

**THE CANADIAN MARITIME LAW ASSOCIATION**  
**L'ASSOCIATION CANADIENNE DE DROIT MARITIME**

[www.cmla.org](http://www.cmla.org)



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September 25, 2015

**Stuart Hetherington, President**  
Comite Maritime International  
Ernest Van Djckkaai 8  
B-2000 Antwerp,  
Belgium

Re: CMI Questionnaire – Study relating to Liability for Wrongful Arrest

Dear Sirs,

The Board of Directors has recently approved the Response of our association to the above questionnaire which we are pleased to enclose.

Trusting the foregoing is satisfactory, we remain,

Yours truly,

THE CANADIAN MARITIME LAW ASSOCIATION

Per:

A handwritten signature in blue ink that reads "David G. Colford". The signature is written in a cursive style.

David G. Colford, President

**SUBMISSIONS BY THE CANADIAN MARITIME LAW ASSOCIATION**

**TO CMI QUESTIONNAIRE**

**STUDY RELATING TO LIABILITY FOR WRONGFUL ARREST**

**I. INTERNATIONAL CONVENTIONS:**

(a) Please advise which, if any, of the following Conventions your jurisdiction is a party to and has given effect to in its legislation:

- (i) Arrest Convention 1952
- (ii) Arrest Convention 1999
- (iii) Maritime Liens and Mortgages Convention 1926
- (iv) Maritime Liens and Mortgages Convention 1993

**CMLA Answer:** Canada is not a party to any of these conventions, but has incorporated various aspects of these conventions into its national law.

(b) If none of the above is made part of your national law, or in any event, what are the grounds on which a vessel can be arrested in your country?

**CMLA Answer:** A warrant for arrest of a ship (or a sister ship, defined as having the same beneficial ownership as the offending ship) is available to secure a claim recognized under Canadian Maritime Law as defined and delineated in Federal Courts Act, R.S.C.1985, c.F-7 as amended, (sections 2, 22 and 42) including but without limitation, the following:

- (a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;
- (b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;
- (c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;
- (d) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;
- (e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;
- (f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

- **(g) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;**
- **(h) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;**
- **(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;**
- **(j) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;**
- **(k) any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;**
- **(l) any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;**
- **(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;**
- **(n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;**
- **(o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;**
- **(p) any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;**
- **(q) any claim in respect of general average contribution;**
- **(r) any claim arising out of or in connection with a contract of marine insurance; and**
- **(s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.**

## II. QUESTIONS RELATING TO WRONGFUL ARREST

1. To what extent is a claimant required under your national law to provide security in order to obtain an order for arrest or, subsequently, to maintain an arrest?

**CMLA Answer:** There is no such requirement. However, at any stage in the proceedings, whether or not a warrant of arrest has been issued, a claimant might be called upon to provide security for the legal costs of the other party in the event that the claim is unsuccessful.

2. Under your national law, if the claim for which a vessel has been arrested has subsequently been rejected by the court hearing the case on its merits, would the arrestor be liable in damages by reason of:

(a) The mere rejection of the claim?

**CMLA Answer:** no

(b) Or would proof be required about the arrestor's:

(i) awareness/knowledge that his claim had no foundation, or

(ii) negligence in bringing such a claim, or

(iii) bad faith or gross negligence or, otherwise, malicious bringing of such a claim?

**CMLA Answer:** (b) (i) and (ii) no, (iii) yes, as decided by the Supreme Court of Canada in Armada Lines v Chaleur Fertilizers [1997] 2 S.C.R.617

3. Under your national law, if a vessel is arrested pursuant to a decision by a court of first instance, but the arrest is subsequently repealed by an appeal court (without deciding on the merits of the claim):

(a) Would the arrestor be liable in damages for the consequences of the arrest, and, if Yes, in what circumstances?

**CMLA Answer:** Yes, but only in the circumstances set out in 2(b)(iii)

(b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

**CMLA Answer:** gross negligence or malicious intent to cause harm

4. If the arrest claim was not against the owner of the ship and could not be enforced against that ship under the law of the state where the vessel was arrested:

(a) Would, under your national law, the arrestor be liable in damages?

**CMLA Answer:** no, unless the arrestor is shown to have acted with gross negligence or malicious intent to cause damage.

- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

**CMLA Answer:** For liability under (a), proof of gross negligence or malicious intent to cause damage will be necessary.

5. If the amount of the arrest claim was grossly exaggerated:

- (a) Would, under your national law, the arrestor be liable in damages to the owner of the ship for any of the following losses caused by reason of the grossly exaggerated claim:
- (i) for the extra cost of the security required,
  - (ii) for losses incurred by the owner of the ship by reason of the delay caused by the greater time required to procure the security, or
  - (iii) for losses incurred as a result of the owner being unable to provide the excessive security?

**CMLA Answer:** (i) In Canada, the cost of security forms part of the legal costs and the arrestor is exposed for the extra cost of the security for a grossly exaggerated claim where it is shown to have been made in bad faith; there is exposure in damages in the event that it is proved that the arrestor was grossly negligent or maliciously intent on causing damage.

(ii) in Canada, the arrestor is exposed to damages by reason of the delay caused by the greater time required to procure the security if it is proven that the delay was caused by the gross negligence or malicious intent on causing damage;

(iii) in Canada, an arrestor is exposed to damages for losses incurred as a result of the owner being unable to provide the excessive security only in the event that the arrestor is proved to have acted with gross negligence or malicious intent to cause damage.

- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

**CMLA Answer:** proof of gross negligence or malicious intent to cause damage is required.

6. If the person allegedly liable for the arrest claim is largely solvent and it is possible to enforce judgements or arbitration awards against him, e.g. he owns many ships (not under separate corporate veils), which call regularly at ports where enforcement can take place:

- (a) Can the arrest be considered wrongful as a result, so as to attribute liability to him under your national law?

**CMLA Answer:** No, not solely because the defendant is solvent and it is possible to enforce judgments or arbitration awards against his assets in the jurisdiction

other than the offending ship. The election of remedy is not restricted by how easy or how difficult it may be to obtain enforcement. However, there may be liability if it is shown that the arrestor used legal process for an abusive purpose to maliciously caused damage to the defendant owner.

- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

**CMLA Answer:** in the event of liability under (a), proof of gross negligence or malicious intent to cause damage is required.

7. Are there other circumstances in which, under your national law, an arrestor can be held liable in damages for the arrest of a ship?

**CMLA Answer:** No

8. Does your national law provide for a penalty or other sanction to be levied upon the arrestor, separate and distinct from any damages, if he is held liable for the arrest?

**CMLA Answer:** the Canadian court retains discretion to make an award of legal costs even on a solicitor-client indemnity basis in the proper circumstances where the court does not approve of a course of conduct, even though that conduct is not grossly negligent or malicious. See for example, Le Centennial Pte.Ltd. v Cargo of Garments stowed in various Containers 2015 FC 214.

9. Would a court in your country, seized with a claim for damages for the arrest of a ship in another country, apply the law of the country of arrest (*lex forum arresti*) in that regard, or would it apply its own substantive national law (*lex fori*), or would it apply the substantive law applicable pursuant to the general international private law rules of its country?

**CMLA Answer:** the Canadian court would follow the general private international law rules by determining which law has the closest connection to the tort of wrongful arrest, that is, for example, the law of the tort (delict) in the foreign locality where the wrongful conduct occurred provided that it did not conflict with Canadian public policy. If there is no evidence that the foreign law differs from Canadian law, it is presumed to be similar to Canadian law as in Norwegian Bunkers v Samatan [2014] FC 1200

DATED AT MONTREAL, THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2015

**THE CANADIAN MARITIME LAW ASSOCIATION**

Per:

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David G. Colford, President