

LIABILITY FOR WRONGFUL ARREST OF SHIPS

A comparative analysis of the laws of 38 countries which responded to the CMI questionnaire.

- The synopsis and the tables (see the CMI website) provide a comparative analysis of the answers to the CMI questions by the national maritime law associations who responded to the questionnaire.
- The purpose of this study has been to identify the similarities and differences among the various legal systems, so that the CMI IWG can work towards the unification or harmonization of the laws on wrongful arrest.
- Such similarities and differences are sharply shown below. This summary focuses only on the 3 main questions: (i) conventions; (ii) counter-security; (iii) the test for wrongful arrest.

Resume of the results expressing the number of countries which:

- (a) Apply any specific conventions or national law
- (b) Require counter-security or not
- (c) Apply different tests to determine liability

APPLICABLE LAW

The 1952 Arrest Convention

- **17 out of the 38** countries apply the 1952 Arrest Convention.
 - (Belgium, Croatia, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Netherlands, Norway, Poland, Romania, Russia, Senegal, Ukraine, and United Kingdom).

The 1999 Arrest Convention

- **2 out of the 38** countries apply the 1999 Arrest Convention.
 - (Spain and Norway).

Domestic Legislation Additional to Conventions

- **10 out of the 38 countries** apply one or the other of the adopted Conventions in combination with their national provisions.
 - (Brazil, Croatia, Finland, France, Germany, Greece, Poland, Romania, Russia, Spain and Turkey).

Domestic Legislation

- **16 out of the 38 countries** apply just their domestic legislation.
 - (Australia, Canada, Chile, Colombia, DPRK, Ecuador, Japan, Israel, Korea, Malta, Mexico, New Zealand, Nigeria, Panama, Peru, and US).

COUNTER SECURITY FOR ARREST

Counter security

- **11 out of the 38** countries require the arrestor to provide counter security in order to obtain an order for arrest or maintain the arrest.
 - (Croatia, Finland, Japan, Korea, Mexico, Netherlands, Romania, Russia, Senegal, Spain and Turkey).

No security

- **13 out of the 38** countries do not require security to be provided.
 - (Australia, Brazil, Canada, Ecuador, France, Greece, Hong Kong, Ireland, Israel, New Zealand, Panama, United Kingdom and US).

Discretion of the court

- **In 13 out of the 38** countries, the provision of counter - security depends on the discretion of the Court.
 - (Belgium, Chile, Colombia, Germany, Italy, Malta, Nigeria, Norway, Peru, Poland, Portugal, South Africa, and Ukraine).

TEST FOR LIABILITY IN THE EVENT OF WRONGFUL ARREST

Strict liability

- **9 out of the 38** countries apply strict liability.

- (Croatia, Finland, Germany, Mexico, Netherlands, Norway, Poland, Russia, Spain).

Proof of negligence

- **10 out of the 38 countries** generally apply tort rules, negligence, for wrongful arrest.
 - (Belgium, Brazil, Chile, DPRK, Japan, Korea, Panama, Portugal, Senegal, Ukraine).

Proof of gross negligence, bad faith, or malice

- **14 out of the 38** countries apply the test of gross negligence, or bad faith, or malice.
 - (Canada, Chile (negligence whether gross or not?), Colombia, HK, Ireland, Israel, Korea, Malta, NZ, Panama, Senegal, South Africa, UK, US).

Other phrases used for the arrest to be wrongful – but these are not exactly legal tests.

The following countries use different terminology for the arrest to be wrongful but they do not specify in their answers, apart from Malta, what these phrases mean, or what is the legal test and/or the standard of proof, to be applied. Some of these phrases may mean that the defendant/owner or charterer has to prove negligence on the part of the arrestor; others may mean that gross negligence or malice, bad faith, has to be proved. If it is the latter, it would mean that the test will have two limbs, objective and subjective (i.e. ascertaining what the arrestor had in mind).

- Illicit or unjustified arrest: (Ecuador and Turkey)
- Unreasonable or without good cause arrest. (Australia and Nigeria)
- Without reasonable and probable cause (South Africa)
- Frivolous or vexatious arrest (Malta); this may be tantamount to gross negligence, or bad faith
- Abuse of rights, such as vexatious arrest (Romania and France)
- Without ordinary prudence (Italy)
- Wrongful behaviour (Ukraine)

- Wrongful or unjustified (DPRK North Korea)
- Arrest obtained by false evidence on the application for arrest, arrestor was aware or due to gross negligence he ignored that the claim did not exist (Greece).

In conclusion, the results as derived from the answers to the CMI questionnaire, show a sharp disparity of the laws on liability for wrongful arrest as applied in various countries. The contrast is not only between the common law and the civil law jurisdictions but within the civil law countries as well, which causes confusion. It is the role of the CMI to unify laws and this is an area that requires further work with the aim of unification. The newly formed IWG of the CMI on this area will endeavor to explore the views of representatives of the NMLAs from a broader spectrum and whether or not it will be possible to proceed with unification.

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