a lender to understand what rights the lender may have if it becomes a creditor and attempts to arrest a ship.[3]

Although the prospect of creating a uniform body of rules and laws that simplifiy the international ship arrest calculation is daunting, that has been the principal objective of maritime law during the past decades.[4] International bodies, such as the United Nations Conference on Trade and Development (hereinafter "UNCTAD"), have spent much time and effort attempting to simplify and standardize the procedures for ship arrest. The campaign towards uniformity began following the signing of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships[5] (hereinafter "1952 Convention") which was established to create a set of binding international rules for the procedures of international ship arrest.[6] However, as a result of

1. The in rem action is the procedure whereby a claimant arrests a ship, as if the ship was personified, and any judgment in favor of the claimant may be enforced by foreclosure against the ship. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 895 (2d. ed. 1994).

2. A few important factors include: to whom did the claimant sell in the contract; what jurisdiction were the goods supplied in; what were the terms of the contract; what is law of the flag of the ship; is there an existing, outstanding mortgage on the ship; and in what jurisdiction will the ship be arrested. CHARLES M. DAVIS, MARITIME LAW DESKBOOK 65 (1997).

3. A ship, which is personified under U.S. law, is itself the defendant in a proceeding in rem to enforce maritime liens. The procedure to seize the ship pre-judgment is referred to as a ship arrest. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 589 (Foundation Press, Inc., 2d ed. 1975).

4. *See generally* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 325-27 (1955) (Reed, J., dissenting).

5. International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, May 10, 1952, 439 U.N.T.S. 193 [hereinafter 1952 Convention].

6. 1952 Convention, preamble, 439 U.N.T.S. 195.

technological advances, the shipping industry has seen significant changes over the last forty years.[7] It is not so much the business of shipping that has changed, but the methods by which that business is conducted.[8] Larger, faster and more specialized ships, computer and satellite communications and fierce competition for market share have revolutionized the industry.[9] Likewise, the industry has become purely global.[10] These changes require that the laws governing shipping evolve to keep pace. Therefore, in March of 1999, UNCTAD began a campaign to adopt a new treaty to standardize the international arrest of seagoing ships.[11] This new treaty has been titled the "International Convention on the Arrest of Ships, 1999" (hereinafter "New Convention").[12]

This Comment will discuss the development of the New Convention and will focus on the New Convention's potential impact on commercial lending in the maritime industry by examining how the New Convention may alter claimants' lending practices. Secondly, this Comment discusses how the New Convention may further solidify forum shopping as the claimant's best tool in collecting its outstanding debt.

II. A HISTORY OF SHIP ARREST

To the practicing maritime lawyer, international ship arrest provides both an interesting and challenging legal topic.[13] This field of law is so dynamic because a particular vessel trades worldwide, and therefore, spends much of its time in international and foreign waters. From a claimant's perspective, the right to arrest a ship is the single most valuable tool in enforcing claims and recovering debts against ship owners and operators.[14] However, from the viewpoint of ship owners, as well as mortgagees, it is essential that a wrongful arrest, attachment, or injunction against a ship not interrupt the legitimate trading of that

7. *See generally* ALAN E. BRANCH, ELEMENTS OF SHIPPING (Chapman & Hall, 6th ed. 1989); *see also* PATRICK M. ALDERTON, SEA TRANSPORT OPERATION AND ECONOMICS (Thomas Reed Publications, 4th ed. 1995).

8. PAUL GARDINER, THE LINER MARKET 1997/98, NEW ALLIANCES AND THE NEW ERA 3-4 (Lloyd's Shipping Economist Management Reports, LLP Limited, 1997).

9. *See* 2 WILLIAM V. PACKARD, SEA-TRADING CARGOES 1 (1985); *see also* ALDERTON, *supra* note 7, at 93-95.

10. GARDINER, *supra* note 8, at 4.

11. *See International Convention on the Arrest of Ships 1999*, United Nations International Maritime Organization, at 3, U.N. Doc. A/CONF 188/6 (March 12, 1999) *available at* http://www.unctad.org/en/docs/imo99d6.pdf (last visited Jan. 1, 2001) [hereinafter *New Convention*].

12. *Id.* at 8.

13. MARITIME & TRANSPORT LAW COMMITTEE OF THE SECTION OF BUSINESS LAW OF THE INTERNATIONAL BAR ASSOCIATION, MARITIME LAW HANDBOOK General Section 5 (Hans-Christian Albert et al. eds., Kluwer Law International, 1998) [hereinafter MARITIME LAW HANDBOOK].

14. *Id.*

ship.[15] The struggle between these opposing forces has risen over the centuries to form a dichotomy that still exists today: both factions believe the law is not in their favor and that the other side has the greater advantage under existing law.[16]

Maritime law is one of the oldest regimes of law. There are aspects of maritime law doctrines in use today that can be traced as far back as Babylonian times.[17] This body of ancient law is referred to informally as "Rhodian sea law."[18] Around 500 B.C., the port of Rhodes was a busy and famous seaport. In fact, "the Colossus of Rhodes, one of the seven wonders of the ancient world, was a lighthouse for mariners."[19] Some legal historians suggest that Rhodes heard a large number of maritime disputes and that the decisions may have been circulated among judges, merchants and ship owners under the Rhodian name.[20]

This accumulation of sea law developed into various "sea codes" as maritime trade moved out of the Mediterranean and towards the west and north.[21] These compilations of authority, to a degree, were used for dispute settlement among seafarers.[22] The most important sea code to the Anglo-American heritage was the sea code of Oleron.[23] Oleron was a large island off the Atlantic coast of France, which was used because of the shelter it provided for trade to the north.[24] Oleron's sea code may have crossed over to England at the end of the 1100's when Eleanor of Aquitaine married Henry II.[25] It was during this period that the historical paths of the various maritime laws diverged both by jurisdiction and

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15. *Id.*

16. *See generally Preparation and Adoption of a Convention on Arrest of Ships*, United Nations International Maritime Organization Diplomatic Conference on Arrest of Ships, U.N. Doc. A/CONF.188/3 (Mar. 1, 1999) *available at* http://www.unctad.org/en/docs/imo99d3.pdf (last visited Apr. 30, 2001) [hereinafter *Preparation*] (containing comments and proposals by governments and other organizations about the draft articles for a convention on arrest of ships).

17. *See* NICHOLAS J. HEALY & DAVID J. SHARPE, CASES AND MATERIALS ON ADMIRALTY 1 (3d ed., 1999) (citing the doctrine of jettison as an example). Jettison is the right of a shipmaster to throw cargo overboard to save the ship and the other cargo from a maritime peril. This action creates a duty for the saved ship and cargo to partially reimburse the jettisoned cargo's owner so that the loss is in proportion to their property values. This duty is referred to today as General Average. *Id.*

18. *Id.*

19. *Id.* at 1-2.

20. *Id.* at 2; *see also* GILMORE & BLACK, *supra* note 3, at 5 (special courts or tribunals were established in Mediterranean port towns to hear and adjudicate disputes arising between seafaring interests; Rhodes was known as one of the most influential of these special tribunals).

21. HEALY & SHARPE, *supra* note 17, at 2.

22. *Id.* (explaining how most of the sea codes bore the names of the seaports where they originated, such as, Amalfi, Consolat de Mar (Barcelona), Guidon de la Mer (Rouen). Many of the sea codes had overlaps in time and subject matter, but they were a primary source of law).

23. *Id.*

24. *Id.*

25. *Id.*

substantively.[26]

Over the ensuing years, various jurisdictions developed different systems and rules concerning the right to arrest a ship. Those countries under a common-law regime adopted the English law approach.[27] These jurisdictions have a long tradition of a separate admiralty court with specific rules relating to the arrest of vessels. With British shipping surging overseas in the 1500's, these admiralty courts achieved great importance, as well as a high volume of cases.[28] They offered litigants, especially foreign ones, significant advantages over the courts of common law.[29] For example, admiralty courts had no juries.[30] Furthermore, they employed the civil law of procedure which enabled testimony to be given in writing from abroad and accepted in England.[31] Through the use of this procedure, cases could sometimes move more rapidly.[32] Although these admiralty courts applied general maritime substantive law and made litigation attractive to foreign claimants with their procedure, they may also have created the ability for forum shopping in international ship arrest.

In civil-law countries, the in rem action did not exist. In such countries, an in personam action was combined with the *saisie conservatoire* (conservatory attachment) to effect arrest.[33] The conservatory attachment permits a debtor's property to be seized and detained under judicial authority pending a judgment.[34] The subsequent judgment, if favorable to the claimant, could then be enforced either against the attached property or any security the defendant may have substituted in order to free the ship to continue its trading.[35]

Finally, there are a handful of jurisdictions that seem to have taken the best features of both the common-law and civil-law traditions. Such is the case in the United States. United States maritime law allows a claimant both the right to arrest a ship in rem, and the right to a maritime attachment.[36] A distinctive feature of admiralty law in the United States is the availability of a special in rem remedy. This action is codified in

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26. *Id.*

27. William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1898 (1999).

28. HEALY & SHARPE, *supra* note 17, at 3.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Saisie conservatoire* is a French legal term that most closely parallels the pre-judgement attachment procedure, whereby a claimant is allowed to hold property of the debtor as security for his pending claim. Tetley, *supra* note 27, at 1898, 1940.

34. *Id.* at 1898.

35. *Id.*

36. *Id.* at 1928.

the Supplemental Rules for Admiralty under Rule C.[37] The procedure permits seizure of a ship by an ex parte order of the court without a hearing or a judgment.[38] The proceeding in rem is an action against a vessel or other "maritime property," as the offending object.[39] In essence, the vessel becomes the defendant in the action.[40] This concept, which allows someone to arrest the offending thing, is unique and at the heart of U.S. maritime law. The notion of suing a ship is considered a legal fiction in many jurisdictions, but is central to remedies in U.S. maritime law.[41]

The in rem action cannot be comprehended however, without some understanding of the substantive issue that underlies it, the "maritime lien." In U.S. maritime law, the maritime lien is a necessary condition for an action in rem.[42] Upon the occurrence of certain accidents, defaults in obligations arising out of contract, or an employee's status, U.S. maritime law gives the party suffering the loss a right which can be conceived of as a property interest in the offending thing, usually a ship.[43] This interest in the offending ship is the maritime lien, and is based upon the amount of the incurred loss.[44]

For instance, an unpaid furnisher of supplies to a ship has a right to act against the ship it supplied. This right against the ship also secures a seaman's unpaid wages. Furthermore, the ship itself can also have a lien against the cargo it carries if the freight bill goes unpaid.[45] These are only a few of the liens U.S. maritime law recognizes. For purposes of this discussion however, the lien that is of concern is the one against the ship for unpaid supplies to a ship.[46]

The maritime lien differs from other liens because it is independent of possession, non-consensual, and is not extinguished by subrogation.[47]

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37. FED. R. CIV. P. SUPP. R. C. 28 U.S.C. § 2072 outlines the "Supplemental Rules for Certain Admiralty and Maritime Claims." These rules apply to admiralty procedure and maritime claims in the U.S. federal courts. Admiralty actions are brought in federal court; therefore, the Federal Rules of Civil Procedure govern the action except where they are inconsistent with these Supplemental Rules. FED. R. CIV. P. SUPP. R. A.

38. SCHOENBAUM, *supra* note 1, at 896.

39. GILMORE & BLACK, *supra* note 3, at 589. Other property may include, the cargo, the fuel on board the ship at the time of arrest, or other appurtenances that are maritime in nature. SCHOENBAUM, *supra* note 1, at 427-29.

40. SCHOENBAUM, *supra* note 1, at 431.

41. HEALY & SHARPE, *supra* note 17, at 129-130.

42. GILMORE & BLACK, *supra* note 3, at 622.

43. *Id.* at 587.

44. SCHOENBAUM, *supra* note 1, at 430-31.

45. *Id.* Freight is the term referred to as the compensation payable to the carrier for the carriage and arrival of goods in a mercantile and recognized condition ready to be delivered to the merchant. BRANCH, *supra* note 7, at 209.

46. *See* 46 U.S.C. § 31301 (listing recognized U.S. maritime liens and necessaries).

47. GILMORE & BLACK, *supra* note 3, at 587-88.

It may exist even though the owner of the ship in which it lies is not personally liable for the underlying claims.[48] The lien will run with the ship until it is "judicially sold," sunk, or in some cases under laches.[49] The lien is enforced by a direct proceeding against the ship in which a lien lies in an in rem action.

Maritime liens are created when the supplier goes unpaid after providing goods needed by a vessel to complete a voyage.[50] These goods are referred to as "necessaries."[51] In the early days of shipping, a ship owner was unable to absorb the costs of the voyage prior to its completion because he would only be paid upon completion of the voyage.[52] Payments for the costs of the voyage were conditioned upon earnings from a successful voyage.[53] Therefore, it was critical for a ship owner to receive credit from his suppliers.[54]

In return for credit terms that would extend for the length of the voyage, a ship owner granted the suppliers a lien against his ship.[55] This maritime lien gave the supplier security that they would be repaid.[56] However, only those goods deemed "necessary" for the completion of the voyage were given this status; thus the right to a maritime lien for "necessaries" was established.[57] This method of credit allowed seagoing trade to occur when other financing methods were unavailable. Suppliers became an equity investor in the maritime venture itself. Today, this type of financing for supplying a vessel's necessaries continues.

Under the United States's maritime law regime, a second type of action exists. Here, personal maritime liability can exist even without lien status.[58] This action most resembles a civil law country's procedure for ship arrest. It is referred to as the maritime attachment and arises from a "maritime claim."[59] The maritime attachment is codified under

48. *Id.* at 594-95.

49. SCHOENBAUM, *supra* note 1, at 452. A 'judicial sale' is a sale to a buyer which takes place under the authority of the local court in an auction type setting and after the in rem action has been decided. A buyer at the sale takes "clear title to the vessel, free and clear of any claim or liens of anyone." DAVIS, *supra* note 2, at 24.

50. DAVIS, *supra* note 2, at 321.

51. *Id.*

52. *Id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *Id.* at 328; *see also* Foss Launch & Tug Co. v. Char Ching Shipping, U.S.A., 808 F.2d 697, 699-700 (9th Cir. 1987).

58. SCHOENBAUM, *supra* note 1, at 885.

59. For the purposes of this paper the term 'maritime claim' refers to a claim that does not

Rule B of the Supplemental Rules for Admiralty.[60] The action is brought in personam against the defendant ship owner by asserting his personal liability for the claim and allows for prejudgment garnishment of the defendant's property as security against the claim.[61]

Once the defendant is notified and makes an appearance, he may substitute the security garnished with an acceptable alternative, thereby allowing the garnished ship not to be detained from trading.[62] However, if other security cannot be posted, or in the case of default judgment, the court will award monetary damages to the plaintiff and the ship will be sold to satisfy the claim.[63] Like an action in rem, the ship sale here will also be considered a judicial sale.[64] Therefore, any other claimants' liens will also be extinguished at the time of the sale.

The maritime lien and the maritime claim are the two principle types of action that can effect a ship arrest worldwide.[65] The local substantive law of a particular state where the arrest takes place will govern which action is available to claimants.[66] If the local jurisdiction recognizes the claim as one that creates a maritime lien, then the right against the ship in rem exists.[67] In that case, the procedure is to arrest the ship as the defendant in the action.[68] The claimant must investigate the state's substantive law to establish which claims the local jurisdiction recognizes as a valid maritime lien. An important practical point, however, is even though there might be the procedural right to arrest the ship in rem, a particular state's substantive maritime law might not recognize this claimant's particular claim as one that rises to lien status. In such a case, the claimant would not be able to arrest the ship in rem in that particular jurisdiction. Consequently, the lack of uniformity of recognized maritime liens in different jurisdictions creates the possibility that forum shopping will result as the claimant will seek out a jurisdiction where the claim will receive lien status.

Therefore, when the state substantive law does not recognize a maritime lien for the plaintiff's claim, he is left with the maritime attachment procedure to secure the claim. Such a claim may be barred, if the

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rise to the level of lien status, but because of its maritime nature it still invokes maritime jurisdiction over the claim.

60. FED. R. CIV. P. SUPP. R. B.

61. SHOENBAUM, *supra* note 1, at 885.

62. DAVIS, *supra* note 2, at 20.

63. *Id.* at 26.

64. *Id.* at 24.

65. *See* Tetley, *supra* note 27, at 1898.

66. SHOENBAUM, *supra* note 1, at 901. The term state used throughout this paper refers to the various countries of the world and not the states that form the United States of America.

67. GILMORE & BLACK, *supra* note 3, at 589.

68. *Id.*

owner of the ship is not the person the claimant did sell the goods to, or if the ship owner the claimant sold to is not the owner of the ship at the time of arrest. The claimant would not be able to arrest the vessel and would have to look for a better forum in which to bring the action. The development of these inconsistencies in ship arrest procedure around the world and over time has created the demand by ship owners and claimants for a uniform procedure in ship arrest. The 1952 Convention was created to remedy this situation.[69]

Considerable progress was made towards international uniformity in the law of ship arrest after the 1952 Convention entered into force. "By 1985 more than 60 different jurisdictions had ratified or acceded to [the 1952] Convention and a number of other jurisdictions had changed their laws so that they conformed to a greater or lesser extent with the [1952] Convention."[70] Currently, seventy-five states are parties to the 1952 Convention.[71] As a result of this movement towards the adoption of the 1952 Convention, two general principals have become widely recognized. First, arrests should be permitted only for the purpose of obtaining security for a maritime claim.[72] Second, the proper subject of an arrest should be either the vessel in which the claim arose or a "sister ship" registered under the same ownership.[73]

Around the world international ship arrest is still conditioned according to the jurisdiction in which the ship arrest takes place. The local jurisdiction's substantive law still defined the success of a ship arrest. Although the procedural law may allow for the arrest of the vessel, the claimant may still lose the underlying claim because the substantive law does not recognize the claim as valid. Likewise, even though the substantive law may recognize the validity of the claim, the order of priorities may place that claim below many others. In that case, once the ship is sold to satisfy the judgment, there may be no money left in the fund derived from the sale once the higher priority claims are paid out. This latter case leaves the claimant successful on the merits, but with no real recovery of monies and his lien extinguished. These variables, along with the vessel's ownership, the operator of the ship, the flag of the vessel, the law of the contracting state, and the type of claim, will

69. *See* HEALY & SHARPE, *supra* note 17, at 284.

70. MARITIME LAW HANDBOOK, *supra* note 13.

71. *Preparation*, *supra* note 16, at 18.

72. MARITIME LAW HANDBOOK, *supra* note 13.

73. *Id.* The term 'sister ship' is used in maritime law to describe two ships whose ownership is registered to the same legal entity. This is a difficult burden to prove because many ships have been separated into 'one-ship owning corporations' to limit the liability of any common ship owner. For further explanation of 'sister ships' in regards to maritime liens, *see* WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 1032 (2d ed. 1998); *see also* SYDNEY T. HARLEY, HOW TO SECURE A MARITIME LIEN 50-51 (1981).

determine in what country a claimant should look to file its claim.[74]

Such finality of a claim, combined with the added uncertainty of recovery, continues to give critical important to where the arrest of a ship takes place. Claimants have naturally begun to seek out the most beneficial forums for arrest, while ship owners continue to create sophisticated corporate structures to escape liability through structuring the vessel's ownership so that the ship is immune from the most "creditor-friendly" jurisdictions.[75]

III. A New Arrest Convention

At its ninth session, the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (hereinafter "JIGE") completed consideration of the draft articles for a new convention on arrest of ships.[76] The JIGE requested that the secretaries of UNCTAD and the International Maritime Organization (hereinafter "IMO"), in consultation with the Chairman of the JIGE, prepare a revised set of draft articles on the basis of the decisions taken by the JIGE.[77] The JIGE also recommended to the IMO Council and to the Trade and Development Board of UNCTAD that:

> They consider favorably, on the basis of the useful work done so far, proposing to the General Assembly of the United Nations the convening of a diplomatic conference to consider and adopt a convention on certain rules relating to the arrest of sea-going ships on the basis of the draft articles prepared by the Group of Experts.[78]

These draft articles were produced in consultation with the Chairman of the JIGE in April of 1997.[79] They served as the basis of work for the diplomatic conference that convened in Geneva in March, 1999.[80] Once the draft articles were finalized they were distributed to the governments and intergovernmental and non-governmental organizations for comment.[81]

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74. Davis, *supra* note 2, at 65.

75. *See supra* note 73.

76. *Draft Articles for a Convention on Arrest of Ships*, U.N. TDBOR, at 2, U.N. Doc. TD/E/IGE. 1/5 (Apr. 14, 1997) *available at* <http://www.unctad.org/en/docs/ige1d5.pdf> (last visited Apr. 30, 2001) [hereinafter *Draft Articles*]. The JIGE, a body of experts, drafted the 1993 International Convention of Maritime Liens and Mortgages which established the requirements for internationally recognized maritime liens and mortgages. At the close of the conference the experts decided that a new convention on the Arrest of Ships should be drafted to conform with the Convention they had just completed. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *New Convention*, *supra* note 11, at 5.

81. *Id.*

The General Assembly of the United Nations endorsed the convening of the Diplomatic Conference at the end of 1997.[82] The conference was approved on the basis of considering and adopting a new convention on arrest of ships. The Conference on Arrest of Ships (hereinafter "Conference") convened at Geneva as a United Nations/IMO conference during the first two weeks of March, 1999.[83] Representatives from states, and observers from intergovernmental organizations and non-governmental organizations attended the Conference.[84] The Conference established a Main Committee, headed by a member from Norway; a Drafting Committee, headed by a member from United States; and a Credentials Committee headed by an Australian delegate.[85] Zhu Zengjie, head of the Chinese delegation, acted as President of the Conference.[86]

As a basis for its work, the Conference had before it the draft articles for a convention on arrest of ships prepared by the Joint Group of Experts from the Lien Convention.[87] The Conference also deliberated on the comments and proposals submitted by the governments and intergovernmental and non-governmental groups.[88] By March 12th, 1999 the Conference had adopted the text for the New Convention.[89] The Convention was opened for signature at the United Nations Headquarters in New York from September 1999 until August 31, 2000.[90] The Conven-

82. *Id.* at 3 (showing the Arrest Conference was approved by U.N General Assembly Resolution 52/182 on December 18, 1997).

83. *Id.* (showing the Conference was convened from March 1-12, 1999).

84. Representatives from the following States participated in the Conference: Algeria, Angola, Argentina, Australia, Belarus, Belgium, Benin, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea, Haiti, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Japan, Kenya, Latvia, Lebanon, Liberia, Lithuania, Madagascar, Malta, Marshall Islands, Mauritania, Mexico, Monaco, Morocco, Mozambique, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, U.A.E., U.K., USA, Uruguay, Viet Nam, and Yemen. Observers representing the following intergovernmental organizations were present at the Conference: Arab Labour Organization, Organization of African Unity, Organization of American States, Organization of Islamic Conference, Intergovernmental Organization for the International Carriage of Rail. *Id.*

85. *Id.* at 4.

86. *Id.*

87. *Id.* at 5.

88. *Preparation*, *supra* note 16.

89. *New Convention*, *supra* note 11, at 5.

90. As of January 14, 2001 the *New Convention* remains "not in force." Only six participants have signed the *New Convention*. Pakistan was the first to sign, followed by Ecuador, Bulgaria, Denmark, Norway and Finland. However, under Article 14(1), ten participants' signatures were required to enter the *New Convention* into force. *New Convention*, *supra* note 11, at 18; *see also Pakistan Signs Arrest Convention*, LLOYDS LIST, July 14, 2000, at 6.

tion is written in Arabic, Chinese, English, French, Russian and Spanish,[91] and all original texts are held as authentic.[92]

IV. THE DRAFT ARTICLES

The majority of the comments about the draft articles (from the various states and the international organizations) seemed to focus on three articles of particular concern. The first conflict developed over whether or not the New Convention should include a closed and exhaustive list of maritime claims or an open-ended list.[93] A second concern emerged over article 2(3), which allows claimants to arrest a vessel that is ready to sail or is already sailing away from the port of arrest.[94] Finally, much debate focused on article 6, which allows for the sanctioning of frivolous arrests and the making of counter-security mandatory for those claimants who effect an arrest.[95]

The draft articles begin with "Article 1 – Definitions."[96] The purpose of this article is to define a "Maritime claim"[97] and to list the claims recognized as giving a claimant a right to arrest. Article 1 is a closed and exhaustive list of twenty-two claims which allow a claimant who has suffered a loss, been injured, or is unpaid, to arrest a ship.[98] The draft Convention expands the list of claims in this article from the seventeen numerated claims in the 1952 Convention.[99] The new claims include environmental damages; wreck removal; port, harbor and canal dues; vessel sale and purchase contract disputes; and Protection & Indemnity (hereinafter "P & I") insurance claims.[100]

The working group established to draft the articles was divided as

91. *New Convention*, *supra* note 11, at 6.

92. *Id.*

93. *Draft Articles*, *supra* note 76, at 3 n.1.

94. *Id.* at 6.

95. *Id.* at 11.

96. *Id.* at 3-5.

97. *Id.* at 3. Draft Article 1 states: "'Maritime claim' means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or concerning or arising out of a mortgage or a "hypothèque" or a registrable charge of the same nature on any ship" . . . ." *Id.*

98. *Id.* at 3-5.

99. *See* 1952 Convention, *supra* note 5, 439 U.N.T.S. at 195-197.

100. *Draft Articles, supra* note 76, at 3-5. P & I insurance came into common use after the 1836 case of *De Vaux v. Salvador*, 111 Eng. Rep 845 (K.B. 1836), which established that collision liability was not a "peril of the sea," and thus was not covered under the typical Lloyds policy of most ship owners. P & I "clubs," mutual insurance societies, were founded to cover the risk that remained from a ship owner's hull insurance policy. P & I insurance today covers virtually all the risks not covered by hull insurance. HEALY & SHARPE, *supra* note 17, at 808; *see also Ship Arrest Nightmares, New Convention to the Rescue*, FAIRPLAY, Mar. 16, 2000, at 32 (explaining the *New Convention*'s application for a claimant's right to arrest in regards to P & I Insurance unpaid premiums and brokers' fees and commissions).

to whether Article 1 should adopt an approach similar to that taken under the 1952 Convention, which provided an exhaustive list of maritime claims, or whether to adopt a new and more flexible open-ended list format.[101] The question was left open by the working group to be decided at the Conference.[102] This created a multitude of comments on the different positions from the participants leading up to the Conference.

One faction, as seen by the position of the government of China and United Kingdom, as well as the International Chamber of Shipping (hereinafter "ICS") (the ship owners' interest group), thought that Article 1 should follow the tradition established under the 1952 Convention.[103] The rationale behind this position was that a closed list would clearly define the valid claims for an arrest and leave no room for ambiguity.[104] The closed list would ensure consistency of interpretation in different jurisdictions and promote greater international uniformity.[105] The premise of their opposition to the open list was that it would "lead to the exercise of the right of arrest in respect of claims which are not of a maritime nature and/or are of only minor importance, thereby causing needless detentions and consequential disruptions to international trade."[106]

However, the faction of participants in favor of an open list, including the Japanese and Italian governments, and the claimants' public interest groups, made strong arguments for a new non-exhaustive open list.[107] This position was based primarily on a concern for the future of maritime law and the need to create a document that would be dynamic. An open list would leave flexibility in the wording of the article so that the Convention could continually evolve to suit any future legal changes occurring in the maritime field.[108] The participants favoring this position pointed out that a closed list, no matter how carefully prepared, may never be or remain a complete list of claims.[109]

As a compromise to both positions, the Mexican government posited that a hybrid of both options should be adopted.[110] The Mexicans suggested that the best scenario was to combine both proposals.[111] They

101. *Draft Articles, supra* note 76, at 3 n.1.
102. *Id.*
103. *Preparation, supra* note 16, at 3, 18, addendum 2 at 2.
104. *Id.* at 18.
105. *Id.*
106. *Id.*
107. *Id.* at 5, addendum 3 at 2.
108. *Id.* addendum 3 at 2.
109. *Id.*
110. *Id.* at 7.
111. *Id.*

believed that an article giving the definition of a claim, which had a closed list of claims as examples, but also included a closing sentence permitting the inclusion in the future of claims not originally envisioned, was the best for both positions.[112]

This proposal actually seems to make the most sense from a historical perspective. The tradition of a supplier of necessaries being given a lien against a vessel grew out of the need to adapt to the circumstances of the industry over time.[113] Indeed, even the closed list approach taken in the 1952 Convention has already been modified by the five new additions that were proposed for the New Convention's "closed list of claims."[114] This need for the additional recognized claims in the New Convention illustrates that a closed list approach is impractical for such a dynamic industry. Although this conflict may seem trivial, the form Article 1 takes will determine whether the New Convention favors ship owners or potential claimants.

The second major conflict over the draft articles occurred over the next article, "Article 2 – Powers of Arrest."[115] The concern grew over the proposed language that would allow a local jurisdiction to seize a ship "even though it is ready to sail or is sailing."[116] Although this controversy will pit a claimant against ship owner, a comment must be made about practical ship arrest in order to understand the full implications of this clause.

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112. *Id.* Their proposed text read: 1."'Maritime claim' means any claim in respect of: [repeat the list of claims in subparagraphs (a) to (v)] . . . The foregoing shall be without prejudice to the possibility of entertaining any other claims concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or concerning or arising out of a mortgage or maritime claim, or a registrable charge of the same nature, on any ship, other than those mentioned." *Id.*

113. *See* SHOENBAUM, *supra* note 1, at 426.

114. *Compare* 1952 Convention, *supra* note 5, at 197-199 *with New Convention*, *supra* note 11, art. 1, at 8-11.

115. *New Convention*, *supra* note 11, art. 2, at 10. Article 2 Powers of Arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected.

2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

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

Id.

116. *Draft Articles*, *supra* note 76, at 6.

In a majority of jurisdictions around the world, a ship arrest can only be effected once the ship arrives at the port of arrest.[117] For example, in *Pee Dee State Bank v. F/V Wild Turkey,* a U.S. federal district court sitting in admiralty held, that an in rem action can only be effected against the defendant's property in the venue where the property has been or could be arrested.[118] Therefore, a large challenge creditors face is to properly time the arrest procedure. This is so because ships are moving entities. When a ship is not moving, it is not making money.[119] Likewise, a port maximizes it revenues when it is turning around ships and creating cargo movements.[120] In today's competitive shipping environment, vessels, such as container ships, can turnaround in a port in less than twenty-four hours.[121] Therefore, the potential claimant needs to closely track ship arrivals while simultaneously preparing to file a petition for an arrest warrant. In order to avoid literally missing the ship, a claimant must ensure that there is no delay in either of these steps. A claimant needs to ensure that sufficient time is allowed in order to have a warrant signed by a judge and served by a marshall.[122] Should a claimant miss the narrow window of opportunity, he will incur further delay and cost in trying to recoup an already outstanding bill. In many instances, claimants must race against the clock to be successful.[123]

Although the proposed paragraph 3 in Article 2 states that a ship arrest can be made against a ship that is "ready to sail or is sailing,"

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117. HARLEY, *supra* note 73, at 5.

118. *See* Pee Dee State Bank v. F/V Wild Turkey, C.A. No. 2:91-809-18, 1991 U.S. Dist. LEXIS 20288 (Oct. 9, 1991).

119. *See* ALDERTON, *supra* note 7, at 63-64.

120. *See id.* at 272-73.

121. A container ship is a ship that carries truck sized "boxes" measuring eight feet high, eight feet wide, and twenty feet or forty feet long. *See id.* at 35. Goods of any kind can be packed into a container at any location, and then the standardized container can be loaded onto any ship without the need to re-stow the individual goods on the ship. Before containerization a general cargo ship would spend half its life in port loading and unloading cargo. Containerization has been called the most far-reaching advance in marine technology. *Id.* at 34-36.

122. *See* HEALY & SHARPE, *supra* note 17, at 130-31 (describing the arrest process).

123. The author (employed at the time by Trans-Tec Services) was involved in a case that illustrates this point. A claim by a supplier of fuel arose against a ship owner, "A.B.C. Container Line," when the ship owner failed to pay its bill. At the time, the shipping company was on the brink of financial collapse. After studying the locations of all seven of their owned ships and the applicable law in each of those jurisdictions, the Trans-Tec' Services collection team decided the best opportunity was to arrest the m/v "Helen" in Jamaica. Unfortunately, the "Helen" was loading cargo in a small private port on a remote part of the island, leaving Trans-Tec Services only fourteen hours until she set sail. Trans-Tec's local Jamaican attorney was unsure if he could get the arrest order signed by the judge and still have enough time to dispatch a marshal to the remote port. The only option to was to fly the marshal and the attorney out to the ship. Searching frantically, Trans-Tec Services located a helicopter service and arranged to have the ship served with the writ of arrest only minutes before the ship exited Jamaican waters. The next day, we received $175,000 from the debtor in exchange for releasing the ship from arrest.

scrutiny has been aimed mostly at the "is sailing" language. If fact, only one group commenting on the clause seemed to think there was a critical argument against arresting a ship that is "ready to sail."[124] In reality, this type of language should remain since most ships can arguably be "ready to sail" at any time. If omitted, defending ship owners could make frivolous arguments to escape arrest. By contrast, the language "is sailing" does have serious implications for ship arrest. By allowing a creditor the ability to effect an arrest of a ship once it is actually underway, the language will give the creditor more time to effect a successful arrest.

Under the Law of the Sea Convention, a coastal state may arrest a foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal waters for the purpose of bringing civil proceedings against the ship.[125] The implementation of the "is sailing" language would allow a local jurisdiction to effect an arrest of a vessel up to twelve miles out to sea.[126] This language may further allow arrest of up to twenty four miles out to sea if a "hot pursuit" scenario arises.[127] Under Article 111 of the Law of the Sea Convention, the authorities of the coastal state may exercise further control into the Contiguous Zone of the coastal state if they have good reason to believe that the ship has violated the laws and regulations of that state.[128] Therefore, this simple two-word phrase at the end of Article 2, paragraph 3, could extend the time to arrest a vessel by a few precious hours. Under the Law of the Sea Convention, however, an arrest can still be concluded in the territorial sea if a coastal state so decides to effect an arrest.[129] The New Convention would just make it more readily available to the private sector as well.

It is easy to understand why the ship owning faction at the conference had a significant interest in striking the "is sailing" language. The delegates who opposed the wording, however, did not indicate that it was their intention to help ship owners elude potential claimants.[130]

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124. *See Preparation, supra* note 16, addendum 3 at 4. The Latin American Association of Navigation and Law of the Sea pointed out that the "is sailing" language would conflict with Argentine law under article 541, the Netherlands Code of Civil Procedure under article 582, as well as the Italian (article 645), Swedish (article 345), Finish (article 278) and German (article 482) codes. *Id.*

125. U.N. Convention on the Law of the Sea, Nov. 16, 1994, art. 28(3), 1833 U.N.T.S. 397, 408 [hereinafter LOSC].

126. *See id.*

127. *Id.* art. 111, at 439.

128. *Id.*

129. *Id.* art. 28(3), at 408.

130. *See Preparation, supra* note 16.

Instead, the arguments raised were along the lines of safety and trade.[131] The Chinese delegation thought the language would endanger the safety of the ship, the safety of persons on board the ship, and any persons involved in the arrest of the ship.[132] The South Korean delegation stated, for example, that "arrest of a ship which is ready to sail or is sailing is not desirable because it may destabilize normal practice of commerce by affecting customers not involved in the claim . . . therefore this paragraph should be deleted."[133] However, whether a vessel is sailing or is still at a berth, an arrest will inevitably affect customers who are not involved in the claim but who have cargo on the ship.[134]

The pro-claimant faction at the Conference received limited support by the participating states in allowing the "is sailing" wording to remain. Only the Japanese delegation believed that the wording could be admitted, subject to the condition that it not affect the rules of other international conventions relating to the arrest of a ship in the course of navigation.[135] Its main concern was that it should not contradict the 1982 Law of the Sea Convention.[136]

Here, again, the Mexican delegation suggested an alternative compromise to the conflict. The Mexicans suggested re-drafting the paragraph to clarify the proposed concept. Their re-working of the paragraph incorporated "the concept of the zone of jurisdiction of the State and [made] a clear reference to the territorial waters of any State over which that State exercises full sovereignty."[137] Their proposed paragraph read as follows: "A ship may be arrested even though it is ready to sail or is sailing within the area of jurisdiction of the riparian State."[138]

Although the Mexican wording is clearer, in most aspects this argument seems moot. In fact, the ICS argued that Article 2, paragraph 3, for all practical purposes, is not suggesting anything that is not already allowed or controlled by the local jurisdiction or included in other international conventions.[139] However, as the Latin American Association of Navigational Law and Law of Sea delegation commented, allowing the "is ready to sail or is sailing" wording to remain in Article 2 would

131. *Id.* at 19.
132. *Id.* at 4.
133. *Id.* at 10.
134. For instance, if the vessel is at a berth and a marshal serves notice of arrest, the ship may be forced to suspend loading or discharging operations and possibly shift to a lay berth unless the claimant or the court allows the vessel to continue cargo operations under arrest.
135. *See Preparation, supra* note 16, at 6.
136. *Id.*
137. *Id.* at 7.
138. *Id.*
139. *Id.* at 19.

impact those civil law states, which already have wording in their national codes that prohibits the arrest of ships "ready to sail."[140]

The third conflict regarding the draft articles arose from the newly-created "unjustified arrest" clause. "Article 6 – Protection of Owners and Demise Charterers of Arrested Ships," establishes the right of the local jurisdiction to order a claimant to pay counter-security to the court.[141] The fund created would be paid to a ship owner in the case of an "arrest being wrongful or unjustified."[142] The 1952 Convention introduced the international use of a wrongful arrest defense as a means to deter and punish frivolous claims.[143] However, the question of whether the 1952 Convention should contain a provision on the right of a ship owner to collect damages in case of wrongful arrest was hotly debated from the outset of the drafting committee at the original ship arrest conference.[144] The civil law countries generally were in favor of such a provision and the common law countries firmly against it.[145]

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140. *See supra* text accompanying note 125.

141. *New Convention*, *supra* note 11, at 13-14. Article 6 Protection of Owners and Demise Charterers of Arrested Ships

1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which
   may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:
   (a) the arrest having been wrongful or unjustified; or
   (b) excessive security having been demanded and provided.
2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:
   the arrest having been wrongful or unjustified, or
   (b) excessive security having been demanded and provided.
3. The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.
4. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.
5. Where pursuant to paragraph 1 of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Id.

142. *Id.* at 14.

143. 1952 Convention, *supra* note 5, 1833 U.N.T.S. at 404-405.

144. *Id.*

145. *Id.*

The wrongful arrest clause originated from the ship owners' concern that claimants would arbitrarily use the arrest mechanism to threaten them into paying claims.[146] In essence, ship owners were concerned that claimants would turn ship arrest into a ransom tool to coerce them to pay the debt whether it was theirs or not.[147] The claimant could use the knowledge that ship owners would rather pay small claims than have a vessel under arrest and unable to trade and earn revenue. Under the original arrest procedure, claimants had little to lose. They could arrest a ship, and if the court decided the merits of the claim were invalid, the ship would be released and the claim extinguished.[148] Indeed, a claimant's only real risk was court costs and attorney fees.

With the practice of chartering ships to third parties, the implications of creditors relying on the credit of the vessel in supplying necessaries created uncertainty to all involved when a ship was arrested.[149] A ship owner will frequently charter its ship out to a third party who then trades the ship on its own.[150] Frequently, these third-party charterers are under-capitalized and are simply speculating on freight markets when they contract to charter a ship. If the freight market unexpectedly moves against them, the charter can begin to lose money immediately. As a result, the charterer, without the owner's knowledge and in violation of their contract, may begin to accumulate the necessaries for a voyage from its suppliers on the credit of the vessel.[151] Once the owner receives the ship back, either when the charter expires or if the charterer goes bankrupt, suppliers would threaten arrest or actually arrest without notice unless the owners paid the charterer's bills.

Ship owners argued that this was unjust, and believed that creditors should pursue the charterer and not the ship owner.[152] An far as ship owners were concerned, if a charterer went bankrupt it was the suppliers loss for not requiring adequate security for the risk, and the loss should

146. *Preparation*, *supra* note 16, at 5. The delegation from China describes the typical objection to allowing claimants easy access to arresting vessels without any risk of incurring damages for being wrong on the merits of the claim. *Id.*

147. *See National Law Still Final Arbiter Despite Ship Arrest Convention*, LLOYDS LIST, Dec. 8, 1999, at 18.

148. *Preparation*, *supra* note 16, at 5.

149. *See* TETLEY, *supra* note 73, at 602-04.

150. A vessel charter is much like a rental agreement. The ship owner rents his ship out via contract to a third party for a period of time or for a particular voyage. Other chartering agreements can resemble long-term leases. These charter agreements are called demise or bareboat charters. They involve transferring ownership rights to the charterer where the charterer becomes an owner "pro hac vice." *See generally* MICHAEL WILFORD, TERENCE COGHIL & JOHN D. KIMBALL, TIME CHARTERS (3d ed., 1989) (discussing the fundamentals of ship chartering).

151. *See* Tetley, *supra* note 73, at 605.

152. *Id.* at 617.

not be passed onto them.[153] However, when a supplier's services rose to the status of a maritime lien, then a jurisdiction allowing for arrest in rem would in essence punish the ship owner because the ship would be personified as the entity that owes the supplier for the services rendered.[154]

On the other hand, the jurisdictions recognizing necessaries as simply a maritime claim would not allow such an arrest against the ship because the supplier sold to the charterer and not the owner of the ship.[155] Therefore, ship owners thought it important to create a method to deter these wrongful arrests against their ships.[156] They believed that the most effective deterrent was to create damages for wrongful arrest.[157]

United Kingdom law defines a wrongful arrest as a ship arrested in circumstances where there is gross negligence or malice on the part of the claimant or his solicitors.[158] This is a high standard and successful actions for wrongful arrest are rare in the United Kingdom, as well as in the majority of jurisdictions.[159] The burden under the new "unjustified arrest" clause, however, may not be so high.[160]

The unjustified arrest is already codified in the national laws of some civil law countries. For example, under German law, a claimant is liable for damages if the arrest is without justification.[161] This liability exists regardless of fault on the part of the claimant.[162] It is sufficient if the warrant of arrest is unjustified from the start of the proceedings or if it would have been set aside.[163] The damages can include loss of profits by the arrest and detention of the vessel.[164]

Like Germany's standard, Article 6 of the New Convention raises the stakes for claimants contemplating a ship arrest by use of the unjustified arrest wording. The participants commenting on the New Convention were split evenly on whether to institute unjustified arrest damages.[165] The delegates who supported use of the unjustified arrest

153. *Id.*
154. *See* GILMORE & BLACK, *supra* note 3, at 589.
155. *See* TETLEY, *supra* note 73, at 568-70.
156. *See id.* at 1055.
157. *See id.* at 1076.
158. MARITIME LAW HANDBOOK, *supra* note 13, at England and Wales - 22.
159. TETLEY, *supra* note 73, at 1055.
160. *See Preparation*, *supra* note 16, at 28.
161. MARITIME LAW HANDBOOK, *supra* note 13, at Federal Republic of Germany Part I - XIII.
162. *Id.*
163. *Id.*
164. *Id.*
165. *See generally*, *Preparation*, *supra* note 16.

did so to create a stronger deterrent for claimants bringing frivolous claims. China, for instance, commented that:

> This article introduces the right of a court to set counter security for wrongful or unjustified arrest as a condition for the arrest of a ship. This right exists in some jurisdictions. It can be beneficial in making a claimant reconsider arrest in doubtful circumstances or where arrest may be contemplated as a means of applying unreasonable pressure . . . This article is supported, as it deters wrongful arrests.[166]

Furthermore, some delegates felt the clause did not go far enough. A detailed reading of the clause reveals that thus the decision to require counter-security is a discretionary one left to local court.[167] The pro-ship owner delegation, the ICS, commented that "shall" should replace "may," thus making the counter-security mandatory.[168] They contended that this change in the wording was necessary to counter the unbalanced nature of the arrest procedure as it currently stood.[169] The ICS stated that "the draft Convention [was] unbalanced because a defendant has to furnish security in order to obtain the release of the vessel, whereas claimants are not compelled to provide any security for losses incurred by the defendant for which the claimant may be found liable."[170]

The opposing faction at the Conference thought that the addition of the unjustified wording was unacceptable. States such as Mexico and Thailand were opposed to the wording.[171] Mexico commented that the criteria making up the counter-security decision were subjective and that the decision should be left to the local courts.[172] Thailand went further, suggesting that the wording was ambiguous and would lead to international interpretation problems because it was internationally untested and untried.[173]

Although the addition of this "unjustified" language may not affect the practical aspect of counter-security in ship arrest because the decision is still left to the discretion of the local courts, making it mandatory is not a sound idea. Frequently, when a ship owner is experiencing a cash flow crisis, the ship's crew will go unpaid.[174] When this occurs, one of the only means of receiving their past-due wages is by ship

166. *Id.* at 5.

167. The clause reads in pertinent part, "The court *may* as a condition of the arrest of a ship . . . ." *Draft Articles*, *supra* note 76, at 11.

168. *Preparation*, *supra* note 16, at 20.

169. *Id.*

170. *Id.*

171. *Id.* at 9, 15.

172. *Id.* at 9.

173. *Id.* at 15.

174. *See id.* at 32.

arrest.[175] Demanding that crewmembers put up counter-security when they have not been paid seems an unjust way to make ship owners immune to claims from the crew.[176] If ship owners know their crew will not be able to post the needed counter-security, they may continue to avoid paying the crew for an even longer period of time.

Furthermore, the term "unjustified arrest" seems counter-intuitive here. Presumably, a court would not order an unjustified arrest in the first place.[177] In practice, the local court decides whether the arrest is justified when it reviews the claimant's petition for the arrest. At that point, if the reviewing court believes the arrest is unjustified it would simple deny the petition. In reality, the unjustified arrest language seems more of a counter-threat against a claimant or a punitive damage award for the ship owner against the claimant for losing the case on the merits.

The final version of the articles in the New Convention, demonstrates that, despite the debate over the draft articles at the Conference, the delegates decided to accept most of the wording as drafted. However, it is important to comment on how the Conference resolved the actual conflicts discussed above.

In the first conflict, over the definition of what should be a valid claim, the delegates decided to stay with tradition and followed the approach of the 1952 Convention. At the Conference, the delegates approved the closed and exhaustive list of maritime claims.[178] Although

175. GILMORE & BLACK, *supra* note 3, at 35-36.

176. *See Preparation, supra* note 16, addendum 1 at 2.

177. *Id.* addendum 3 at 4.

178. *New Convention, supra* note 11, at 3-4.

Article 1

Definitions

For the purposes of this Convention:

1. "Maritime Claim" means a claim arising out of one or more of the following:

(a) loss or damage caused by the operation of the ship;

(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;

(c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;

(d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);

(e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;

some of the claims were modified from the draft language,[179] the overall result was to keep the limited definition of claims by using the closed list.[180] In the second conflict, where the debate was over allowing the right of a claimant to arrest a vessel "ready to sail or that is in the process of sailing," the clause was rejected by the delegates and stricken from the New Convention.[181] As for the final conflict described above, after a vigorous debate, the delegates elected to adopt the addition of the "unjustified arrest" to Article 6 of the New Convention.[182]

Consequently, it appears that the claimants suffered more disappointments than ship owners upon conclusion of the Conference.

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
(h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;
(i) general average;
(j) towage;
(k) pilotage;
(l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
(m) construction, reconstruction, repair, converting or equipping of the ship;
(n) port, canal, dock, harbour and other waterway dues and charges;
(o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
(p) disbursements incurred on behalf of the ship or its owners;
(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
(s) any dispute as to ownership or possession of the ship;
(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
(u) a mortgage or a "hypothèque" or a charge of the same nature on the ship;
(v) any dispute arising out of a contract for the sale of the ship.
2. "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.
3. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
4. "Claimant" means any person asserting a maritime claim.
5. "Court" means any competent judicial authority of a State.

179. For instance the conference defined salvage operations in more detail and likewise expanded the language for making environmental claims.

180. *New Convention*, *supra* note 11, at 3-4.

181. *See id.* art. 2, at 10.

182. *Id.* art. 6, at 13-14.

V. THE IMPLICATIONS OF THE NEW CONVENTION

The importance of the New Convention can be gauged by the number of delegates that attended the conference in March, 1999. There were delegates from ninety-three states, as well as observers from many others.[183] Virtually all the major powers and maritime nations were present.[184] A majority of the delegates, including the major powers, signed the Final Act.[185] Although under Article 12, signing the Final Act at the conference does not constitute an expression of consent to be bound under the actual New Convention,[186] it does however indicate an initial desire to facilitate "the harmonious and orderly development of [the laws that govern] world seaborne trade."[187] Likewise, it records the conviction of the delegates that there is a necessity for a "legal instrument establishing international uniformity in the field of arrest of ships . . . ."[188]

In order for a state to consent to be bound by the Convention, it must sign the New Convention when it is deposited with the Secretary-General of the United Nations in New York from September 1999 through August 2000.[189] Thereafter, the New Convention will remain open for accession.[190] Although a majority of delegates attending the conference signed the Final Act, and it would seem that the New Convention would attract the minimum ten signatures required before the closing in August 2000, to date only six nations have agreed to be bound.[191]

Even though the New Convention closely parallels the 1952 Con-

183. *Report of the United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships,* United Nations International Maritime Organization Diplomatic Conference on Arrest of Ships, at 27-28, U.N. Doc. A/CONF.188/5 (Mar. 12, 1999) *available at* http://www.unctad.org/en/docs/imo99d5.pdf (last visited Apr. 30, 2001) [hereinafter *Report*].

184. *Id.*

185. *Id.* at 7.

186. *New Convention*, *supra* note 11, art. 12, at 17.

Article 12 Signature, ratification, acceptance, approval and accession

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

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or (c) accession.

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

187. *Id.* at 8.

188. *Id.*

189. *Report*, *supra* note 183, at 16.

190. *Id.*

191. *Supra* note 90.

vention, Article 3 of the New Convention[192] the universe of maritime claims which permit the use of ship arrest; if the New Convention goes into force, this may impact ship arrest. Under Article 3(1)(a), the general rule is that a ship against which a maritime claim is asserted may be arrested only if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is the owner of the ship when the arrest is effected.[193] The only other circumstances in which ship arrest is permitted irrespective of the liability of the ship owner are contained in Article 3(1)(b)-(e).[194] These include: claims against a demise charterer, who for all intents and purposes is the owner of the ship via contract; claims based on mortgages of the ship; claims relating to the ownership of the ship; and claims secured by maritime liens.[195]

This last exception is the only one of great significance. Article 3(1)(e) will create many debates as to what will qualify as a maritime lien.[196] There are three options to consider. The first would be to allow only recognized international maritime liens as a basis for arrest.[197] These types of liens are outlined in the 1993 International Convention of

192. *See Report*, *supra* note 183, at 22.

193. *New Convention*, *supra* note 11, at 11. Article 3 Exercise of Right of Arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
   (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
   (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
   (c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or
   (d) the claim relates to the ownership or possession of the ship; or
   (e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.
2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:
   (a) owner of the ship in respect of which the maritime claim arose; or
   (b) demise charterer, time charterer or voyage charterer of that ship.

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

Id.

194. *Id.*

195. *Id.*

196. *See Report*, *supra* note 183, at 19-20.

197. *See* Tetley, *supra* note 27, at 1967-69.

Maritime Liens and Mortgages (hereinafter "1993 MLM Convention").[198] They are a limited list of five maritime claims which rise to the level of a maritime lien.[199] The second option would be to allow arrest for liens that are nationally recognized as valid maritime liens under the arresting jurisdiction's law.[200] This option would create the ability for forum shopping and would be adverse to the goal of uniformity in the maritime law.[201] A final option could be to combine the first two options. This would be done by allowing states party to the 1993 MLM Convention to be restricted to those liens, while non-party states could effect their own recognized liens.[202] The wording of the New Convention suggests that this third option was the compromise reached.[203]

Article 3 may keep states that follow the U.S. view on ship arrest, and the in rem action, from signing the Convention.[204] Under Article 3, the convention sets up the arrest procedure that mirrors the civil law view on maritime attachment procedure. This will severely limit a claimant's abilities to effect arrest in many jurisdictions if a state were to adopt both the 1993 MLM Convention and the New Convention. As a result, a claimant may be barred from any legitimate right to recover his debt, and may find himself at risk under the terms of the new Article 6 which awards a ship owner "unjustified arrest" damages as well.[205]

The International Ship Suppliers Association expressed this exact dissatisfaction with Article 3 when it stated:

> This comendment will be particularly unfair to the small claimant who, even though he may not be entitled to a maritime lien under the terms of the 1993 MLM Convention, arrests a vessel only to find out that the name of the owner's company has been changed (which is common practice with owners who are trying to avoid payment).[206]

Furthermore, the Association's closing remarks about Article 3 reflected a concern that the more limited protection for its members would create significant changes in financing for the shipping world.[207] They stated

198. MARITIME LAW HANDBOOK, *supra* note 13, at International Section 33.

199. *Id.* at International Section 35. The list of liens include: a) claims for crew wages, b) claims for personal injury, c) claims for salvage, d) claims for port dues, and e) claims for torts arising out of physical loss caused by the operation of the vessel, e.g. collision damages.

200. *See* Tetley, *supra* note 27, at 1967-69.

201. *See Preparation*, *supra* note 16, at 32.

202. *See* Linda Howlett, *New Ship Arrest Convention: Solution or Confusion*, MARITIME REVIEW, 1st half of 1999, at 55, 57.

203. *Id.*

204. *See* Tetley, *supra* note 27, at 1939-40; *see also* SHOENBAUM, *supra* note 1, at 901.

205. *See Preparation*, *supra* note 16, at 32.

206. *Id.*

207. *Report*, *supra* note 182, at 22.

that, "[u]nder the provisions of the new Convention, ship owners and managers might find suppliers unwilling to supply vessels on open credit terms if any doubt existed as to payment being properly protected by international law. This could interfere significantly with the smooth operating of a vessel."[208] On this point, the ship suppliers association might not be too far off. If financing for ship owners begins to decrease, the cost of ocean shipping would rise. This would affect even ship owners with good credit. Likewise, a rise in shipping costs could cause a ripple effect throughout the global economy if the increase in costs were passed on to consumers.

VI. THE NEW CONVENTION'S IMPACT ON FORUM SHOPPING

The best jurisdiction in which to arrest a ship depends on the facts of the particular case. Because of the international nature of ocean shipping, "forum shopping" is an activity commonly practiced by maritime claimants all over the world.[209] The rationale behind forum shopping is a simple one. Plaintiffs will frequently attempt to have their action tried in a jurisdiction where they believe they will receive the most favorable judgement or verdict.[210] In the case of maritime claims, the judgment sought is that the claim (1) is valid on the merits of the case, and (2) "primes", or has priority over, all other claims that may be joined to the action from other parties.[211] Although the rationale for forum shopping may be simple, the matrix that develops in deciding where the best forum lies is extremely complex.[212] The maritime claimant has two methods for conducting forum shopping. The first method is a reactive method while the second is a proactive method.

In the reactive method of forum shopping, a maritime claimant will literally chase the debtor's ship around the world until the ship calls a port in a jurisdiction in which the claimant is confident of recovery.[213] This process can take a significant amount of time since ships can be at sea for significant amounts of time.[214] Usually, when the ship finally arrives at the choice forum, the claimant will pounce on the vessel with little or no warning to the ship owner. The impact of this surprise attack

208. *Id.*

209. *See* Tetley, *supra* note 27, at 1968, 1972.

210. *See* The Atlantic Star, 2 Lloyds Rep. 446, 451 (Q.B. C.A. 1972); *see also* BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

211. *See* Tetley, *supra* note 73, at 912.

212. *See supra* text accompanying note 2.

213. *See generally, New Convention Set to Widen Arrest Rights*, TRADEWINDS, Feb. 7, 1997, at 18 (referring to forum-shopping as a "cat-and-mouse" game).

214. *See* ALDERTON, *supra* note 7, at 47 (describing the average distance traveled for an oil tanker as 5,400 nautical miles per voyage).

can benefit the claimant in many ways, and, for the unsuspecting ship owner, unearth old claims he may have long forgot. Likewise, a ship owner who has recently purchased the targeted ship will, for the first time, realize the potential liabilities it may inadvertantly have just purchased with its new vessel.[215]

In order for forum shopping to work, the claimant must know which jurisdictions offer the best potential for arrest, both procedurally and substantively. Ignoring either aspect of law will lead to failure since simply effecting an arrest of a ship does not guarantee recovery of the debt. While a claimant may be able to procedurally arrest a vessel, if the ship owner is willing to post a bond and fight the underlying claim on the merits of the case, a claimant may find out that his facts about the substantive law of the jurisdiction were wrong.[216] In this scenario, the claimant will not only lose the claim, but any possibility of effecting his rights in the proper forum elsewhere.[217]

Although reactive forum shopping takes place regularly, the intentional act of forum shopping is generally frowned upon by most legal entities in the maritime industry, except for the claimants attorneys.[218] This debate is played out in the famous English Admiralty case of *The Atlantic Star*,[219] Lord Denning, Master of the Rolls, viewed forum shopping as a necessary means as well as a compliment to his court.[220] The case concerned a collision among three ships.[221] The plaintiff first brought an action against the ship owners of the M/V Atlantic Star in the Antwerp Commercial Court, but for choice of law reasons, subsequently commenced an action in the English Admiralty Court.[222] The owners of the Atlantic Star moved for a stay of the English action because of the plaintiff's action in Belgium.[223] The Admiralty Court dismissed the ship owners' motion on the condition that the plaintiff quickly discontinue the action in Belgium.[224] When the case came on appeal before Lord Denning, he delivered the following remarks about forum shopping:

> [I]nconvenience falling short of injustice, is not sufficient to stay the action . . . . If a plaintiff considers that the procedure of our Courts, or the substantive law of England, may hold advantages for him supe-

215. *See* SCHOENBAUM *supra* note 1, at 430-31.

216. *See Dropped Catch, Ship Arrested After Owner Has Gone*, FAIRPLAY, Dec. 9, 1999, at 28 [hereinafter *Dropped Catch*].

217. TETLEY, *supra* note 73, at 1111-13.

218. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1690 (1990).

219. The Atlantic Star, 2 Lloyds Rep. 446 (Q.B. C.A. 1972).

220. *Id.* at 451.

221. *Id.* at 449.

222. *Id.* at 450.

223. *Id.* at 451.

224. *Id.*

> rior to that of any other country, he is entitled to bring his action here - provided always that he can serve the defendant, or arrest his ship, within the jurisdiction of these Courts - and provided also that his action is not vexatious or oppressive . . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our Courts if he desires to do so. You may call this "forum shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[225]

However, as patriotic as Lord Denning appeared not all of his peers agreed. Reversing the dismissal of the motion, the House of Lords allowed the appeal to be heard.[226] Lord Reid responded to Lord Denning by commenting:

> My Lords, with all respect, that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of the island felt an innate superiority over those unfortunate enough to belong to other races . . . I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be "driven from the judgment seat" without very good reason, but in the latter the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay. If both parties are content to proceed here there is no need to object. There have been many recent criticisms of "forum shopping," and I regard it as undesirable.[227]

Many ship owners around the world agreed with Lord Reid's position.[228] These ship owners believe it is unjust that a claimant can "stake out" a port in a creditor friendly jurisdictions, such as the United States, Panama, or South Africa, and wait for a targeted vessel to arrive.[229] This forum shopping "sport", along with its negative treatment by most courts, has lead to the development of the second type of "proactive" forum shopping in which a forum selection clause is written into a

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225. *Id.*

226. The Atlantic Star, 2 Lloyds Rep. 197 (H.L. 1973).

227. *Id.* at 200.

228. *See Preparation*, *supra* note 16, at 18. The ICS had cautioned the Conference in drafting the articles to the New Convention to be mindful of the need for uniformity. Otherwise, "ships would be subject to frequent and in some cases arbitrary arrests for the same claims because they move through many jurisdictions each with there own national rules on arrest". *Id.*

229. *Id.* Each of these jurisdictions offers claimants advantages to bringing the action in that country. Panama and the United States each apply U.S. type law so extensive list of liens are recognized for an in rem action, while South Africa is an excellent forum in which to pierce corporate veils of owners of "one-ship owning corporations." *See generally* MARITIME LAW HANDBOOK, *supra* note 13.

contract.[230]

In contrast to the reactive method, the proactive method uses forum selection clauses in a contract to pre-select a particular forum in which disputes will be litigated. Here, a supplier can research the substantive national maritime laws to determine which jurisdictions allows him the best chance of winning on the merits. Frequently U.S. law is a popular choice for suppliers because U.S. law on maritime liens is very accommodating to suppliers of necessaries.[231] Conversely, an opposing ship owner, would prefer a jurisdiction with law resembling English law, which has a more restricted definition of necessaries.[232]

A choice of law clause in a written agreement will frequently be upheld.[233] This position was first decided under U.S. law in the landmark case of *The Bremen v. Zapata Off-Shore Co.*[234] *Zapata* involved a German corporation and a U.S. corporation which agreed, in a forum selection clause, that all disputes would be settled in London.[235] In *Zapata*, the Supreme Court found that, although U.S. courts had historically not favored forum selection clauses, the courts were now beginning to adopt a more hospitable attitude towards them.[236] Therefore, the Court held such clauses "should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[237] In its decision the Court referred to other jurisdictions that had already taken a favorable view towards the clauses.[238] The Court stated:

> We believe this is the correct doctrine to be followed by the federal district courts sitting in admiralty . . . This approach is substantially that followed in other common-law countries including England. It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of

230. *See* Ryan-Walsh, Inc. v M/V Ocean Trader, 930 F. Supp. 210, 219 (D.Md. 1996). In *Ryan-Walsh*, the court enforced a clause in a marine fuel supply contract that provided for application of U.S. law and providing for a U.S. forum, even though the fuel was supplied in Singapore and Indonesia. *Id.* at 222.

231. SCHOENBAUM, *supra* note 1, at 422-23.

232. TETLEY, *supra* note 73, at 589.

233. *See* Ryan-Walsh Inc., 930 F. Supp. at 219.

234. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

235. *Id.*

236. *Id.* at 9-10.

237. *Id.* at 10. In the case of unreasonable circumstances a court has the option to use the doctrine of forum non conveniens by declining to hear the action, thus allowing the moving party to take the action to a more reasonable jurisdiction on the basis of international comity. HEALY & SHARPE, *supra* note 17, at 177.

238. *See Zapata*, 407 U.S. at 11-12.

the world.[239]

In *Zapata*, neither party had any real connection with the forum, yet the highest court in the United States held that the forum selection clause was reasonable and freely negotiated between the parties.[240] The rationale expressed was that the forum selected for this international agreement between the parties provided a neutral forum for litigation.[241]

The practice of contracting with a negotiated forum selection or choice of law clause has become more relied on worldwide since decisions like *Zapata*. Because the two largest jurisdictions for maritime litigation, London and New York, recognize the validity of the forum selection doctrine, its use has become extremely prevalent in shipping.[242]

The impact of the New Convention on forum shopping is significant in terms of both methods. On the one hand, the New Convention provides the mechanism to allow the process of the proactive model to become even more efficient. On the other hand, the impact of the New Convention on the reactive forum shopper can be seen as detrimental. However, until a uniform procedure, as well as a uniform substantive law, is adopted and enforced by all maritime states, there will continue to be opportunities for claimants to exploit both methods of forum shopping to recover unpaid bills.

In promoting uniformity in maritime law, the New Convention, in effect, opposes the reactive model of forum shopping.[243] If states utilize the New Convention, the substantive law differences that exist between different states may become an irrelevant factor in the forum shopping equation. By enforcing the New Convention, a state will in essence bar a claimant's right to a trial on the merits since the claimant will not be able to effect the arrest in the first place.[244] The claimant will be barred because his claim may not be executed under the New Convention if the ownership of the vessel has changed before he can effect the arrest.[245] This allows ship owners to play the "change the company name game"

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239. *Id.* at 10-11.

240. *Id.* at 12.

241. *Id.*

242. For example, charterparties negotiated between ship owners and charterers all include a choice of law and either forum or arbitration clauses within them. *See* LARS GORTON, ROLFE IHRE & ARNE SANDEVARN, SHIPBROKING AND CHARTERING PRACTICE 155 (3d ed., 1990).

243. *See Report*, *supra* note 183, at 22. The Secretary-General of UNCTAD has stated that the terms of the *New Convention* contribute to harmonization of international maritime legislation. *Id.*

244. *See Preparation*, *supra* note 16, at 18 (explaining the need for a closed list of claims that will clearly limit and delineate who can effect an arrest).

245. *Id.* at 32; *see also* M.D. Lax, *International Convention on Arrest of Ships 1999*, LLOYDS LIST, Aug. 18, 1999, at 6.

to escape liability.[246] Likewise, if the claim is against a party other then the actual ship owner, such as a charterer, the claimant is automatically barred from arrest under the New Convention's general rule unless the claim itself qualifies under the limited lien status of the New Convention and the 1993 MLM Convention.[247]

Therefore, until the New Convention is enforced worldwide, the dichotomy established in the reactive forum-shopping model will continue. Once the New Convention is in force, the reactive forum shopper will be left to target those states which are not parties to the New Convention. Furthermore, they must seek those non-convention states that have a wide acceptance of enforceable claims. For example, states that follow the in rem regime followed by the United States would be favorable jurisdictions to effect an arrest when the claim is outside the New Convention's closed list of acceptable claims.[248] Thus, the claimant will simply avoid effecting an arrest when the targeted ship is calling at a port where the New Convention is in force.

On the other hand, most of the work to improve the ability of proactive forum shopping is done by Article 7(1).[249] Article 7(1) per-

246. *See Dropped Catch*, *supra* note 216.

247. *See Preparation*, *supra* note 16, at 32.

248. *New Convention*, *supra* note 11, at 8-10.

249. *Id.* at 14. Article 7 Jurisdiction on the Merits of the Case

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

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

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

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

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

6. Nothing contained in the provisions of paragraph 5 of this article shall restrict

mits a ship to be arrested in the jurisdiction where it is currently lying, while at the same time allowing the case to proceed on the merits in the forum stipulated to by the parties.[250] The language of Article 7(1) seems clear on this procedure:

> The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.[251]

This paragraph establishes a rule whereby the local court can act as a jurisdiction for the arrest procedure and then as a bailiff in holding the security while the merits of the case are heard elsewhere. It allows the substantive aspects of a claim to be heard in a jurisdiction other than where the arrest has been effected, while recognizing the judgment of the jurisdiction where the merits were heard.[252] Article 7 shows the beginnings of large-scale comity between different nations and their respective rulings, as long as due process is satisfied.[253]

Once the court in the selected forum has decided the merits, the case will be transferred back to the jurisdiction in which the ship, or the substituted security, is being held.[254] Under Article 7(5), the final decision of the court that decided the merits of the claim will be recognized by the arresting jurisdiction, provided that the defendant was afforded due process under the law in the case on the merits.[255] For international translation reasons, the New Convention defines due process in the more generic form of reasonable notice and opportunity to present a defense in the proceedings on the merits.[256]

However, the New Convention also allows the jurisdiction holding the security a "catch all" escape clause. If the arresting jurisdiction believes that the decision on the merits rendered by foreign court is against its public policy, then the arresting jurisdiction may disregard that decision.[257] This escape clause seems to shift much of the possibility for any success on the merits of the case back to the control of the

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> any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

250. *Id.; see also* Howlett, *supra* note 202, at 57.

251. *New Convention*, *supra* note 11, at 14.

252. Howlett, *supra* note 202, at 57.

253. *Report*, *supra* note 182, at 20.

254. *New Convention*, *supra* note 11, art. 7(5)(a), at 15.

255. *Id.*

256. *Id.*

257. *Id.*

jurisdiction where the arrest took place and once again subject to the substantive law ot the arresting jurisdiction.

After analyzing the New Convention, it may be concluded that the drafters, as well as the delegates at the conference, believed that forum shopping needed to be rectified. However, it may also be surmised that those same drafters and delegates agreed with Lord Reid, in his decision in the *Atlantic Star*, that there is a significant difference between the proactive and reactive methods of forum shopping.[258]

VII. CONCLUSION

The New Convention is a reasonably balanced instrument. While it contains some improvements on the 1952 Convention from the ship owners' perspective, such as the explicit provision for counter-security against unjustified arrest, there are provisions, such as the expanded list of maritime claims under Article 1 that may give ship owners cause for concern.

If the New Convention is to become the governing instrument in ship arrest procedure around the world, it is impossible to predict with any certainty whether it will be more advantageous to the ship owners or to the claimants. Nevertheless, one thing is certain: until all the maritime states adopt the New Convention, the non-uniformity in ship arrest will continue to allow claimants to forum shop for the most favorable jurisdiction.

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258. The Atlantic Star, 2 Lloyds Rep. 197 (H.L. 1973).

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