

**REPLY BY THE ASSOCIATION FRANÇAISE DE DROIT MARITIME
(FRENCH MARITIME LAW ASSOCIATION) TO THE CMI
QUESTIONNAIRE OF 27 MAY 2015 ON THE STUDY
RELATING TO LIABILITY FOR WRONGFUL ARREST**

I – INTERNATIONAL CONVENTIONS:

- a – The Arrest Convention 1952 and the Maritime liens and mortgages Convention 1926 are applicable in France.
- b - If the vessel is not flying the flag of a contracting State of the 1952 Arrest Convention, she could be arrested, either by reference to this Convention, or by application of French domestic law (article L. 511-1 of the Code of Enforcement of Civil Proceedings).

According to this article, not specific to arrest of ships, any claimant who has a prima facie claim can apply to the judge to be authorized to make a protective attachment of his debtor's assets, if he provides evidence that recovery of his claim is in jeopardy.

II – QUESTIONS RELATING TO WRONGFUL ARREST:

1. There is not any more specific legal provisions referring to security to be given by the arrestor. However, this possibility is not expressly excluded either.

In practice, the French judge very rarely orders the claimant to provide such a security.

2. Article L.111-7 of the Code of Enforcement of Civil Proceedings provides :

“The application of these measures (protective or enforcing) cannot exceed what is necessary to obtain payment of the claim”.

Two other legal provisions the Code of Enforcement of Civil Proceedings are relevant:

- Article L.121-2 :

“The enforcement judge may order the lift of any useless or abusive measure and condemn the claimant to damages in case of abusive arrest”.

- Article L.512-2 :

“The expenses due to a protective measure are borne by the debtor, unless the judge rules otherwise.

When a lift of the arrest has been ordered by the judge, the claimant may be ordered to compensate the damage caused by the protective measure.”

The Supreme Court’s case law on article L.512-2 constantly states that no evidence of the arrestor’s fault is required. The arrested party only has to prove damage linked to the protective arrest.

However so far, existing case law about wrongful arrest of ships is based on the abuse of rights: the arrestor is considered as having acted recklessly or in bad faith.

Such abuse constitutes a fault and the arrestor is liable for damage caused by the arrest.

According to case law:

- a vexatious arrest (C. Ap. Rennes 27 June 2002 – “Sedov”),
- imposing a guarantee much higher than the claim, or maintaining an arrest for the full amount after having received evidence that damage to the cargo was very limited (Cass. Com. 23 April 2013 – “Bering Wind”),
- arresting a vessel not related to the claim and not belonging to the debtor (C. Ap. Aix-en-Provence 21 September 2011 – “Scandinavia”, C. Ap. Paris 2 July 2008 “Petunia”),
- arresting a passenger vessel ready to sail in order to oblige the debtor to pay (C. Ap. Aix-en-Provence 10 March 1987 – “Tipasa”),
- misuse of arrest proceedings (C. Ap. Pau 15 September 2015 – “HC Nadja Maria”),

have been considered as an abuse of rights.

3. Case law applies the same tests as those mentioned in question 2.
4. Under article 3-4 of the 1952 Convention it is possible to arrest the vessel in respect of which the claim arose even if the debtor is not the owner. That provision is applied in France. Normally, the arrestor does not bear any liability if such arrest is ordered. It remains that there are some cases where the liability of the arrestor was incurred on the basis that the arrested vessel did not belong its debtor (see question 2- Cass. com. 19 March 1996, Alexander III).

5. If a party is knowingly grossly exaggerating the amount of the claim, it might be taken as an abuse of right which could lead to liability for damage (see question 2).
6. If a person is largely solvent the recovery of the arrestor's claim is not threatened. But, under the Convention, a threat in the recovery of the claim is not a requirement to arrest a vessel.
An arrest ordered in such situation could not lead to the liability of the arrestor unless an abuse of right is established.
7. No. An arrestor can be held liable for the arrest of ship only if an abuse of right is established.
8. Our Code of Civil Procedure provides that a party which bring proceedings in an abusive or delaying ways could be sentenced to pay a civil penalty to the state with a maximum of EUR 3.000. Such sanction is seldom used in ship arrest.
9. When the arrest is made under the 1952 Convention, article 6 provides that: *"all questions whether in any case the claimant is liable in damages for the arrest of a ship (...) shall be determined by the law of the contracting state in whose jurisdiction the arrest was made or applied for."*

In other circumstances EC Regulation Rome II on the law applicable to non-contractual obligation provides that the law applicable to an obligation arising from a tort is the law of the country in which the damage occurred.

It remained that when we consider case law on the liability for wrongful arrest the judge seldom take into account the questions on conflict of laws. An arrest is closely associated with enforcement procedures which are governed by the law of the country of the judge (*lex fori*). Generally the questions of the liability of the arrestor is determined by the *lex fori*.