1979

Compromise Provisions Regarding In Rem Procedures

Joseph Sweeney
Fordham University School of Law

JOSEPH C. SWEENEY

Compromise Provisions Regarding In Rem Procedures

The Hamburg Convention of March 1978 was the culmination of eight years of efforts in UNCITRAL to modernize the international rules on carriage of goods by sea. The earlier 1924 Convention (The Hague Rules)[1] did not have provisions respecting the validity of bill of lading clauses restricting the place for legal action. There were references in the 1924 Convention to liability of "the ship" which presupposed the continuation of national rules establishing liability *in rem* of the vessel upon which the goods had been damaged[2] (as well as the liability *in personam* of the carrier) but the Convention did not directly address the question of the separate liability of the vessel. Among the many provisions of the 1976 UNCITRAL Draft Convention on Carriage of Goods by Sea[3] and of the 1978 Hamburg Convention are important rules dealing with places where such actions may be brought.

These UNCITRAL provisions had emerged from comparative law analysis and policy-based compromises during the long preparatory period of the Draft Convention. In the UNCITRAL discussions, consideration was given to the viewpoints of shipowner States which sought either a very narrow base of jurisdiction over the carrier at his principal place of business or a place designated in the carrier's printed bill of lading clauses. In response, shipper or cargo-owning States drew attention to national case law and legislation invalidating bill of lading clauses that forbade recourse to courts other than a specified forum (such as the carrier's principal place of business)[4] and sought provisions assuring a wider range of choices for

1. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, 51 Stat. 233 (1924), T.S. No. 931, 120 L.N.T.S. 155, II *U.N. Register of Trade Law Texts* 142 (for full citations of this and other UNCITRAL documents see Note "UNCITRAL Documents," Part I-C supra.)

2. Hague Rules art. IV (1): "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from . . . ." Cf. arts. IV(2), IV(5).

3. The text of the 1976 Draft Convention appears in UNCITRAL, *Report on Ninth Session* (1976) (A/31/17), VII *Yearbook* 15-20 and is reprinted in 8 *J. Marit. L. & Comm.* 267 (1977). The Report of the Secretary-General prior to the first substantive session in February 1972 contains an excellent study of all the jurisdictional problems. See U.N. Doc. No. A/CN. 9/63/ Add. 1 (1972), III *Yearbook* 263 at 275-287.

4. Examples of choice-of-forum clauses in bills of lading, and of national legislation and case law dealing with such clauses, appear in the Report of the Secretary-General, n. 3 supra, III *Yearbook* 273-275 and 277-279.

The issue respecting validity of choice-of-law clauses in bills of lading is sharply

legal action. From these conflicting views, a great compromise on jurisdiction was achieved: contract clauses could not bar the plaintiff from suit at a limited list of places related to the contract or to the performance of the carriage. This basic compromise was carried forward into the Hamburg Rules as Art. 21(1), which provides:

> 1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
>
> (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
>
> (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

---

divided in worldwide jurisprudence. The problem centers on the language of art. III (8) of the Hague Rules (46 U.S.C. 1303 (8)) which provides as follows: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect. . . ."

A 1955 decision of the Second Circuit Court of Appeals had dismissed, as against the presumed validity of the jurisdictional clause, an argument based on COGSA 1303(8) and held that jurisdictional clauses would be valid unless the shipper proves the clause unreasonable. Wm. H. Muller & Co. v. Swedish American Line, 224 F.2d 806 (2nd Cir.), cert. denied 350 U.S. 903 (1955). This decision was in line with that court's earlier decision in Kloeckner Reederei und Kohlenhandel G.M.B.H. v. A/S Hakedal, 210 F.2d 754 (2nd Cir. 1954), cert. dis. 348 U.S. 801 (1955), discounting the argument that the possibility of different and unfavorable results in another forum should influence the decision of an American court, on a motion to dismiss for *forum non conveniens* reasons, where both parties were foreign. Subsequently, the Fifth Circuit took an approach to jurisdiction which conflicted with that of the Second Circuit in *Muller* and *Kloeckner*. In 1967 the Second Circuit reconsidered the 1955 *Muller* decision and specifically overruled it, Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2nd Cir. 1967): The court held that the jurisdictional clause in question had the effect of lessening the carrier's liability in accordance with COGSA 1303(8) and was thereby rendered invalid. For a general discussion of the earlier aspects of the problem, see Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading* 110-22 (1962). Recent cases invalidating a jurisdiction clause because of 46 U.S.C. 1303(8) are Roach v. Hapag-Lloyd, 358 F. Supp. 481 (N.D. Cal. 1973) and No. Assurance Co. Ltd. v. M/V Caspian Carrier, 1977 A.M.C. 421 (N.D. Cal. 1977).

The decision in M/S Bremen and Unterweser Reederei G.M.B.H. v. Zapata Offshore Co., 407 U.S. 1 (1972) is important for the general approval of the validity of negotiated arbitration provisions in international business transactions, but the document involved in that case was clearly not a bill of lading with its attendant public policy restrictions on freedom of contract. See generally, Nadelmann, "Choice of Law Clauses in the United States, The Road to Zapata," 21 *Am. J. Comp. L.* 124 (1973) and Wilner, "Judicially Assisted Dispute Resolution: Choice of Judicial or Arbitral Forum Clauses," in 1975 *Ford. Corp. L. Inst.* 235 (1975; "International Project Financing," Sweeney ed.)

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea.

This compromise rejected the position that there should be no limit on access to courts that would accept suit. On the other hand, paragraph (c) assures cargo interests that bill of lading clauses would not bar action at "(c) the port of loading or the port of discharge." The reference to the port of discharge was bitterly resented by the shipowner States, but cargo-owning States insisted on this option, and there seemed no adequate answer to their point that cargo damage was usually discovered at the port of discharge.

It will be noted that, under paragraph (1) of Art. 21, the limited list of alternative places where the plaintiff could institute judicial proceedings did not include the place where the plaintiff might secure the arrest of a ship owned or operated by the carrier. The subject matter of this article is the preservation of existing procedures for jurisdiction based on arrest of the vessel, with special reference to *in rem* process to enforce a shipper's maritime lien in the vessel on which the goods were damaged.

IMPORTANCE OF IN REM PROCEDURES

Today it is generally true that plaintiffs in civil litigation must run the risk of the death, bankruptcy or other disappearance of the defendant or his assets during the lengthy conduct of pre-trial, trial and post-trial maneuvers. There are however two general exceptions to this rule in civil litigation. One is pre-trial attachment of property, where there is a danger of the defendant absconding. A second exception is the commencement of the action against a defendant by seizure of the defendant's property where the defendant cannot be found within the jurisdiction—often termed an action *quasi in rem*. In litigation in admiralty however it may also be possible for one who holds a special property interest in the ship—a maritime lien—to obtain security during the entire proceeding by a pre-trial seizure of the vessel which is the subject of the suit.

Many nations have some form of procedure which permits arrest or attachment of a vessel, usually to prevent concealment of assets, or to provide a basis for jurisdiction where the defendant is not present or for detention at the behest of government. But there are now few nations which retain the special process "*in rem*" against the vessel as defendant, as contrasted with actions "*quasi in rem*," where the carrier is defendant.[5]

5. Sorely needed in this area of the law is a comparative law study of *in rem* procedures. When the author was in private practice he often observed the arrest of vessels in a world-wide admiralty practice by a number of jurisdictions which would

Efforts in the Comité Maritime International by shipowners to "harmonize" and "unify" the maritime law by eliminating the lien for cargo damage have combined with efforts of lending institutions to reduce the number of claims which are prior in right to the ship mortgage.

In view of the multinational, virtually homeless character of the shipping industry, the *in rem* procedure offers the opportunity of a convenient forum for injured passengers, crewmen, longshoremen, collision victims, salvors and damaged-cargo owners. While the wrong may occasionally occur near the defendant's home port or corporate headquarters, the mobility of vessels makes it likely that the exact place of accident will be fortuitous. As a result, claimants need to take advantage of the temporary presence of the vessel if their rights are ever to be enforced. Going beyond this general policy-based justification is the peculiar position of the U.S. as the major world trader. As long as roughly 95% of U.S. foreign trade, by volume, is carried in foreign flag vessels there is no doubt that the U.S. will continue to need the use of *in rem* process. What is said for the U.S. of course applies to other important shipper nations such as Australia, New Zealand and Canada—nations which also share the traditional admiralty doctrines of England.

As noted above, a prerequisite to the use of *in rem* process is that the claimant be the holder of a maritime lien in the defendant vessel.[6] Unlike a mortgage, the maritime lien does not arise by the will of the parties but originates out of certain types of occurrences: a maritime tort or the breach of a maritime contract or a salvage act. Such facts create in the claimant a property right in the vessel that was involved in the occurrence that gives rise to the claim.

IN REM PROCESS: ORIGINS AND STATUS IN THE UNITED STATES

It is possible that the *in rem* process is merely the result of judicial engineering by eighteenth and nineteenth century practitioners

not be counted as States with *in rem* procedures. The International Bar Association has published *Arrest of Vessels* (Hagberg ed. 1976), vol. I in its series on maritime law. Unhappily, many of the descriptive articles do not include citations to statutes and decisions; consequently the work is somewhat impractical for maritime lawyers, although it may be useful for management and insurer's purposes. The volume does not distinguish between arrest for the purposes of *in rem* process or arrest for protective purposes (*saisie conservatoire*).

6. See generally M.W. Zack Metal Co. v. International Navigation Co., 510 F.2d 451 (5th Cir. 1975) and Todd Shipyards Corp. v. City of Athens, 83 F. Supp. 67 (D. Md. 1949). See also The Bold Buccleugh, 13 Eng. Rep. 884 (P.C. 1851); and Gilmore & Black, *The Law of Admiralty* 590-591 (2d ed. 1975); Ryan, "Admiralty Jurisdiction and the Maritime Lien: an Historical Perspective," 7 *West. Ontario L. Rev.* 173 (1968); Herbert, "Origin and Nature of Maritime Liens," 4 *Tul. L. Rev.* 381 (1930) and Price, *The Law of Maritime Liens* (1940).

at the admiralty bar in England and the U.S.[7] Possibly it is not one of the hoary traditions of the Rhodians, the Romans or the Maritime Codes. The important point to note is that today there is no uniformity of view in the legal systems of the world concerning this favorite weapon of admiralty lawyers. Nevertheless, there is a sufficient number of instances in the Laws of Visby (circa 1250 A.D.)[8] in which there seems to be a personification of the vessel being charged with certain costs and expenditures to argue that the almost legendary maritime codes of the past presupposed the existence of *in rem* process.[9]

For present purposes we may leave the origin of *in rem* process to historians. In any event, by 1860 the U.S. Supreme Court had recognized that owners of damaged cargo could use *in rem* process against the vessel causing the damage, and based such process on the view that every valid claim for cargo loss or damage created a maritime lien against the ship.[10] Then in 1868 the Court in *The China* gave theoretical and practical justification for *in rem* process based on the claimant's need for an effective basis for recovery.[11] Further explanation of the nature of *in rem* process was provided in the opinion of Mr. Justice (later Chief Justice) Hughes in *Rounds v. Cloverport Foundry & Mach. Co.*[12] In upholding the constitutionality of a state court attachment of a vessel under the "Saving to Suit-

7. An early American admiralty text, Hall, *The Practice and Jurisdiction of the Court of Admiralty* (1809), translating the English authority (in latin), Clerke's *Praxis Supremeae Curiae Admiralitatis*, states (60-1) in commenting on *in rem* process that, "This proceeding is in the nature of the process of foreign attachments under the custom of London, which has been introduced into most, if not all of the States with great advantage and success. Its object is to compel the appearance of an absent or absconding debtor and in the case he does not appear to satisfy the debt out of his effects and credits."

8. E.g. The Laws of Visby (Translated in 30 Fed. Cas. 1189) art. XXVI: "If a ship riding at anchor in a harbor is struck by another ship which runs against her, driven by the wind or current, and the ship so struck receives damage, either in her bulk or cargo, *the two ships shall jointly stand to the loss*; . . . ." See also arts. XVIII, XLIV, L, LXVII and LXX.

9. There is an analogy between *in rem* process and the historic bottomry bond. See generally, The Grapeshot, 76 U.S. (Wall.) 129 (1870) and Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934) which contrast the bottomry bond with the preferred ship mortgage.

10. Bulkley v. Naumkeag Steam Cotton Co., 65 U.S. (24 How.) 386 (1860).

11. The China, 74 U.S. (7 Wall.) 53 (1868). The China, a British steam vessel outbound from New York under the conn of a compulsory pilot, collided with and sank an inbound brig. The compulsory pilot was 100% at fault so the steam vessel owners urged no liability either *in personam* or *in rem* since there was no basis for *respondeat superior*. The Supreme Court noted that the pilots would undoubtedly be judgment-proof and therefore the remedy of the damaged vessel would be a mere delusion if there were no maritime lien resulting in an *in rem* liability of the vessel. Accordingly, ". . . the collision impresses upon the wrongdoing vessel a maritime lien."

12. 237 U.S. 303 (1915).

ors Clause,"[13] as against the assertion that attachment of vessels is exclusively the prerogative of admiralty process, the opinion stated:[14]

> The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself "seized and impleaded as the defendant and is adjudged and sentenced accordingly." By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world and under it the property itself passes, and not merely the title or interest of a personal defendant. . . .

Over the years, much has been written on the distinctions between the "procedural" theory of *in rem* in the U.K. and the "personification" theory in the U.S. In spite of theoretical differences, there is little practical difference. Under the modern English procedural theory[15] the *in rem* process is used (as it is said) to hold the ship to ransom — that is, to force the shipowner to appear personally and defend. The American theory relies on a concept of personification to hold the ship herself liable for certain torts and contracts committed under conditions which justify the payment of damages when the shipowner may not be subject to personal service or, more importantly, even though the shipowner may not be liable under traditional common law principles.[16]

One of the most important practical consequences of *in rem* process against the ship is to make the owner's interest in a chartered ship available for the satisfaction of a maritime claim even though the claim arose while the ship was operated by the charterer. The theoretical justification can be sought in Gilmore and Black's analysis of the conflicting cases:[17]

> To a nineteenth century court it would have seemed strange to hold the subjectively innocent shipowner liable without limitation (i.e., *in personam*) for torts committed while the charterer was in control of the ship. The conclusion that the shipowner should be held to a liability limited to his inter-

13. § 9 of the Judiciary Act of 1789, 1 Stat. 76, now codified at 28 U.S.C. § 1333 (1).
14. 237 U.S. at 306.
15. The differences between these concepts may possibly be due to the destruction of the historic Doctors' Commons in London in the mid-nineteenth century which resulted in the absorption of Common-law (as opposed to Civil-law) concepts in cases tried by Common lawyers in admiralty. See Wiswall, *Development of Admiralty Jurisdiction and Practice since the Eighteenth Century* (1970); I *British Shipping Laws, Admiralty Practice*, by McGuffie, Fugeman and Gray (1964).
16. See Note, "Personification of Vessels," 77 *Harv. L. Rev.* 1122 (1964). See also Gilmore & Black, *The Law of Admiralty* 586-622 (2d Ed. 1975).
17. Gilmore & Black at 621-2.

> est in the ship through *in rem* process may be looked on as an instinctive adjustment of theory to reality. In our century we have become accustomed to the idea of liability, indeed unlimited liability, without fault — . . . Abandonment of the agreeable fiction of ship's personality will have been bought at far too high a price if twentieth century shipowners are to be absolved of liability for the tortious uses to which their ships are put by third parties to whom they have entrusted control . . . .

Arrest of vessels (either *in rem* or *quasi in rem*), like various other types of proceedings involving the seizure of assets, has been challenged on the ground that the defendant is deprived of the use of property prior to an opportunity for a judicial determination of the claim.[18] Such challenges under the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution turn on the adequacy and speed of the applicable procedures, and should not undermine the substantive rights protected by in rem process. Fortunately, work is under way to assure that arrest procedures will comply with constitutional guarantees.[19]

---

18. The *in rem* process is alleged to violate due process of law under the Fifth Amendment because there is no notice to the holder of the chattel and no provision for a hearing on the merits of the claim before the holder is deprived of the chattel. In Techem Chemical Co. v. M/T Choyo Maru, 416 F. Supp. 960 (D. Md. 1976) the court discusses the problem without deciding it. Dictum supports the *in rem* procedures in East Asiatic Co. Ltd. v. SS Indomar, 1976 A.M.C. 2039. Admiralty attachments of funds are involved in two recent cases, one holding the attachment unconstitutional, Grand Bahama Petroleum Co. Ltd. v. Canadian Transport Agencies, Ltd., 1978 A.M.C. 789 (W.D. Wash. 1978) the other holding it to be constitutional, Engineering Equipment Co. v. S.S. Selene, 1978 A.M.C. 809 (S.D.N.Y. 1978).

19. The Maritime Law Association of the United States has proposed amendments to the Supplemental Rules to provide for a hearing to be granted forthwith where property is arrested. See MLA Doc. No. 605 at pp. 6637-6644 (1977).

In rem process is significantly different from the procedures that have been held unconstitutional. See Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) where the Puerto Rico police began an *in rem* seizure of a yacht under a statute permitting confiscation of vehicles used for unlawful purposes, in this case, transporting a small quantity of marijuana. The three judge court held the statute unconstitutional on the basis of Fuentes v. Shevin, 407 U.S. 67 (1972). The Supreme Court reversed, finding that there was no due process violation because of the extraordinary situation wherein pre-seizure notice and hearing might frustrate the public interest since the property might be removed or concealed or destroyed. See also U.S. v. One 1972 Wood 19 ft. custom boat FL 844 3AY, 501 F.2d 1327 (5th Cir. 1974).

Other analogies, further removed, involve that of summary seizure of aircraft by the Federal Aviation Authority under statutory authority to prevent violations of safety statutes; See Aircrane v. Butterfield, 369 F. Supp. 598 (E.D. Pa. 1974). Less analogous summary seizures provided by statute are found in Erving v. Mytinger & Casselberry, 399 U.S. 594 (1950) (misbranded drugs); Faheley v. Mallonee, 332 U.S. 245 (1947) (bank failure); United States v. Pfitsch, 256 U.S. 547 (1921) (war material); North American Storage Co. v. Chicago, 211 U.S. 306 (1908) (contaminated food); and Phillips v. Commissioner, 283 U.S. 589 (1931) (internal revenue collections).

DRAFTING THE UNCITRAL TEXT

As has been mentioned, ocean carriers have sought to solve jurisdictional problems by contract; for example, bill of lading clauses often provide that any litigation arising out of the carriage may only be brought in the courts of the principal place of business of the carrier. The 1924 Convention ("Hague Rules") does not deal directly with the validity of such clauses and national case law and legislation on this question are in sharp conflict; thus there were strong reasons for an international solution.

Case law in the U.S. has tended to invalidate such jurisdiction clauses on the ground that they erected barriers to the full realization of the substantive rights of the cargo-owners protected by the 1924 Convention.[20] Consequently, the U.S. delegation feared that any international legislation on the subject could only restrict the cargo owner's existing rights in the U.S., and that very delicate compromises would have to be achieved in order for the new rules to become acceptable to both cargo-owning and carrier nations.

A Secretariat Study presented to the UNCITRAL Working Group analyzed alternative approaches to jurisdiction in cargo damage cases that might be followed in the new Convention:[21] (1) No provision on jurisdiction, in accordance with the existing Hague Rules; (2) a provision prohibiting all forum selection clauses; (3) a provision prohibiting those forum selection clauses which evidence abuse of economic power or the use of unfair means; (4) a provision on jurisdiction following the examples of other international transport conventions, especially the Warsaw Convention, The European Road and Rail Conventions, and the Passenger Luggage Convention.

To illustrate the fourth alternative, the Secretariat prepared alternative draft proposals. One of these (Draft Proposal A) assured the plaintiff of specified alternative places for suit related to the location of the parties and the salient events in the making and performance of the contract of carriage, including the place of loading and the place of discharge. This approach, embodied in paragraph A of the Draft Proposal, attracted widespread support and was embodied in art. 21(1) of the Hamburg Rules, quoted above.

To implement the compromise that the plaintiff would be afforded adequate but not unlimited alternatives, paragraph B of the Draft Proposal provided as follows:

> No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above.

---

20. See e.g., Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) and related cases cited in n. 4 supra.

21. See Report of The Secretary-General, III *Yearbook* 277-278 (paras. 86-96).

In spite of the wide support for Draft Proposal A, the U.S. pointed out that paragraph B of the Draft Proposal, which forbade the commencement of legal proceedings in any place not specified in paragraph A, would bar proceedings at the place of arrest of the offending vessel when arrest occurred at a place not specified in paragraph A. Consequently, the U.S. argued that the criteria selected for jurisdiction of cargo disputes were fatally insufficient and that the omission of a provision for some sort of *in rem* jurisdiction was a defect that must be remedied. The choices for the United States in a future convention would be at best an attempt at a reservation to the jurisdictional portion of the convention or at worst a failure to ratify because of the strong public policy in favor of retention of *in rem* jurisdiction in the U.S., especially in cargo damage cases.[22]

The U.S. at first proposed simply the addition of the place of *in rem* jurisdiction to the list of available jurisdictions in paragraph A of the Draft Proposal. This proposal encountered considerable opposition on the ground that the plaintiff might subject the ship to *in rem* process at a remote port that bore no relationship to the contract of carriage or its performance. Consequently it was urged that permitting litigation at any place where the ship might be arrested would be inconsistent with the basic compromise offered by paragraph A. Under this compromise, the shipper is freed from bill of lading clauses which often required that claims be brought at a place that was convenient only for the carrier, while the authorized places are restricted to those related to the contract of carriage or its performance.

To meet this objection, the U.S. proposed to add a second provision to permit the defendant to require the plaintiff to remove the action to one of the jurisdictional sites specified in paragraph A; the removal would be conditioned on the defendant's providing adequate security. Since there was no way for the transferee State to determine adequacy, the transferor State would be permitted to determine the adequacy of security.

These changes produced some additional support, but not enough for real consensus. The U.S. therefore made a further proposal—that the *in rem* remedy could be used only where the vessel could be properly attached in accordance with the local law.

It was suggested that any special provision for *in rem* jurisdiction would be inconsistent with the approach of the air and rail conventions. The U.S. argued that these analogies were not appropriate in view of the nature of the permanent installations for rail transpor-

22. The debate in UNCITRAL is reported in some detail in Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)," 7 *J. Marit. L. & Comm.* 69, 77-84 (1975).

tation and the bilateral agreements and guarantees supporting air transport. The U.S. pointed out that its proposals did not give as much effect to *in rem* process as does current law in the U.S. since, under current law, *in rem* process could lead to adjudication on the merits in the U.S. even though the carriage had not had the contact with the U.S. required under art. 21(1) of the Hamburg Rules. The delegation had to face the possibility that further weakening of *in rem* process would be attacked at home as an unnecessary surrender of an essential principle.[23]

These various compromises and adjustments led to the addition to art. 21 of the Hamburg Rules of the following two paragraphs:

> 2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.
>
> (b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.
>
> 3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

---

23. There were no major changes at the Second Reading of the text. At the UNCITRAL Plenary Commission in 1976, the compromise "*in rem*" provision was preserved and even enlarged, after an extensive debate, in that a provision regarding *quasi in rem* jurisdiction over sister ships which had been summarily rejected in 1972 was accepted on the arguments put forward by Singapore. The Soviet Union sought an amendment whereby State-owned vessels could never be subjected to *in rem* process, but this was rejected on the ground that since the vessels must have been legally arrested in accordance with the law of the arresting State and that while some States recognized the immunity of State-owned vessels, many did not, it would be overly ambitious to attempt to resolve that problem in this Convention. Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)," 8 *J. Marit. L. & Comm.* 167, 184-192 (1977).

Respecting the question of the absence of immunity because of the commercial nature of State-owned merchant ships, see generally Philippine Admiral (Owners) v. Wallen Shipping (Hong Kong) Ltd. & another, [1976] 2 W.L.R. 214 (P.C.).

It is believed that these provisions are the product of comparative law analysis and refinement rather than an adoption of the views of any single delegation.

LEGISLATING THE JURISDICTIONAL ARTICLE AT HAMBURG

Despite the lengthy preparatory work of UNCITRAL on art. 21, its controversial nature guaranteed that much time would be spent on this article at the Diplomatic Conference in Hamburg in March 1978. In fact parts of three sessions were devoted to the consideration of twenty proposed amendments beginning with the unsuccessful proposal of the Soviet Union to delete the entire article.

State-owned Vessels

One of the more significant issues involved the immunity of state-owned ships. At the UNCITRAL Plenary it had been proposed that state-owned ships be given immunity from arrest. This proposal was found objectionable because of concern by non-socialist States lest the proposed immunity would be applicable to merchant ships engaged in ordinary commercial service. At the Hamburg Conference, instead of renewing this debate, the Soviet Union proposed that it was not enough that a vessel be arrested in accordance with the domestic law of the arresting State but that the arrest must also be in accord with the principles of international law. This proposition was quickly supported by Norway, the United States, the Federal Republic of Germany, India, Belgium, France and Algeria. Since there was no opposition, the text of art. 21 (2) as prepared by UNCITRAL was amended to insert a new phrase, "in accordance with applicable rules of the law of that State and of international law" to replace the earlier formulation, "in accordance with the applicable law of that State." Obviously opinions varied as to what international law may or may not say on the matter.

Removal Procedures

Another significant issue was a proposal that the art. 21 (2)(a) provision for removal of the case to one of the art. 21(1) jurisdictions chosen by the *claimant* be changed so that the art. 21(1) jurisdiction would be chosen by the *shipowner*. The Federal Republic of Germany, supported by Belgium, Singapore and Liberia, urged the deletion of the removal provision in art. 21(2)(a) because of incompatibility with the 1952 Arrest of Ships Convention[24] and al-

24. II *U.N. Register of Trade Law Texts* 156, 439 U.N.T.S. 195. It is not feasible to deal fully with this convention here. The U.S. is not a party to it. The 1952 Convention compromises traditional Anglo-American concepts of jurisdiction *in rem* with French Civil Code concepts of the defendant's right to be sued at his domicile. (See

leged impracticality of international removal of actions. Both proposals were defeated; the prevailing view was that such changes would undermine the delicate balance between economic interests reflected in the UNCITRAL compromise.[25]

CONCLUSION

Under the new Hamburg Rules the owner of damaged cargo may always elect to bring his legal action at one of the fora designated in art. 21(1). Where experience has indicated to the claimant that something more serious must be done to prevent a carrier from ignoring a claim, the cargo owner may attempt a traditional *in rem* action against the ship or the more widely available arrest *quasi in rem* where such procedures are permitted by statute or decisional law. Often it is the seizure (or the threat of seizure) which is the most important part of the arrest process, since rapid and fruitful settlement discussions will usually occur when the carrier appreciates that he is dealing with a non-frivolous claimant who can disrupt his entire vessel operation. If it appears that there are genuine issues of fact and law that will require litigation it will then be possible for the defending carrier to request removal of the case from the

---

generally, Weser, "Bases of Judicial Jurisdiction in the Common Market Countries," 10 *Am J. Comp. L.* 323 (1961)). Under the latter view, the maritime claim must be brought against the defendant in personam, unless the defendant is not present within the jurisdiction; in this case arrest of the vessel will be authorized and may lead to a judgment for the full amount of the claim. Art. 7 of the 1952 Convention gives the courts of the country in which an arrest is made jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such courts. A special class of cases permits a decision on the merits where the claimant has his principal place of business or habitual residence in the arresting State, where the claim arose in the arresting State, where the claim concerns the very voyage during which the arrest was made and other cases not here relevant. The compromise nature of the 1952 Convention surfaces in its very name: the English language version uses the term "arrest of vessels" (the end result of either *in rem* or *quasi in rem* process) while the French name "*saisie conservatoire*" refers to emergency protective measures. The Hamburg Rules do not require courts of contracting States to arrest and do not enlarge the cargo claimant's rights under the 1952 Convention, but may in fact restrict them since cases which under the 1952 Convention might be decided on the merits in the arresting court must now be removed at the petition of the shipowner to one of the jurisdictions listed in art. 21(1) of the Hamburg Rules. For a full discussion of the 1952 Convention, see Kriz, "Ship Mortgages, Maritime Liens, and their Enforcement: The Brussels Conventions of 1926 and 1952," 1963 *Duke L.J.* 671 and 1964 *Duke L.J.* 70; Ripert, "Les Conventions de Bruxelles du 10 mai 1952 sur l' Unification du Droit Maritime," [1952] *Droit Maritime Francais* 343.

25. The vote on the proposal to delete the removal provision was: In favor, 8; opposed, 33; abstentions, 21.

The U.S. was also able to secure a clarifying amendment, strongly favored by the United States Maritime Law Association, to refer to arrest in "any port *or place* in a Contracting State." The emphasized language was added to make sure that the arrest provisions would apply if ships are arrested in territorial waters that are outside the "port" area.

arresting jurisdiction to one of the fora listed in art. 21(1). Guarantees to prevent misuse of the removal provisions, however, are also part of the new scheme. As we have seen, security sufficient to the arresting court must be posted. And the removal of the action will not be time-barred since (by virtue of art. 21(4)(c)) the receiving court, if a contracting party to the Convention, will not consider the removal of the action to be the commencement of a new action.

The work of the UNCITRAL drafters and the spirit of compromise which prevailed at Hamburg have preserved a most useful procedure for future development in cargo damage actions arising under the new Hamburg Rules. Although various aspects of the compromise were opposed on theoretical or policy-based grounds by groups that, together, comprised a majority of participants at UNCITRAL and possibly at Hamburg, the compromise "package" was accepted by the diplomatic conference. Thus the U.S. was able to preserve the essence of *in rem* process to meet the needs of its foreign trade as a cargo-owning nation.

The work of UNCITRAL in providing a forum for intellectual resolution, in a spirit of scientific cooperation, of these complex problems of maritime jurisdiction has demonstrated its permanent value for the future in the progressive development and harmonization of international trade law.