

CMI – IWG open meeting on Liability for Wrongful Arrest of Ships

**Transcript of the debate held on
Friday 9th November 2018, 14.30-16.30**

**at Thomas Miller & Co., 90 Fenchurch Street, London,
EC3M 4ST**

88 delegates in attendance.

The Agenda for the meeting and the questions set for this debate are also attached as a point of reference for the delegates and others who receive this report.

Executive Summary and Reflections

1. We had a very interactive 2-hour session.
2. Various representatives of NMLAs spoke (such as from Canada, USA, UK, Ireland, the Netherlands, France, Spain, Greece, Malta, Nigeria, Turkey, Ukraine, Japan, Hong Kong, China, and representatives of ICS, P & I Clubs, and cargo interests' insurers).
3. There was an illuminating and constructive debate among participants, who freely expressed their views as derived from their experience of practice in their own jurisdictions.
4. As it will be seen in the transcript, most of the participating lawyers and cargo insurers were concerned about any change of the law and were more or less happy with their national law regarding wrongful arrests.
5. It was said, that although many of them have had experience of 'so called wrongful arrests', actual wrongful arrest cases are rare and, in any event, there can be other remedies in place than a claim for general damages, which can be disproportionate. As to counter security or a cross undertaking, it was said that such a provision would deter the weaker claimants, such as crew members and others who are not protected by compulsory liability schemes, to have access to justice.
6. Many expressed the view that there is no real problem, first because wrongful arrests are rare, other than the occurrence of sharp practices to put pressure on the shipowner, and second because in most cases security is provided without much delay to the ship or even arrest. In the event of a failed claim there is a costs award.
7. However, P & I Clubs and the ICS (which represent owners) expressed the view that they are unhappy with the system because it is unsatisfactory and fragmented, and it will need to be looked at further.

8. Although the IWG project and the debate were welcomed and the participants would like to have more of such debates for the purpose of learning about the various national systems on arrest of ships, there was no appetite for change. The show of hands, however, was almost evenly balanced for and against change.
9. At the end of the debate, there was consensus that the CMI Project should continue to the next stage of a further questionnaire and further communication with the industry sectors.
10. However, I think that to attempt a reform of the system of arrest at an international level would not only be an almost impossible task, but it would also be prevented by national protectionism. On reflection, I do not think that any attempted uniformity would be achievable; (and even if it were, it might have the same fate as the 1999 Arrest Convention). Model law rules will only be serving the purpose of guidance.
11. The project, once the industry became aware of it by reason of the debate (and it was commended by the Court of Appeal in the *Alkyon*), has had the value of learning and it may provide a stimulus to law reformers of each national system to improve their respective laws on the subject.
12. Personally, I have come to the view that Sir Bernard Eder is right to pursue improvement of the procedural rules of arrest under English law, until such a day when the Supreme Court finds an opportunity to overrule its decision in the *Evangelismos*. Perhaps Sir Bernard's approach may be taken as an example for improvement of the national laws of the other jurisdictions.
13. Looking at the matter academically, of course, one can see that the laws should be somehow harmonised. But from what transpired broadly from the debate, which was attended by the very top legal practitioners and other professionals of the shipping industry, is that, in practice, the national legal systems work satisfactorily.

14. Be that as it may, the following points emerged from this debate:

- (a) there is an important distinction between technically defective arrest and wrongful arrest which causes confusion;
- (b) different legal systems have different procedures of arrest; many do not have the concept of an action in rem;
- (c) in some jurisdictions, the court gives only permission to arrest the ship and it does not issue the actual arrest order;
- (d) counter-security or a cross undertaking as a condition for arrest would raise the threshold of arrest as the judge would have discretion whether or not to grant the arrest order;
- (e) besides, (d) above would cause unfairness to economically weaker claimants – such as the crew and those who are not protected by compulsory insurance – because they would be prevented from access to justice;
- (f) a balance must be struck between the competing interests;
- (g) other remedies should be considered for the rare eventuality of wrongful arrest instead of change;
- (h) one should look at the context of wrongful arrest, i.e. which jurisdiction, how many arrests occur there, experience of lawyers, experience of judges etc;
- (i) if the arrestor loses on the merits, he/she will have to pay costs award, being the losing party;
- (j) a distinction should be drawn between a procedurally wrongful arrest and the strength or weakness of the underlying merits.

The questions that can be considered for the next questionnaire, as arising from this debate, may be around the following:

- (i) state: (a) your jurisdiction; (b) how many years you are practising; and (c) how many arrests of ships take place more or less in your jurisdiction?
- (ii) have you or your colleagues dealt with a wrongful arrest case, or one that was considered to be close to wrongful?
- (iii) was it in your jurisdiction – or in another one, and which?
- (iv) if yes, give details of the case;
- (v) was there a procedural mistake or defect?
- (vi) were any tactics used by the arrestor to put pressure on the shipowner?
- (vii) was the arrest aiming to challenge: (a) the inherent jurisdiction of another state; or (b) the jurisdiction agreed by the parties to the dispute in an arbitration agreement; or (c) was the arrest made for the sole purpose of obtaining security for the claim?
- (viii) was security for the claim readily available?
- (ix) what was the outcome in your example?
- (x) do you want CMI to make proposals for unification of the law on wrongful arrest of ships, or not?
- (xi) instead of unification, would you support the provision of (a) counter security or (b) cross undertraining to be provided as a condition of the arrest?
- (xii) what exemptions should there be in such a provision and for whose protection?
- (xiii) what should the test for wrongful arrest be (negligence, or other)?
- (xiv) in the event of a finding of wrongful arrest, what damages do you consider would be fair? (a) no damages; (b) just the legal costs; (c) all losses suffered by the shipowner if it is proved they were caused solely by reason of the wrongful arrest?
- (xv) would you like to propose alternatives to damages, other remedies?

IWG Chairman

Dr Aleka Sheppard

Date this report was finalised: 2nd March 2019

Edited Verbatim Transcript

Dr Aleka Sheppard, Chairman of the IWG (hereinunder “Aleka”):

Thank you very much for attending this Meeting which is very important.

By way of an introduction, the CMI instructed us to assemble as many people from the shipping industry together (i.e. representatives of P & I Clubs, cargo insurers, and the NMLAs, so that we can have an open debate about wrongful arrest of ships. I will explain in more detail in a minute.

I am Aleka Sheppard - for those of you who do not know me. I would like to introduce you to my colleagues, the team: to my right is Edmund Sweetman (a barrister in Ireland, who practises also in Spain, I understand). He is the new Rapporteur of the International Working Group (“IWG”). Previously, I was the Rapporteur and Giorgio Berlingieri was the Chairman. When he stepped down as Chairman, I was appointed in his place. So we have a young Rapporteur, who is energetic to do the work. We are honoured also to have Dr George Theocharidis (on my left) who is a Joint Rapporteur and was appointed yesterday by the Executive Committee of the CMI. He is both an academic and a practitioner and he offers his knowledge from the continental jurisdictions, mainly Greece.

To the very left of the panel we have Reinier van Campen from Holland, who is another member of the IWG from a civil law jurisdiction.

We have more members of the IWG but, because they have had CMI engagements elsewhere, they are unable to join us today. Giorgio Berlingieri had to fly to Italy because he was instructed in a number of arrests and I hope one of them is a wrongful arrest!

Ann Fenech from Malta is presently dealing with matters of the CMI executive committee at the IMO. Another member and a great contributor to the group is Karl Gombrii - a very distinguished lawyer in Norway.

Also, a valuable contributor to and a member of this group is Sir Bernard Eder who is involved in an arbitration today and it is a great pity that he is not here with us.

I aim to include in this IWG younger people but this will be determined after this meeting. This debate, in fact, will determine whether or not we continue with the

project, if there is enough appetite in the industry and the NMLAs for the furtherance of this project. In particular, if there is a need, or any reason, why the CMI should take steps to attempt uniformity of the law.

I assume you have read the discussion paper which is the basis for this debate so we can start.

You have read what is the mandate of the IWG, so I do not need to repeat that, Ok?

At this meeting, the purpose of this debate is to exchange views and it is, in fact, your opportunity to make your voices heard and we will pass your views on to the CMI, so that we can make a record of what the industry wants. It is your time to speak, it is not our time – we are going to have views from the floor.

As you can see in the Agenda, the main issues derive from the answers to the questionnaire; we sent a questionnaire out to the membership of the CMI and the analysis was fascinating, I did not expect that. We were complaining about English law being the tough one – that you cannot have a wrongful arrest case ever because of the very, very high threshold in the test. But in the civil law jurisdictions the law is really very diverse; there are some similarities between jurisdictions, but diversity is more prominent and you see that the law has got to become somehow uniform, if people want it.

Some people say they want our law to be as it is – diverse – because “ it is an attraction of claimants to our jurisdiction, because we get work” – that’s a lawyers’ argument – but it is not really a reality, is it? So, I am raising now the first question of the debate: do you see a need for a revision of the current fragmented regime at national level and adopt a uniform regime at international level?

John Kimball (USA)- not all of us have a lot of experience of this IWG; I was wondering whether you could take a couple of minutes to set the stage a little bit more. What is the starting point of the IWG?

Aleka: OK, the results of the questionnaire and the analysis of the answers were uploaded on the CMI website. The beginning of this working group was, in fact, in 2014 after Sir Bernard Eder gave a speech at the Tulane University in 2013 when he had a robust debate with Professor Davies who was against Bernard’s campaign to reform common law on the subject. Bernard has been fighting for reform of English

law for over 30 years. At the same time in 2013, due to Bernard's encouragement, I wrote an article, and in my book as well, about the wrongs of wrongful arrest under English law and I compared it with some civil systems. I suggested in that article that reform might be needed at international level. That was spotted by John Hare, who was then the Secretary General of the CMI and, I guess, he was looking for an international law reform project. He invited me to speak at the CMI Hamburg in 2014 and, following on this, the CMI EXCO, officially set up the IWG. The first Chairman of it was Giorgio Berlingieri and I was the Rapporteur. The mandate was primarily to find out how wrongful arrest is treated in various national regimes and jurisdictions and then to obtain the views of the CMI members on whether they wanted the CMI to attempt to unify or the law; assuming there was consensus for reform, the group would attempt to draft uniform rules. That was the beginning; we set up the questionnaire fairly quickly. Karl Gombrii, Giorgio Berlingieri and I drafted the questionnaire. We sent it out and Giorgio was the 'Chief Whip'; he really pushed the national maritime associations to respond and we got 38 responses as you heard at the CMI Assembly. We set the CMI record for the greatest number of responses. I had the onerous task of analysing them. It was very time consuming and I engaged 2 young assistants to summarise the results in tables

You will find the answers to the questionnaire at the CMI web-site and in this booklet at the back. Leaving aside the common law jurisdictions, the other jurisdictions are divided and some of them, to my surprise, apply strict liability as a test for wrongful arrest. Others apply the negligence test and some others use peculiar terms in their legislation which need to be defined. The diversity of these results – prompted the CMI to give us the go-ahead to explore the matter further and that is why they advised us to have this meeting to explore the industry's views, and here we are!

Aleka invites responses

So, does anybody wish to contribute to the first question – “do you see a need to revise the current fragmented regime and adopt a uniform regime at international level?” Or “do you want to just stay as we are with different legal systems and different legal tests for proving wrongful arrest?”

To warm you up, I will start with my co-panellists; Reinier are you happy with the system in Holland?

Reinier van Campen (Netherlands): In general, we have a good working system in the Netherlands, it is, in fact, and while I may not be entirely objective, I think we have a fairly balanced system – as follows: you apply to the court for permission to arrest the vessel. It is an *ex parte* application. The court then, having reviewed the application, grants permission to arrest a vessel. It is a big difference between common law jurisdictions and civil law jurisdictions. I think in the common law jurisdictions you get a court order and the court orders the arrest. In the Netherlands, we have a permission from the court and as the applicant, who has obtained permission – the applicant - the arrestor – instructs the bailiff to effectively arrest the vessel. That is a difference. Why did I say it is a fairly balanced system? Because in the Netherlands, you obtain permission from the court fairly easily, you submit your petition – it can be two or three pages – you set out the details of the case and why you think the ship owner is liable and you have to mention whether or not it is one of the 1952 arrest convention flag states, which vessel you want to arrest, and it is all done *ex parte* – so you get permission from the courts purely on the facts as you have presented them. The fact that you obtain permission from the courts doesn't give you a real justification to actually arrest; you have the permission but it is still your risk to do so, and if you do take that risk (you need good advice prior to arresting) and you lose your case on the merits entirely, then you are strictly liable for all damages you caused; so the balance is you obtain permission to arrest fairly easily but if you do arrest you also take a risk. I have been practising close to 22 years as a lawyer and I have never arrested a vessel which turned out to be wrongful, because you know what the liability is, and you are cautious when advising clients to arrest. On the whole (I speak on different occasions on ship arrest in the Netherlands) and I think people, not coming from the Netherlands, consider the Netherlands a sort of arrest paradise – it is so easy; it is just a perception, but yes, of course, Rotterdam is a fairly big port in Europe, so there are a lot of vessels calling in the Netherlands and overall we receive many instructions to arrest, and on each and every occasion I will say, ok yes, that we can obtain permission, if we present the case right, but please know what the risks are and the risks can be quite substantial if you arrest wrongfully, but the bottom line, I think, as I experience this as a Dutchman, and as my clients experience it, it is a fairly balanced system.

Aleka: Did you have any experience of wrongful arrest or handle a case of wrongful arrest?

Reinier van Campen: the most recent case of wrongful arrest was published a number of years ago and it had a strange turnout. Basically, it was a straightforward cargo claim – groundnuts or peanuts from China – and the vessel was arrested; security was obtained and then they started litigating over the merits – things did not develop quickly and 13 years later, there was a final judgement and in the final judgement, the entire claim was entirely dismissed, rejected; the arrestor did not have a claim and he should never have arrested the vessel; then the shipowner said: well that is interesting, now we know that the arrest was wrongful, and now we are going to pursue the cargo and cargo claimants for wrongful arrest; so it ended up in court and the court said: ‘well, 13 years later you are a little bit too late because you knew from day one who was the arrestor and how wrongful the arrest was’. Under Dutch law the claim for wrongful arrest or any wrongful act becomes time-barred after five years, and so you will have to take a close look at your time bars, as well, and that is the only published case I know of.

Aleka: Thank you – now, anybody from the audience with any experience of wrongful arrest? I should mention that this session is being recorded, so please state your name and jurisdiction.

Andrew Keates (UK): there is clearly, perhaps, a lack of international knowledge because Mr Reinier is clearly a very accomplished Dutch lawyer, but here in the UK we do not have to get any permission from any court to arrest. It is purely a procedural and administrative matter – I must take my instructions from my client. I must then decide if I can swear what used to be an affidavit, which is now a witness statement, using the appropriate admiralty forms to make the claim, describing the claim but more importantly describing the vessel etc, etc etc; then the Admiralty Marshall, who is not a judicial officer but what used to be known as a clerk of the court, but is now a ‘manager’ or something, and he will make the decision on procedural grounds more than anything else; so the whole thrust of making an arrest lies with the client and the lawyer and it has nothing to do with the court at that stage; so it is a rather different situation to the ones which we have heard Reinier describing; many civil lawyers with whom I deal (and I have dealt with many civil lawyers and other common law lawyers

over the years) have, perhaps, some sort of misunderstanding, which needs to be put right first, before we can do anything, or take any steps, because if we need comparative steps to be taken then that is something maybe we should make a priority.

Aleka: – OK, well we have done the preliminary steps – we know how the 38 jurisdictions deal with wrongful arrest – what is the country and what is the test and what damages might be allowed. This meeting will determine what we do next – we are going to do another questionnaire upon your guidance people – this is the industry’s forum and CMI needs your guidance – what do you suggest the next steps should be? I guess it will be another questionnaire to explore more about the subject.

Voice: The issue is dissemination of that knowledge.

Aleka: – Yes, we have disseminated it to the industry but just through the CMI website, which I presume is visited by reps of the NMLAs. However, not many people knew about this project until receiving our invitation to attend this forum.

Andrew Keates: I was incidentally involved in a wrongful arrest case, an English case back in the early 1980s, which was utterly fascinating, I am not going to go into the details now, but it can be discussed.

Aleka: Did you win in England?

Andrew Keates: We won on the fact that it was wrongful, but the court decided that it was not quite grossly negligent enough by the lawyer who had conducted the arrest!

Aleka: That is the problem with common law and all the other jurisdictions of common law. Of course, you know, as the English lawyers do, that *the Alkyon case*, which was decided by Teare J. at first instance, was recently heard by the Court of Appeal and the judgment is awaited.

Mitsuhiro Toda (Japan) I have one experience – I arrested a ship for the claim of paint supplies but unfortunately the arrest order was later cancelled, repealed, by the court; then the ship owner sued my clients for wrongful arrest damages but the court said, no, no, no, it is not wrongful arrest; of course it could be said to be defective in a situation like this. Well, my client supplied paints to A and A in fact owned the ship but the ship flies convenience flag registered by the name of B; so in such circumstances it is difficult to identify who are the real owners. But anyhow, later on, it was decided

by the court that you arrested the ship alleging the ship was owned by the other party whose name was not registered; anyhow, I would suggest that defective arrest and wrongful arrest, sometimes, under the civil law country is very difficult to specify who the real owner is; and in the case of, what shall I say, provisional attachment to obtain the security, then such things happen. You arrested a ship but later you failed to prove the merits, so it could be said to be defective but defective arrest cannot be said automatically to become wrongful arrest for which the ship owner is entitled to claim damages. That is my point.

Aleka – thanks. In England, I do not know about other jurisdictions, you do a search to find the real registered owner to arrest the ship and if you arrest the wrong ship it should be wrongful, but in England it would be difficult to pass the test of malicious intent. This was the case in *The Evangelismos* where the claimants arrested the wrong ship but it was held it was not out of malice or ‘crassa negligentia’, so the owners whose ship was mistakenly arrested failed in the claim for wrongful arrest. In your case, one aspect is the procedural and the other is the substantive; of course, if you arrested the wrong ship, you lose on the merits. How do you define wrongful arrest in your jurisdiction? What is the test?

Mitsuhiro Toda: Negligence

Aleka: Well, was it not easy to prove negligence in that case?

Mitsuhiro Toda: No, shipowner failed to prove negligence.

Aleka: Thank you very much for your contribution. Are you happy with the system in Japan?

Mitsuhiro Toda: Yes, happy

Aleka: it gives you work!

Mitsuhiro Toda: Because we do not have procedures in rem, it makes a difference.

Aleka – would you like uniformity then?

Mitsuhiro Toda ... Well, the gentleman said that under English law, you do not need to get the court’s permission or a court order to arrest a ship, so perhaps I would like such a system to change, so in such sense, unification would be good.

Aleka: Yes, English law has to change anyway! (I can see you are taking notes; it is all recorded, so you do not have to make notes). Anyone else?

John Kimball: Just to follow up with the first speaker - I did not feel like I got to the end of your story – if in fact there was a wrongful arrest, what would be the financial consequences to the party who initiated that arrest and was there a requirement for counter security to be put in place to pay for that mistake?

Reinier: to answer your last point first, in the papers that were distributed, the Netherlands are mentioned as being a party where counter security is mandatory – in fact it is not. We should be at the bottom of the list – there is a provision where the judge has the discretion to order counter security but, in practice, it never happens, really it never happens. As regards the first part of your question, to what extent are you liable: – you are liable for all the damages you have caused, not only the cost of security, (basically a bank guarantee that has been out there for a number of years and the interest accrued over the amount that was secured), but also if the vessel was detained for a number of days and if it lost hire over those days; you are liable to compensate that and, of course, all the damages must be proved to the court. If you do not agree to it, this may cause some difficulty but, in principle, you take a big risk if you have a flimsy case. I always advise my clients to arrest the vessel immediately when it enters the port because during the loading or discharging the vessel will not be delayed at all – other lawyers say we should arrest right before she starts sailing because the pressure is really high and we will get our security for the cargo claim much quicker because they want to leave the port; there are two ways of looking at this; yes it will create a lot of extra pressure but if you have a weaker case then you are also more likely to cause damages and the damages can be substantial.

Aleka: By the way, Reinier, the paper regarding your jurisdiction has been corrected to reflect the judge's discretion on counter security.

I think we should continue without following the order of the agenda items because John you have progressed the discussion to damages.

Would people go for strict liability like in the Netherlands and for general damages?

Nicola Cox (West of England) UK: I have one question, one observation. What is the policy reason behind why there should be such a high test under English law? It

seems strange that a local authority can have a loose paving stone and be liable and negligent for substantial damages and yet you intend to arrest a vessel, albeit for security, and you are not liable, unless the defendant can prove a much higher test I cannot see the logic looking at this from scratch – I cannot see the policy reason for why there is such a high test?

Aleka: You have to read my article, it is all there!

Nicola Cox: Why is it higher than say negligence to prove wrongful arrest?

Aleka: It is rather a historical matter, in 1800 the House of Lords, in the *Evangelismos* case, applied the test applicable to malicious prosecution of a person because there was no precedent at common law for wrongful arrest of a ship. That test required the party to prove malice or gross negligence of the prosecutor.

Nicola Cox: so, the reason was taken from an analogous case Rather than first principles as to why there is policy under English law.

Aleka: Then the courts were stuck with *The Evangelismos* which has been followed for over 200 years and is still not over-ruled and the case is so far followed by the common law systems, which follow English law.

Let us have the views of more participants.

Edmund Sweetman (Ireland & Spain): it does seem to give rise to a very distinct imbalance of circumstances where a claimant can obtain security against the shipowner and even if the claimant loses the case, he is not to be liable for the damages the shipowner has suffered. It might be interesting to hear from anyone in the audience who can speak up for the common law regime and the test of mala fides.

Beatrice Witvoet (France): just to contribute to the discussion we have in front of us; in France we have really similar system as the Dutch, so we need to go to the judge to have permission and then the claimant would carry out the arrest; but we have some cases regarding wrongful arrest and the consequences and some condemnations against the claimants – it is not very often but we have had some.

Aleka – ok but the test is very, very fluid – what do you have to prove for wrongful arrest?

Beatrice: it is quite subtle, I would say – it is not straightforward, but usually there is the idea of a fault from the claimant; it is not only that he should not have arrested the vessel that he knew he did not have grounds to arrest; so it is just a little bit in between, I would say.

Aleka: so, it is not just negligence. It is an objective and subjective test?

Beatrice: Yes.

I have an example: it is in relation to the *OW Bunkers'* bankruptcy and the consequent arrest of vessels. We had a Dutch client whose vessel was arrested once in the US for first time, and a deposit was placed into the hands of the judge as security; then when the vessel arrived in France, on the west coast, she was arrested second time, for the same claim by the same claimant. So, it can happen and we had to go back to the judge who authorised the arrest and he said OK the arrest was lawful and we had to go to the court of Appeal and, at the end of the day, and owner of the ship won – it happens with the condemnation of the claimant who decided to arrest the vessel; he is usually condemned to fully indemnify the shipowners.

William Sharpe - Canadian Maritime Law Association: so, I will say a word for the *Evangelismos* test:

Yes, the Supreme Court of Canada in the *Shiller Fertiliser* case, reviewed the test and came to the conclusion that it had been settled law for so long that any change should be a matter for the legislature. So I will now discuss the policy behind that test and, first of all, it is well to remember that compulsory insurance for marine liability is by no means universal for oil cargoes, yes but for many types of claims there is no international regime for compulsory insurance; there may not be a domestic regime for compulsory insurance and there are many sorts of claims such as charter hire where there may be FD&D cover, but in others the shipowner may not necessarily have such resources. For risk management, it is a common practice among shipowners to use single purpose vessel companies and ships are mobile assets; we are not dealing with a factory that is planted in the ground; so there are many classes of claimants such as seafarers who are owed wages and tort victims whose only effective recourse is to have a low threshold right of arrest. Now this is by no means one-sided based under Canadian practice because while a ship may be arrested readily, so may a motion be brought for the release of the vessel; such motions are

expedited; if the claimant is unsuccessful, then the claimant is faced with an adverse cost award so it is by no means a no risk proposition for a claimant to act imprudently in arresting a vessel - certainly among the Canadian admiralty bar the plaintiffs do take some care in trying to locate the owner to associate the owner with the claimant in rem – so certainly in the Canadian experience there has been very little abuse of the system and interim security is often negotiated beforehand and, if it cannot be negotiated beforehand, then certainly the shipowner and their insurers do have prompt recourse to the courts to sort things out and I should say that the position of the Canadian Maritime Law Association is that - while we are very appreciative of all the analysis and we appreciate that the debate should occur - we have not yet seen evidence of such severe abuse as to suggest that the CMI might accept the policy of demanding a higher threshold and that is CMLA position.

Aleka: thank you very much – that is a great contribution and, of course, Canada is a very civilised nation. But there are jurisdictions where there are cowboy claimants and they just arrest a vessel for the sake of establishing jurisdiction there to make life difficult for the defendant in breach of a contractual jurisdiction clause or for other reasons. I have another example from Ann Fenech which happened in Malta. She told me to contribute her example here because she is not able to attend this session. Recently she has been battling with an arrest of a ship which was arrested in Jamaica first by the mortgagees. The ship was judicially sold. The courts held three million dollars for security for the mortgagees. The claim was one million and the mortgagees, out of spite, went to Malta, arrested the ship again in Malta and blackmailed the owner by maintaining the arrest; and as we know there is no P & I club cover for that type of claim. Is that right Nicola?

Nicola Cox: not just for transactional or operational costs but if there is a value dispute under the terms of the contract it will fall under FD& D claim potentially like any other claim for any other cost.

Aleka: Anne's case is similar to the *Alkyon*, really, where the mortgagee did not have a legitimate claim. But with a civilised nation like Canada and others, the lawyers would have advised the claimant properly; that is the crux of the matter, good lawyers, moral lawyers, ethical lawyers, advise their clients properly. My question now is: should we

close our file on the CMI Project and report there is no desire for change or uniformity of the law?

William Sharpe: But there could be *in personam* remedies against the person who acted unreasonably in arresting. It is not that there are no other remedies; if the claimant is a financial institution they are not going to fold up their tents and steal away in the night and therefore certainly under Canadian law it would be possible to insert an *in personam* remedy against an unreasonable claimant and it would proceed to trial and a determination on the merits – the critical issue here is what should be the initial threshold and what procedures are appropriately associated with the initial threshold for arrest.

Aleka: Absolutely

Edmund Sweetman: William, just a question; given that you are standing up as a defender of the common law in that situation, what justification do you see for a situation where there is a bona fide arrest made and where ultimately the claim fails for some reason? for example, if the claim is for damage caused to a ship and it is found not to be the fault of the vessel arrested. So there is a bona fide arrest made and there is a dispute determined by the court and it is determined against the arrestor; but in those circumstances, certainly under Irish law there would be no liability for wrongful arrest; I assume that the same position would obtain in Canada [YES] - what justification can you see for allowing that situation – why shouldn't, in those circumstances, the bona fide arrestor be liable for the damage caused by the arrest?

William Sharpe: As I mentioned, ships are very mobile assets.

Edmund: so, are you worried about the chilling effect that might occur otherwise?

William Sharpe: yes, I do have an example of the chilling effect; some years ago the Canadian office in British Columbia introduced the *in rem* process and I am sure that the marine lawyers who pushed for it assumed that the *Evangelismos* test would be applied. A few months after the new procedure was introduced, an arrest came before a judge who was experienced but not in admiralty law who said, aha, this is like an interim injunction, so yes countersecurity undertaken for damages. It is not surprising that we see the *in rem* process is used very little; so it is the relevant power of the parties who are talking about a sea farer or a claimant who may not have access to

insurance – the issue becomes one of access to law and a balancing of interests and, of course, it is a policy decision but there is a rationale for the *Evangelismos* test, which is to say the remedy can be pursued by means other than raising the threshold to arrest.

Edmund Sweetman: yes, I can see. You might identify a difference between the requirement for counter security and liability for an arrest in circumstances where the action fails because in the same way, an unsuccessful litigant would be liable for the costs of the action if the costs follow the event, as they do in many jurisdictions – but I can see how countersecurity might be considered a barrier to access to justice, particularly where ships are mobile assets. That is probably a distinct issue in many ways.

Aleka: Yes, we can go to that later. You said it could be unjust to the crew if we change the test but the crew have maritime lien so there is no problem for the crew or anybody who has a maritime lien which follows the ship.

An un-named Delegate: well it is an issue where the crew has no financial resources to follow the ship from jurisdiction to jurisdiction in the hope that someday it might be arrested. The interests of the crew and tort victims in liability regimes where there is no compulsory insurance, they have to be considered in the mix.

George Theocharidis (Greece); Before I comment, I would first like to thank on behalf of the International Working Group, Thomas Miller for hosting this event here in the very heart of London next to this very iconic building, IMO was really a very good headquarters, but I think we are better here.

Now there seems to be a problem which is why we have this debate, we have clashing interests. On one side you have the claimant and the claim could be something like hundreds of dollars or something substantial like a bank claim for a million or even more and on the other hand we have the ship owner. At this very initial point we do not really know the substance of the case and therefore, as was correctly said, the claimant needs to find this asset which is moved around the world in order to obtain some kind of security and therefore to know that it will be able to satisfy its claim in a convenient way because, although the counter argument to that would be, “you can find the vessel anywhere after you have a judgement on the merits”; however, by that time, the vessel has probably changed flag or shipowner which is very, very easy, so

we need to find a balance on the one hand for that claimant; – how much he has to pay, how much he has to suffer in order to pursue the claim and, of course, the shipowner, on the other hand. We have given an example here of a vessel, an energy vessel, which carries 100 million value of cargo; now, if that ship stops for five or six days, somewhere, we can understand how much damage that would be for the shipowner; so in order to approach that issue we have to strike a balance and it is interesting from the reports by the different countries to see that, even in continental law jurisdictions, we still have some countries which have a hard test like the common law, not to that extent of course; Greece for example, in order to be able to get a claim for wrongful arrest, the shipowner will have to prove first of all that the right, the substantive right, which the claimant was pursuing was non-existent and either the claimant had knowledge of that or he was grossly negligent which is quite hard to prove. So even in continental law countries you can still find, like Greece, that there is quite a hard test and the rationale behind that is quite clear – you can have a good faith claimant, as Edmund said, who wants to pursue his claim; it could be for 5,000 dollars - a crew member, or a bunker provider, finds the vessel very close in the area; he does not want to change continent and does not want to pursue the claim somewhere very far; then if for any reason - even for any procedural or technical reason - his claim might fail before the court - perhaps it is time-barred - and he might find himself in a position where he might have to pay substantial damages – lots of thousands. So, I think, and this is why we want to hear these opinions, especially from the P & I Clubs, because they deal with security, they deal with the problems of shipowners and how they see the problem. Could there be some uniform law whereby they would know the limits of security; they would know when to put up the security in place and, if something does not go well they would know to what extent they would be able to recover that.

Aleka: Thank you George. I sense that, although I have not heard from many of you yet, there is a sort of uneasiness about disturbing their national systems and you would rather stay with a fragmented international system, is that correct? How many people prefer fragmentation? Raise hands please. (Some hands are raised, perhaps half of the audience).

How many would opt for doing something to improve the system as far as we can? Perhaps unification? Raise hands please. (A reasonable show of hands).

I would like to hear from more people with practical examples of wrongful arrest.

Has anybody had wrongful arrest, in your experience, either in your jurisdiction or know of in other jurisdictions?

Andrew Chamberlain, HFW (UK): – just a couple of comments which are along the line of what you are discussing. It is quite important to distinguish defective arrest from wrongful arrest – there is a problem of definition here and I agree with our Japanese colleague that an arrest might be defective, but it is a long way short of bad faith or wrongful. I am firmly a defender of the common law jurisdictions – our Canadian colleague made excellent points as well; it is about balance. I do agree, but my one experience of a wrongful arrest claim – and I preface that by saying that wrongful arrest is relatively rare – there are a number of reasons for that, one is the high professional standard required of maritime solicitors around the world – my experience of arresting ships around the world, many of our colleagues in Holland, Belgium and France are admirably even-handed about giving an honest appraisal of the prospects of successful arrest and getting the law right. You sometimes get more difficulties in jurisdictions where there is very little expertise of maritime law at all, particularly, where the judiciary has no background in maritime law; so, my one personal experience was in Spain and I have nothing against Spanish colleagues. But one of the dangers of uniformity where you always have to have security for wrongful arrest is that when wrongful arrest is alleged in a common law jurisdiction, the question of whether an arrest is maintainable is Question 1, but actually has nothing to do with the underlying merits, quite rightly – they are two different questions. You have a rightful arrest, a hopeless case that you then lose – that's fine. When you have an opportunity for a party to complain of wrongful arrest, what you will find (and this happened to me in Spain), is that inevitably the merits of the case then get argued in the context of whether it is a wrongful arrest or not and it was a disaster – years of litigation, huge amounts of money spent and nobody was very happy on any side; so I am firmly a defender of the status quo and I say that for a number of reasons, and I just throw out this question for perhaps Nicola and other P & I colleagues, I do wonder whether a significant liability for wrongful arrest is actually covered by P & I interests? I don't think it is. No, so that is something for the P & I community to think about carefully, I would suggest.

Aleka: So, I guess that is the feeling of common law jurisdictions – anyone else?

Kiran Khosla - ICS: ICS represents shipowners and I think, as a general principle, we would be interested in the ICS if the CMI work continued to try to improve the situation. The last attempt that was made for protecting shipowners from wrongful arrest was in 1999 at the Arrest Convention and at that point we did support Article 6 in the 1999 Arrest Convention, which provided protection for shipowners in the event that an arrest was wrongful, or unjustified or excessive and we would like to pursue that. Whether uniformity is achievable, and I think that is questionable, we certainly think it would be something to consider because there have been cases – and I think that the case you have referred to in your paper *The Alkyon*, highlights the problem of wrongful arrest where shipowners are left without any recourse and have had to incur quite considerable losses, which they are unable to recover; so some form of countersecurity is certainly what we would be looking at and we would hope that it is made mandatory as well.

Aleka – Thank you for that. May I comment on that first point. What Sir Bernard Eder is arguing is for a provision of a cross undertaking in damages like in freezing injunctions. Would that solve the problem? I personally do not think so. The problem will not be solved, unless we change the test for wrongful arrest. The 1999 Convention of course provides for a lower threshold of negligence

but you would still have to define what is unjustified arrest - so the two go together. You cannot have a cross-undertaking or counter security and not have a change to the test, because you would have to go through that loop of proving culpable conduct later on, when you try to prove your case of wrongful arrest.

Nicholas Wilson MFB (UK): If I could just answer that point about cross undertakings; I do think that there is a possibility that if you require cross undertakings that you are going to snuff out legitimate claims, that there is every possibility there; Just to go back to Mr Sweetman's point earlier, regarding say a collision action and the question of security; you often hear the phrase: "it is only security that we are after, we are not necessarily seeking to have the matter resolved there and then" and the easy answer is to put up security, if that is what somebody is seeking, and it is a very, very premature at the arrest stage, as has already been mentioned, to consider the merits. With an asset which is mobile and vulnerable, and it could change

ownership, this may not be a problem with a collision because there is a maritime lien on it, obviously, but it is premature to try to determine the merits of any matter, when it is only security which you are seeking, and it could take a year, two years, before a matter gets to trial and there is a final determination in relation to the issues; and I think it is arguable, from a common law perspective, that it is a bit much to expect of the lawyer who is undertaking the arrest, if you like, and their client to ascertain the liability at that stage – you are only seeking security for your reasonably arguable best case, as it were.

Aleka: Obviously there are very complex issues to consider before any change is made. Just to refer to the possibility of a provision for a cross-undertaking to be provided by the arrestor just as it is provided when a freezing injunction is applied for, (the argument pursued by Sir Bernard). This would require the arrestor, the client of the lawyer, to undertake to be liable to the shipowner in damages, if the arrest is proved to have been wrongful, and it would require the court to have discretion to grant it as a condition of the arrest. As English lawyers know, prior to the *Varna* case, the court had discretion to grant the arrest upon consideration of the evidence given in an affidavit in which the arrestor or on his behalf the lawyer was required to state on oath to the court that he had made full and frank disclosure of all relevant information known to him. That rule was displaced by new procedural rules on arrest and the arrest became **a right**, which meant that the court was deprived of that discretion.

Emeka Akaboglu – Nigeria MLA: One of the things that I am going home with today is the distinction between wrongful arrest and defective arrest – I like that distinction and while I sympathise with the position of the ship owners, as relating to loss suffered, I think it should largely be taken care of by the need to immediately offer security and I emphasise the importance of this distinction because there are many times where a strict liability regime against the arrestor will be unfair, to say the least, particularly within the Nigerian jurisdiction, where you often find that an arrest may be vacated on technical grounds, which have nothing to do with whether the arrestor has a legitimate claim. So there is a typical scenario where we have ship arrest being vacated for an alleged reason ie that leave was not obtained before the processes were served on the particular party. So it may be served on the correct party later, but because there is an allegation they did not obtain leave to serve outside jurisdiction before arrest, it is vacated and that has absolutely nothing to do with the merits of the claim; so in that

scenario if there has been such a vacation and the ship owner comes back to start claiming for some damages because the last claim couldn't proceed, then it is unfair by all respects. So, I align myself with the submissions that the security which needs to be provided by the ship owner should be provided as quickly as possible and the ship continues doing business and the losses mitigated and essentially the status quo should remain.

Aleka: Nigeria is a common law jurisdiction, isn't it?

Edmund Sweetman: I might just intervene there, Spain has been mentioned and wearing my Spanish hat for a moment to speak about the idea of a cross undertaking, which would be perhaps what one would expect in a freezing injunction situation; obviously you have to undertake to be liable i.e. the applicant for the injunction would have to undertake to be liable for any costs or damages by reason of tying up the defendant's property. That is effectively a promise to pay, but different to counter security, such as it exists in Spain, where money must actually be lodged in court or a bank guarantee be furnished to a percentage of the amount being claimed, and that certainly has the potential to be a barrier to access to justice and to this particular and specific asset which is the ship.

Aleka: but arrests happen in Spain, don't they?

Edmund Sweetman: well I can just imagine, I can see the argument where perhaps a crew member or a person is perhaps injured on a ship, perhaps a serious injury where someone is quadriplegic and would have a very significant claim and would have to effectively post a bond of a significant amount of money in order to arrest a ship in Spain and that would certainly be an issue and as regards the test of the merits, what they say in Spain, it is very easy to arrest but you need leave from a judge; but you effectively set out in bold terms your grounds of arrest and once it comes within the convention your arrest order is issued, but you don't arrest the ship until you have actually posted the security. That is in Spain, there is then the application to balance against the ease of arrest the potential to set aside that arrest, but it is not on the merits, it has to be on a technical ground and then, if you lose your action, you are liable for costs. But I think it is an interesting question, I am wondering if anyone else has views on why shouldn't the unsuccessful litigant be liable for the cost of the failed

action, but also the costs of tying up the vessel because it is a distinct issue in those circumstances; why is it necessary to protect the unsuccessful litigant?

Aleka: we will come back to that

Damilola Osinuga Nigerian MLA: I would just like to echo what Emeka has said; basically, Nigeria is a common law jurisdiction and it is almost the same thing as happens in England, except for the fact that you need a cost order to get an arrest. However I seem to be in favour of a cross undertaking because what you have in Nigeria now is that there are impasses where lawyers decide to arrest a vessel so as to frustrate, maybe the charterer, knowing fully well that the vessel has to sail and knowing fully well that the charterer is not the relevant party; and they know that because the charterer will also be liable for other contracts that he may be in breach of that contract and so they arrest that vessel. So I agree that the Evangelismos test is not the best we should have now but I am definitely not in support of the strict liability regime and I feel that a cross undertaking might just be the solution; this cross undertaking should be given for the arrest. We have a situation in Nigeria where you can give security for costs after the arrest. The owners of the arrested vessel can come to court with an application to get security for costs. However, that can only be given in two conditions when the claim is above five million, or when the defendant or the claimant are not resident in Nigeria. And it is still at the discretion of the judge.

So not everyone is entitled to security for costs in Nigeria so I believe it should be a situation where cross undertakings should be given before the arrest and I am in favour of that.

Aleka: Well, if a cross undertaking as a condition to arrest were to become a requirement before arrest, we should have exceptions – i.e. for the crew and the weaker parties who are not protected by compulsory insurance.

Damilola Osinuga: Yes, I agree that crew members should be exempted, but there is an unfortunate situation in Nigeria that the court decided that the crew members did not have a maritime lien! They do not have a right of maritime lien any more, and they should go to the Industrial Court to pursue their claim. It was a High Court decision.

Aleka: that is very strange!

Nelson Otaji (Nigeria): I just want to make a little clarification about what my colleague has just said. Crews have a maritime lien in Nigeria, as is provided in the Merchant Shipping Act. But the issue that comes up now is that there was a little amendment to the Constitution, so that if the action you are filing is not an action in rem, but an action *in personam*, which means you sue the employers of the crew, – may be a mining company owing crew wages; so therefore if you are suing them *in personam* then you have to go to the Industrial court.

Aleka: Okay, that is an *in personam* action.

Nelson Otaji: so that is the main distinction that needs to be drawn.

Kiran Khosla: we have been hearing a lot of comments about crew claims and I want to point out that there is now compulsory insurance for crew claims under the MLC and that has provided quite a significant amount of protection for particular types of claims; and I also think, and I want to come back on this, for a freezing order there is a requirement to put up counter security and we can't see why this should not apply for arrest of ships as well.

Aleka: thanks

Laurence Mc Kenzie (UK): I am an English lawyer; I just wanted to support what Mr Sweetman said about the arrest in Spain. I had a contractual claim on behalf of a client and, as far as I was concerned, there was a good contractual claim and I had taken legal advice from myself and also from Spanish lawyers; but the Spanish system requiring security through the Proctor at Law, a court official, effecting the arrest, discouraged the arrest even though we felt it was a good claim; so there are issues against counter security in certain jurisdictions.

Sertac Sayan - Turkish MLA: I am a lawyer – I would like to give you clarification about Turkish law on the arrest of vessels. Since the 1st July 2012 there were big changes in Turkish court of arrest in order to arrest a vessel and it has been simplified; also, steps have been taken for both the party who applies for the arrest and for the judge to follow in order to arrest the vessel. First of all, the vessel must be within the territory of that court and the judge writes a letter to the port authority and tries to find out whether the vessel is in that territory or not and also they go one step further and ask who the owner is.

If the vessel is found within the territorial jurisdiction of that port, then you have to pay 10,000 SDR lump sum amount of money which is the equivalent to 17,000 or 18,000 USD; then you have to submit supporting evidence to prove your right to arrest the vessel and if the judge is satisfied to arrest the vessel, they issue the arrest order in three days. So, the party who suffers the arrest has the right to oppose this and the judge must fix the date of hearing from three days to seven days to handle the oppositions, and the judge may increase or decrease the amount of security. Under these circumstances, I have not come across any wrongful arrest claim under Turkish law; it is very difficult because the defence will be: "we submitted all the supporting documents, the judge accepted this", unless you submit fraudulent documents, which may slip from the attention of the judge; and if there is a wrongful arrest it should be examined under the law of obligations and the causing of indirect or direct losses to the party who is subject to the arrest.

Aleka: Does it not take rather long to arrest a ship?

Sertac Sayan: No, there is a very specialised maritime court in Istanbul and most of our cases and files are in front of the judge; you cannot make any false declarations to the judge because they say you will go again to the same judge – it takes only one day to arrest a vessel if all the documents are in front of the judge, otherwise it is easy.

Edmund Sweetman: There is an interesting issue, that is, with respect to what is demanded of the applicant for an arrest in English law and, certainly, it is referred to in the English answer to the questionnaire. In England there is no duty when applying for arrest, when swearing the witness statement; it is not necessary to make full and frank disclosure of all matters which might be relevant to the issue.

Under Irish law there is a certain obligation that whatever matters are deposed to should be bona fides and in utmost good faith and has a duty to make frank disclosure to the court when applying for the order.

Aleka: do you wish to add something?

Another unidentified delegate: That is correct but you still have to attest to believing what is being said is true; so there is no utmost good faith and full and frank disclosure duty, but it is not a million miles away from that; you are still having to attest the truth of what you are saying and putting forward prima facie evidence as to your claim as

well. And you have to say, if it is a statutory arrest for example, which heading it falls under, i.e. under Section 20 of the Supreme Court Act 1981.

Another Delegate: I think it is fair to say from what we have been hearing today, and it has certainly been my experience, that in the English jurisdiction people do tend to be quite responsible in terms of arresting a vessel.

Aleka: True. Like in Canada. Civilised jurisdictions

John Kimball: to come back to Edmund's question, as to why an arresting party who has proceeded in good faith but ultimately loses on the merits and whether he/she should have to pay damages, I would like to talk about that, and I would also like to make a comment about the civil losses, as I am not sure that the opposite is always fair either. Under the US system, to have an arrest you have to have a maritime lien to start with and our law is not always clear exactly as to whether there is a lien or not. Under our system if you act in good faith, bringing arrest action which ultimately fails, because it turns out that you did not have a lien, that could take a couple of years for a court to decide. Under our system, at least in my view, it would be inappropriate to penalise the plaintiff for bringing the action and to impose damages on the party for bringing the law suit. Under the American rule we don't even ask that party to pay for the other side's legal fees and it would be inconsistent with our system to impose damages on the plaintiff for bringing the case in the first place. And, I think, the American Law makes a lot of sense; But I think this group, the IWG, is a great idea and the discussion has been fantastic. I think it should continue and you should try. But to go back to the civil law system, I should just ask the question: If in the case you talked about earlier, suppose the ship owner never put up any security and just left the ship there for 13 years, or however long it took, would the arresting party be liable for damages for detention for that long period of time. How does that work?

George Theocharidis: I have not come across a situation where that happened. From a strict legal point of view yes, if you cannot put up security, post a bank guarantee or anything else, if there is no P & I cover, then you have nothing else left to do but leave your ship there under arrest; then yes, if the claim on the merits by the arrestor is fully rejected then he would be liable for the entire damages, yes.

John Kimball: There should be a debate as to whether that were really a fair outcome.

Tim: surely you would have to mitigate the loss.

Edmund Sweetman: In Spain, certainly that is the situation because you have strict liability for an arrest where it fails; – obviously, there is a lot of litigation there, but what is the quantum of that loss? There is no article dealing with it but the effective jurisprudence of the court suggests, and the way the courts normally treat it, you are only liable so long as it would take the ship owner, in normal circumstances, to post the security, so effectively it is a limited amount of time.

Aleka: ok thank you. At the moment, I feel this discussion illuminates the problems with the fragmentation of the systems between civil law jurisdictions and also, of course, the contradiction between common law and civil law. That is undesirable to me; we need to find the right balance; is there anybody from the insurance industry here, cargo insurance? I think we had some bookings by some insurers; who wants to speak? We want to find the right balance, we don't want to push reform in favour or against. It is a balanced position we are trying to find.

Mark Meredith - Xchanging Claims Services(UK): for us, having listened to the discussion, it seems quite clear when you have a big loss on a cargo claim; the first step you take is to contact the P & I Club and hope you get security firmly in place. The prospect of an arrest is the last resort. You don't even want to go down that avenue. You have got to make sure everything is set, and you have got everything right. I think Andrew Chamberlain makes a very good point, as well; from the cargo point of view, it is quite straightforward, there is not much appetite, we understand, for unifying everything, but it is always a matter of being sensible, looking at the claim, looking at the merits, who your target is, where are your proceedings; so to us, it is reasonably straightforward in that respect, get good security in place for your claim and let's discuss the merits thereafter.

Aleka: Anyone from a P & Club here still?

Evgeniy Sukachev (Ukraine): I would like to make a short comment about my country.

Aleka: Where are you from?

Evgeniy Sukachev: From Ukraine. There is a new Procedure and we like it because lots of Turkish clients come to Ukraine.

Aleka: Quid pro Quo, is it?

Evgeniy Sukachev: Yes, because we are in one region. This is very interesting because last year we had also new procedural courts – a civil procedural court and a commercial procedural court, where there are new procedures to arrest and, nowadays, in our ports the judge should make a decision in two days from when the application comes to the court; so if you apply to the court today with a claim until the end of the next day the courts should make a decision anyway.

Aleka – It takes a rather long time –

Evgeniy Sukachev – no just two days so much shorter than in Turkey! – [big laugh]

Also, put joking aside, the judge does not have any time to find out any other points to make a decision; so if you apply, you have for the application all documentation you would like to show the court; if the judge finds them in order, you can have an arrest because all the documents prove your claim. If not, no arrest.

Aleka – so it seems you have to prove a prima facie case and the judge has discretion to grant the arrest order? – is it so?

Evgeniy Sukachev: of course, but his decision is based on submitted documents. Afterwards you can make a counter-claim, or anything else, but this is also a timed procedure, which is shorter than in Turkey.

Another person: (Turkey) In relation to cargo damage, the arrest of the vessel is such a straightforward thing because you go onboard the vessel and then you discover that the cargo is damaged. You stop discharging and call in court appointed experts to determine the damage and usually the judge comes together on board the vessel, determines the damage and they arrest the vessel so there is no problem for the cargo interests...

Reinier van Campen: can I flag maybe a difference, a problem area? We are trying to unify the arrest of ships. But if we have a different test for the arrest of ships, for instance, we now should amend the 1952 or 1999 Convention, or something similar; for my jurisdiction the rules would change – (if counter security, for example, becomes a provision before being allowed to arrest a vessel); – then all of a sudden, we might have a little bit of unification, but there will be a big new difference because bunkers

are not a ship, and for bunkers the provision of counter security would not apply, so then everyone goes after the bunkers.

Currently we have a system where you say we leave it up to each national jurisdiction to set the rules; as I said, in my country, I think, in general, in Holland, we are quite happy with the way we arrest vessels and what the risks are – in fact we have currently a revision of the arrest paragraphs in our procedural code - on ships nothing is changing - and yes if we solve one problem we may create another; we have to be careful about that as well.

Aleka: Absolutely, the fragmentation is so broad, it would be very difficult to unify really. Do you want the CMI to try to find a balanced position? If you don't, the next point is: do you really want counter security, or cross undertaking? it seems to me that you do not want that either (or there may be little support for that) because that will take time to set up and it would be unfair for some parties; so that is out of the question. I will disappoint Sir Bernard about that. And then, since we are not going to be unifying anything, there is no point talking about what damages you get because we will stay as we are, and everybody is happy. Is that a fair understanding?

[Common law jurisdictions do clap], I hear the approval for doing nothing!

Laurence Mc Kenzie: (UK) I would like to comment in support of the Turkish lawyer that I do have experience of a vessel trying to leave Turkish port when it was under arrest and the court ordered the coastguard to fire a warning shot across the bow of the vessel – the Turkish press reported this and a lot of Turks were upset because it was a Turkish vessel being fired upon! but a lot of other people supported the rule of law because the vessel had tried to escape arrest; so I am rather fond of the Turkish jurisdiction

M Toda (Japan): In Japan, two days, perhaps longer, well in Japan it may be one day in most of the cases that the court will decide from the time of receiving the application for arrest, particularly, in ship collision cases; well I have a lot of experience in arresting ships involved in collision cases; just after the collision, maybe several hours after, or the next day, the court issues arrest since such claims give rise to a maritime lien; so in Japan no countersecurity is required, but it should be very, very clear that 100% liability should attach to one vessel. I would like to tell you that as regards

countersecurity, we may differentiate the claims; for example, in terms of this collision claim you should put up countersecurity, but on the other hand, with another type of claim no countersecurity would be required. Such discussion perhaps may be useful.

Aleka: It is very rare to have 100% liability in collisions.

So to recapitulate from what it has been said so far: - you prefer a fragmented system, you don't want counter-security or a cross undertaking, and we dump the damages question too.

Dr Liang Zhao, City University of Hong Kong: I am from the city of Hong Kong and of course I was from China before, so I saw the response from the Hong Kong maritime association and no response from the China Maritime Association, so I can comment on Chinese law. First of all, China is not a party or State Party to any Arrest Convention; further just a couple of weeks ago, I attended a forum organised by the China's Maritime Court. I asked the question: is there a wrongful arrest concept in the view of judges? and they said: yes, theoretically there is a concept, but in practice no, we do not make the judge wrong, or if the claim is wrong, because the judge will have the primary trial of the case and decide whether there can be arrest or no arrest But I had a case a few years ago with these facts: the vessel was arrested by the China Maritime Court, but it was proved it was wrongful arrest because the name of the vessel was mistaken, and the applicant wrongfully arrested a vessel with a similar name and not the vessel which should have been liable. It was wrong, but the China Maritime Court said no, it was not a wrongful arrest, because that is a human error—everyone can make a mistake! So they would not say it was wrong but theoretically in China the people could claim for the wrongful arrest against the applicant who wrongfully arrested the vessel and also claim against the court. That means claiming against the government; in China it is possible but it is complicated. But for countersecurity in China yes, it is very important; the arrested vessel is the kind of security for the claimant but for balance of interest of course the claimant should provide security except in 2 exceptions; (i) in claims for personal injury and (ii) in claims by the crew for the salary because in China they believe they should assist the weaker party; counter security is difficult for individual claimants, not for a company.

Aleka: thank you. please raise your hands if you know, you or your colleagues, have had experience of a wrongful arrest in any part of the world - Oh many hands! So,

something must be done! At least to try, am I right? Anyone who supports the CMI Project? We want to hear – yes or no? – do you want the CMI to try with another questionnaire to seek the views of the NMLAs whether uniformity is favoured or not? You must answer yes or no. You are hesitant; it seems the answer is No.

Do you say yes for us to try to pursue the project?

[Show of hands (about half of the audience more or less)]

How Many people say no – they do not wish the CMI to do anything?

it looks like it is 50:50

With so many hands up with experience of wrongful arrest, the questionnaire may focus broadly on the issues arising from this debate.

Then we could have a further discussion.

John Kimball: My experience is that wrongful arrest may occur only in exceptional cases.

Reinier: So, we actually come to accept that all those hands showing that they are aware of some case of wrongful arrest we should come to accept that this is a rare phenomenon? And we accept, therefore, that the system functions well? If we see some problems and there is a need for fine-tuning, we do not want to open the whole Arrest Convention. I mean it is obvious also, as Anne said, we should go to the specific issue of arresting a ship. We just want to see through a questionnaire to be answered by practitioners, the NMLAs, based on experience and real cases, what the problems have been, what damages were awarded; maybe some fine-tuning could be done on a practical level.

Hugh Bryant (UK): I am an ancient P & I man. As you have been calling for a position from P & I Clubs I just wanted to say to you that it seems to me there is a big distinction to be drawn between places where a P & I club can give security and situations where they can't. If you look at *the Alkyon* case, it was a bank that was arresting for something where there could not be security from a P & I club; there has been some suggestion that FD&D can help. It can't – FD& D never guarantees the principal amount in dispute, so it seems to me in fact that the mischief, if there is a mischief, is in those cases where there isn't readily available security to release the ship, that is in

cases where a ship is arrested and security by P & I letter or whatever or bank guarantee by P & I Club is provided quickly but, even if it is a wrongful arrest, there is actually no harm done. It is where you have actually got a case where the ship owner's ship is denied to them, but perhaps we have all been there; there is a lot of comity here – nobody is naughty. When I was in practice, a long time ago there was an expression, sometimes used, which was called 'judicial wrongful arrest' and there were certain people who did that as a way of putting pressure on people and it seems to me that that's where the mischief is and if the CMI wants to try to address that, it is really a matter of focusing on those cases where security is not easily provided.

Aleka: Yes, they are very rare though, I suppose.

Kiran, could I hear from you what the position of the ICS would be? Any examples?

Kiran Khosla: I can obtain examples, but I don't have any at the moment, but our position is that we would like to see uniformity in this area. We think it is questionable as to whether it can be achieved; past attempts have not resulted in uniformity, but we don't think that there is any reason not to try.

Aleka: I think we might be wasting our time! CMI projects take a long time; then they go to the IMO to pass the Convention, and then there will be another 50 years, if not rejected outright!

Kiran: I think you are right. It is; I can't remember whether your questionnaire obtained results of cases which have caused real problems

Aleka: No, it was not in that first questionnaire, so we must ask in a new questionnaire.

Kiran: that would be a worthwhile exercise and then we can decide whether there is merit going forward and spending the time and resources.

Aleka: that is correct and a good answer for the CMI and I believe there is consensus—we do not want to go empty-handed! By the way, this project is for the young generation because they have to continue it. They have to have something to do at the CMI!

Edmund Sweetman: I think we have all come across tactical uses of an arrest in a case whether that be legitimate, semi-legitimate or illegitimate – that is what Reinier was referring to: do you arrest the ship when she was in port, or do you arrest her

when she was leaving. If you arrest when she is leaving, you put huge pressure on the shipowner to concede a greater amount to be secured plus creating a greater load on the ship owner and incentivising perhaps an earlier settlement. These are, certainly, speaking realistically, the issues that I think all of us must come across in practice where the shipowners are the victims.

Dermott Conway, Irish Maritime law Association: it strikes me that hard cases make bad law, sometimes, and certainly in the context of jurisdictions where there are no consequences for wrongful arrest. I think on the point made by my American colleague earlier about needing context in things, you really want the context of how many wrongful arrests there are in, say, common law jurisdictions before you'd want to be taking on a body of work – several hands went up when you asked the question how many people had been involved in wrongful arrest; well the other question should be how long have you been practising, how many were there and in common law jurisdictions like Ireland and UK, where there are no consequences, the question becomes well how many in the context of that jurisdiction each year are there, how many arrests are there, and then you would want to find out how many findings for wrongful arrest did you have in each year, because that is the real context – and if you find one ship owner in the context of the global shipping market who has had a wrongful arrest does that justify the moving of mountains that you described a minute ago?

Aleka: Thank you, that will go into the Minutes as part of the Executive Summary

Would you want me to round up or do you have any more contributions to make or have you had enough?

Yes, let us go for drinks, courtesy of the UK Club to whom we are grateful.

Steve Cameron – Anecdote - And the court proceedings were being relayed to us by a P & I Club lawyer, in a very English tone: "we went through the week and things were going in our favour and the judge called both parties into his chambers and said: at the end of the week he was minded to find in favour of the shipping line (which was us) but now we got to the second part of the proceedings, where we established who has got the biggest brown envelope; it was at that point that our lawyer, who may have been the only straight lawyer in this particular country, was

incensed and had completely lost his temper, leaned over the desk and bit off the bottom of the judge's ear”!

Aleka: thank you for cheering us up and, on this note, I close the proceedings.

Jeremy Thomas – thanks were given on behalf of the LSLC and the CMI to the panel, to the audience, and to Thomas Miller for their hospitality in providing the venue, facilities and drinks generously.