THE ARREST CONVENTION 1999 – ANY REACTION FROM NEW ZEALAND OR AUSTRALIA?

PAUL DAVID
RUSSELL McVEAGH
AUCKLAND

THE ARREST CONVENTION 1999 - ANY REACTION FROM NEW ZEALAND OR AUSTRALIA?

PAUL DAVID
BA (Hons) LLM (Cantab)

RUSSELL McVEAGH

THE ARREST CONVENTION 1999 - ANY REACTION FROM NEW ZEALAND OR AUSTRALIA?

Introduction

The Arrest Convention 1999 ("**1999 Convention**") was adopted on 12 March 1999 following a two week diplomatic conference in Geneva convened by the International Maritime Organisation and the United Nations Conference on Trade and Development. The purpose of the 1999 Convention was to refine and update the Brussels Convention on the Arrest of Seagoing Ships 1952 ("**1952 Convention**"). The 1999 Convention came about after a lengthy process which commenced back in 1984[1].

The Convention's preamble refers to "the desirability of facilitating the harmonious and orderly development of world seaborne trade" and refers to the need to establish "international uniformity in the field of arrest of ships". In this paper, I will outline the changes introduced by the 1999 Convention and speculate a little on the possible responses from Australia and New Zealand.

In our legal systems it will be necessary to enact the Convention (or any pat of it) for it to become part of our laws. New Zealand's record generally in ratifying international Conventions in the maritime area has not been good but in recent times there has been a greater willingness to adopt international Conventions through the mechanism of the Maritime Transport Act 1994. Neither Australia or New Zealand country has formally ratified 1952 Convention although New Zealand's legislation like the UK legislation from which it was derived, is directly based on the 1952 Convention.

Both Australia and New Zealand have strong traditional connections with the English Court of Admiralty and the early nineteenth century Imperial Admiralty Acts in the field of admiralty law which many of you will be familiar with[2]. While Australia has adopted its own Admiralty Act 1988, after a Law Commission review of the admiralty jurisdiction, New Zealand has maintained a closer link to the UK legislation. New Zealand's Admiralty Act 1973 (and the Admiralty Rules 1997) are both based, essentially, on the UK legislation and procedural rules. The Admiralty Act 1973 was based on the UK Administration of Justice Act 1956 which enacted the 1952 Convention and was subsequently re-enacted (with slight amendment) by the Supreme Court Act 1981. This statutory history means that the list of

---

[1] See the outline of the process given in Berlingieri, *Berlingieri on Arrest of Ships: a Commentary on the 1952 Arrest Convention*, 2nd ed. (London: LLP 1996) at page 157.

[2] See eg. The summary of the origins of New Zealand admiralty law in *Maritime Liens and Claims* 2nd Ed by W. Tetley

claims in the New Zealand Admiralty Act 1973 follows the 1952 Convention with some additional claims which are or may be outside the list in the 1952 Convention[3]. I should add that this traditional background is constantly emphasised by the relevance of old authorities from the early days of the Admiralty Court in London in modern New Zealand admiralty matters[4].

Background to the 1999 Convention

The 1952 Convention was a compromise between the differing approaches in the common law and civilian systems to the arrest of ships[5]. In civilian systems, the arrest of a vessel was merely one element of a general power to arrest a debtor's property[6]. For example, the *saisie conservatoire* in the French system was applied to property other than ships, and, prior to the 1952 Convention, ships could be arrested for any civil claim. In 1952 there was no pre-trial attachment in England.[7][8] Arrest was widely available under civil law systems with protection being afforded to the owner through the provision of counter-security. In contrast, the action *in rem* was only available in the common law systems for specified "maritime claims", but very little protection was given to the shipowner if there was an arrest for an unjustified claim.

The 1952 Convention

The 1952 Convention achieved 75 ratifications and represented a compromise between the two systems. Under Article 1, a defendant's ship could only be arrested for a fixed and limited list of maritime claims - the approach adopted generally by common law countries. However, as part of the international compromise, the concept, previously unknown to the common law of "sister ship" arrest was introduced. This allowed the arrest of a vessel in the same ownership as the ship in respect of which the maritime claim arose.

---

[3] eg. Claims for pollution damage are expressly by statute within "damage done by a ship", claims for stevedoring and lighterage services, port and harbour dues, *respondentia* can all be the basis for an arrest. These claims are or may be outside the 1952 Convention.

[4] See *Mobil Oil New Zealand Limited v The Ship "Rangiora" No. 2* (2000) 1 NZLR 82; *Udovenko v Karelrybflot A/O* (2000) 2 NZLR 24 (CA) and *Fournier & Ors v The "Margaret Z"* (1999) 3 NZLR 111 for examples of modern New Zealand courts considering the principles developed in the Admiralty Court in relation to heads of admiralty jurisdiction.

[5] See Gaskell & Shaw, "The Arrest Convention 1999" (1999) LMCLQ 470, for a useful discussion of the background to the 1999 Convention.

[6] See, by way of illustration, the description of the origins of the arrest process in the 17th and 18th centuries described by Lord Denning in *The Banco* (1971) P137, at 150.

[8] The Mareva injunction was not to be developed until 1975, in *Nippon Yusen Kaisha v Karageorgis* (1975) 1 WLR 1093.

The 1999 Convention

Article 1: Maritime claims

The initial impetus for a new Convention arose from concerns that the list of claims for which arrest was possible under the 1952 Convention was too restrictive. The main debate on Article 1 concerned the issue of whether the list of maritime claims should be "closed", as in the 1952 Convention, or "open". Prior to the final conference it seemed an open list was favoured by many states. The idea was that this would allow for technological and commercial developments in the area of international trade which might give rise to new types of maritime claims. Several states suggested that the fixed list approach was unable to meet the challenge of the new and changing international environment. Certainly, the "fixed list" has created litigation in many jurisdictions concerning whether or not certain claims fall within the jurisdiction and, inevitably, differing positions have been reached on various heads of claim by countries with the same underlying source for their admiralty jurisdiction. At the conference, however, the majority of states chose to retain a closed definitive list.

A "catch all" paragraph (w) to Article 1, which allowed for claims of a "similar nature" to those in the (a)-(v) list of claims was put forward, but this was, in reality, an open list in another form, and was rejected. The list of "maritime claims" is, however, considerably wider than in the 1952 Convention. Although the list is closed, it does expand the ambit of arrestable claims.

The claims added to the list

A significant addition to the list of claims is Article 1(1)(d) which refers to environmental damage. While such claims would probably not have been experienced with any regularity in 1952, they are a significant class of potential maritime claim today. This paragraph is expressed to include claims "of a similar nature" which creates a potentially very broad head of claim. This wide definition recognises that this category of claim is difficult to define and may evolve to a significant degree.

Other significant additions to the list of maritime claims are those relating to wreck removal, ship management services, insurance premia and calls, commissions and brokerages[9] and ship sale contracts.

The ambit of some existing claims has also been extended. Article 1(1)(c) expands salvage claims under the 1952 Convention to include claims for "special compensation" under the 1989 Salvage Convention. Article 1(1)(g) now covers agreements relating to the carriage of passengers.

Article 1(1)(l) extends goods and material claims to cover "provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for it's operation, management, preservation or maintenance"[10]. Claims for port dues are dealt with more fully in article 1(1)(n) by referring to "port, canal, dock, harbour and other waterway dues and charges". Article 1(1)(o) has been extended to cover the "costs of repatriation and social insurance contributions payable on their behalf" in addition to wages.[11] Article 1(1)(m) which deals with claims by shipyards is extended to cover "construction, reconstruction, repair, equipping or converting the ship".

Article 1(2): Definition of arrest

The definition of "arrest" has been expanded to include a "restriction on removal of a ship". This would seem to be drafted sufficiently wide to include a mareva injunction.

Article 2: Powers of arrest

Article 2(1) states that a ship may only be arrested under the authority of a Court of the State party in which the arrest is affected. Article 2(2) stipulates, as Article 2 in the 1952 Convention did, that a ship may only be arrested in respect of a maritime claim. For civil law countries, this acts as a restriction on the powers of general attachment of a debtor's property. As with the 1952 Convention, arrest procedure is left to the law of the forum of

---

[9] cf. New Zealand approach in *SOS Maritime Brokers & Ors v The Ship Dana Star* (1996) 2 NZLR 482, where a writ of arrest was set aside on the grounds the plaintiffs' claim for a commission on the sale of a ship did not found *in rem* jurisdiction.

[10] If adopted into New Zealand law this would change the position established by such authorities as *The River Rima* (1988) 2 Lloyd's, Rep 193 in relation to the supply of containers.

[11] This would not appear to extend the law of UK or of New Zealand although the precise ambit of "wages" is somewhat unclear on the cases.

arrest under Article 2(4). This means that we have very significant procedural variations around our region in the different jurisdictions.[12]

Article 3: Exercise of the right of arrest

Article 3(1) sets out the necessary link between the maritime claim in respect of the vessel and the identity of the person owning, operating or chartering the ship at the time of the arrest. As under Article 3 of the 1952 Convention, arrest is allowed where there is personal liability on the shipowner for a maritime claim where that person is also the owner at the time of the arrest. In addition, under Article 3(1)(b) the ship may be arrested if the demise charterer at the time of the maritime claim is liable for the claim and is the demise charterer or owner at the time of arrest. What is excluded is the ability to arrest a ship for debts incurred by the time charterer. While such an arrest was never available in the common law, the Article narrows the scope of arrest in many civil law countries such as France and Belgium.[13] Also significantly, the proposed wording, which included reference to "registered" in Article 3(1)(c) in relation to mortgages, *hypotheques* or charges of the same nature, has been removed. The common law States argued strongly for this deletion which would otherwise have prevented the holder of an equitable mortgage from enforcing against the vessel. Such types of security are important in container leasing and some yacht financing agreements.

Article 3(2) retains the familiar sister ship provision of the 1952 Convention. There had been a late proposal by the UK delegation to extend this provision to cover ships not only owned by the same person as the principal debtor, but also owned by companies or persons closely connected with them, following the "associated ship" concept adopted in South Africa.[14] While this gained some support from Canada, Australia, Japan, The Netherlands and CMI, it seems that it was a step too far for most delegations and the proposal was defeated.

---

[12] It is regrettable, but inevitable, that neither the 1952 Convention nor the 1999 Convention could deal to any great extend with procedural matters. Essential procedural elements remain governed by the *lex fori*. This means that disparity on a procedural level between national states will continue. Such procedural differences indirectly increase the cost of doing business. Disparity in matters such as appropriate security occurs at the expense of the free movement of ships.

[13] *Supra* note 2 at 477.

[14] Which focuses on issues of "control" of the ship rather than ownership.

Article 4: Release from arrest

Article 4(1) makes it mandatory for a vessel to be released when "sufficient security has been provided in a satisfactory form". Although shipowners and their insurers pressed for a provision clarifying what form of security is acceptable, in the absence of agreement between the parties, this has been left for the state court's determination.[15] Article 5 of the 1952 Convention has been refined and article 4(5) of the 1999 Convention states that the security shall not exceed the amount of the claim or the value of the ship, whichever is lower.

Article 5: Re-arrest and multiple arrest

Article 3(3) of the 1952 Convention allowed only one arrest in respect of any maritime claim. In one of the more significant amendments in the 1999 Convention, Article 5 allows for the possibility of a claimant re-arresting the same ship after it has been released and also for multiple arrests of other ships to supplement the security already provided.[16] A ship may be re-arrested where the initial security proves inadequate, where the guarantor is unlikely to fulfil its obligations or if the ship was released in circumstances effectively outside the claimant's control. Article 5(2) allows the arrest of additional vessels owned by the defendant shipowner where the security provided by the arrested vessel is inadequate. This represents a departure from the existing law in the United Kingdom and in those many jurisdictions which follow English law[17].

Article 6: Remedies of the shipowner

The debate on Article 6 concerned the nature and extent of any liability of the arrestor regarding wrongful or unjustified arrest, and whether the arrestor had to provide counter-security to cover such liabilities. The 1952 Convention merely left the issue of security for wrongful arrest to the law of the State where the arrest occurred. Practice in this area differs widely internationally. Some States require a formal guarantee by the arresting party. Others, such as the United Kingdom, require merely an indemnity to the Admiralty

---

[15] See HCR 781(1) in New Zealand which expressly gives the court the ability to decide whether proposed security is satisfactory. cf *Owners of the Ship "Carina" v Owners or Demise Charterers of the Ship "MSC Samia"* (1997) 148 ALR 623 for the Australian position.

[16] In New Zealand, while multiple notices of proceeding may be issued (r769) a claimant may only issue a warrant of arrest against one vessel (r776(2)).

[17] See *The Banco* (1971) P 137. There have been a number of recent New Zealand arrests which have highlighted the difficulties for an arresting party when the defendant vessel provides inadequate security for the plaintiff's claim.

Marshall for costs and expenses[18]. The States which traditionally might be said to represent ship owning interests attempted to include a provision making it mandatory for security for wrongful arrest to be provided in every application for arrest. This did not gain general support. Article 6(1) gives the court discretion as to whether the claimant must provide security for any loss incurred by the shipowner. This article states that the liability may include loss as a result of the arrest having been "wrongful or unjustified". Of course, a cause of action for wrongful arrest would not be made out in New Zealand law where the arrest simply proved to be "unjustified". The test under New Zealand law is the familiar and difficult (for a plaintiff) test of showing *crassa negligentia* or *mala fides*. Australia has chosen what is, perhaps, a slightly more relaxed standard which has, as yet, I believe, not been considered by the courts and involves showing that an arrest was "unreasonable and without good cause".

Article 7: Jurisdiction on the merits

Article 7(1) grants jurisdiction on the merits to an arresting court, unless there is a valid jurisdiction or arbitration clause. This provision might seem to make a slight change to existing principles in New Zealand law, and seek to remove a residual power of the Court to refuse to recognise an otherwise valid clause. Under Article 7(5) the arresting State is now obliged to recognise a final decision on the merits in another State by releasing the security to the successful claimant. Protection is afforded the shipowner by inclusion in this paragraph of concepts of "reasonable notice" to the shipowner and the requirement that such recognition is not against public policy.

Article 8: Application of the Convention

The 1999 Convention is deemed to apply to any ship within the jurisdiction of any State party whether or not that ship is flying the flag of a State party. In contrast to the 1952 Convention, which was expressly limited to seagoing ships, the 1999 Convention is to apply to all ships, seagoing and non-seagoing.[19] While this had caused some concern amongst States with existing inland waterway treaties, their interests were appeased by Article 10(2) which allows States to make reservations where a specific treaty already governs.

---

[18] With no counter-security by the arresting party. In New Zealand the Registrar can also seek additional security from the arresting party for ongoing fees, expenses and harbour dues under HCR 776(5)

[19] This has no significant implications for New Zealand, which has no real inland water shipping industry (and admiralty jurisdiction already extends to inland waters under the Admiralty Act 1973).

Article 14: Entry into force

The 1999 Convention will enter into force six months after 10 States have consented to be bound by it. The 1999 Convention became open for signature on 1 September 1999. At this time Pakistan is, I believe, the only signatory.

Procedural matters

Neither the 1952 Convention nor the 1999 Convention contain much that is relevant to admiralty procedure. Those matters are basically left for the national courts. As outlined, the 1999 Convention does touch upon procedural matters such as counter-security, adequacy of security, multiple arrests and "unjustified" arrest but these elements are still, in the main, left to national courts. New Zealand's High Court Rules for admiralty matters are based on the UK rules and are similar to rules in many other Commonwealth countries. In my experience the Rules work well and obviously fit well with the Admiralty Act 1973. In recent years our courts have had to grapple with the issue of the burden and standard of proof on applications to set aside admiralty proceedings but that issue would now appear to have been clarified in a satisfactory manner.[20] There is much to be said for standing by the tried and true in this area, and while the 1999 Convention gives some food for thought on procedural matters any proposal for change should be carefully considered in the overall international context and the historical development which lies behind our current Rules.

Concluding comments

The principal area where the 1999 Convention introduces significant change is in the extension of the list of claims for which arrest is available. The 1999 Convention clarifies other aspects of the law but overall retains the balance stuck between the common and civil law countries achieved by the 1952 Convention.

I would like to see New Zealand consider change to its admiralty legislation if other countries with similar legislation change their statutory provisions to reflect the 1999 Convention. The manner of implementation may require some consideration but it would seem likely that some amendment to the Admiralty Act 1973 would bring into New Zealand law any desired changes. While this may sound old fashioned (and I am far from a traditionalist), I would suggest that New Zealand should watch developments in the UK very

---

[20] See *Baltic Shipping Co Limited v Pegasus Lines SA* (1996) 3 NZLR 641; *Mobil Oil New Zealand Limited v The Ship "Rangiora"* (2000) 1 NZLR 119 and *Vostok Shipping Co Limited v Confederation Limited*(2000) 1 NZLR 37

Neither the 1952 Convention nor the 1999 Convention contain much that is relevant to admiralty procedure. Those matters are basically left for the national courts. As outlined, the 1999 Convention does touch upon procedural matters such as counter-security, adequacy of security, multiple arrests and "unjustified" arrest but these elements are still, in the main, left to national courts. New Zealand's High Court Rules for admiralty matters are based on the UK rules and are similar to rules in many other Commonwealth countries. In my experience the Rules work well and obviously fit well with the Admiralty Act 1973. In recent years our courts have had to grapple with the issue of the burden and standard of proof on applications to set aside admiralty proceedings but that issue would now appear to have been clarified in a satisfactory manner.[20] There is much to be said for standing by the tried and true in this area, and while the 1999 Convention gives some food for thought on procedural matters any proposal for change should be carefully considered in the overall international context and the historical development which lies behind our current Rules.

Concluding comments

The principal area where the 1999 Convention introduces significant change is in the extension of the list of claims for which arrest is available. The 1999 Convention clarifies other aspects of the law but overall retains the balance stuck between the common and civil law countries achieved by the 1952 Convention.

I would like to see New Zealand consider change to its admiralty legislation if other countries with similar legislation change their statutory provisions to reflect the 1999 Convention. The manner of implementation may require some consideration but it would seem likely that some amendment to the Admiralty Act 1973 would bring into New Zealand law any desired changes. While this may sound old fashioned (and I am far from a traditionalist), I would suggest that New Zealand should watch developments in the UK very closely. Our legislation is based upon the UK legislation and the general principles of admiralty law developed in the early days of the Admiralty Court in that jurisdiction which are applied in our modern jurisdiction, continue to serve us well. I hope that any consideration of the 1999 Convention, whether in Australia or New Zealand, keeps a firm focus on the importance of harmony and international comity which the Preamble to the Convention underlines. I am very wary of change for the sake of change where an existing legal framework serves well and is in step with many other nations.

I have read with interest the Australian Issues paper and look forward to hearing your views on the best approach to the 1999 Convention.

Paul David

---

[20] See *Baltic Shipping Co Limited v Pegasus Lines SA* [1996] 3 NZLR 641; *Mobil Oil New Zealand Limited v The Ship "Rangiora"* [2000] 1 NZLR 119 and *Vostok Shipping Co Limited v Confederation Limited*[2000] 1 NZLR 37