



POLISH MARITIME LAW ASSOCIATION

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Szczecin (Poland), 29th September, 2015

Mr Stuart Hetherington
President
Mr Giorgio Berlingieri
Chairman
Comite Maritime International

by e-mail (swb@cbp.com.au; presidenza@aidim.org) only

Dear Mr Hetherington, Dear Mr Berlingieri,

re.: study relating to Liability for Wrongful Arrest.

Reference is made, with thanks, to Mr Hetherington e-mails of 25th May, 2015 and 27th May, 2015, attaching a questionnaire, and Mr Berlingieri e-mail of 10th September, 2015.

Please find below responses of the Polish MLA to the questionnaire.

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.**

Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1926.

- (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?**

Provisions of the Polish Civil Procedure Code ("PCPC"), Part II, Security Procedure, art. 730 – 757.

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?**

Article 739 PCPC provides that the court may require counter-security (bail) from the claimant as a condition of enforcement of the arrest. Therefore, at that instance, providing the bail by the claimant is a condition *sine qua non* of the enforcement. Such a bail is to secure potential debtor's claim that may arise as a consequence of vessel's arrest.



In practice this almost never happens before enforcement of decisions to arrest, since Polish courts do not require the bail with their own initiative. Furthermore, as applications for arrests are decided by the courts at closed sessions (*ex parte*), so in practice debtors are not aware of such, the debtors do not have possibility to apply for the bail before enforcement of decisions.

However the debtor may always demand from the court that the claimant will provide sufficient bail after the arrest was enforced. In such a case, if the court orders the bail, the court should suspend the enforcement pending the bail is provided by the claimant. It is worth noting that according to some representatives of the doctrine, the bail cannot be ordered by the court after the arrest has been enforced, as art. 739 PCPC provides the bail as a condition of enforcement, and not otherwise.

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?
 - (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?

Mere rejection of the claim or any other discontinuance of the litigation as to the merits is sufficient. The arrestor's liability does not depend on his fault, since his liability depends strictly and only on the outcome of litigation on the merits of the claim. However the arrestor must prove that a particular loss has arisen as a consequence of the arrest. The loss may comprise both *damnum emergens* and *lucrum cessans*.

Art. 746 § 1 of the PCPC provides that if the claimant did not file the first pleading within a determined time limit or withdrew a complaint or petition, or if his complaint or petition was returned or rejected, or if an action or petition was dismissed, or proceedings were terminated, as well as if the security was granted before the institution of proceedings, and if the claimant did not pursue the entire claim or pursued another claim than the claim which was secured, the debtor is entitled to claim from the claimant redress of damages caused by the enforcement of security. A claim expires if it is not pursued within one year from the day of the arising of the claim.

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



The arrestor would not be liable then. There are no regulations that would provide for his liability at that instance.

Such liability does not fall within provisions of Art. 746 § 1 of the PCPC.

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

The arrestor would not be liable then, at least on the pure wording of Art. 746 § 1 of the PCPC. However, because there is no authority or doctrine to that extent in Poland, one cannot entirely exclude that such liability of the arrestor towards the owner of the ship could be established under Art. 746 § 1 of the PCPC in case the arrestor did not commence proceedings against the owner in respect of the arrest claim or, if commenced, the proceedings were dismissed, rejected, returned.

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

The arrestor would not be liable then. There are no regulations that would provide for his liability at that instance.

Such liability does not fall within provisions of Art. 746 § 1 of the PCPC. It seems that also when the claim secured by the arrest is not found entirely justified by the court in the proceeding on merits and the claim is only partially awarded and partially dismissed.

6. If the person allegedly liable for the arrest claim is largely solvent and it is possible to enforce judgments 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?
- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

The arrestor would not be liable. In principle, Polish law does not recognize a concept of “wrongful arrest” as such. In such a case, the arrest merely should not be ordered, as there would not be an interest in obtaining a security, which interest is one of *sine qua non* conditions for ordering the arrest (art. 730¹ § 2 of the PCPC - a legal interest in security for a claim exists, if the lack of security would prevent or significantly hinder the enforcement of a ruling issued in a given case or otherwise prevent or seriously hinder satisfying the purpose of proceedings in a given case). More comments on that problem are given at the bottom of the questionnaire.

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?

No, there are none.

In respect of security obtained within the security proceeding provided by the PCPC, only art. 746 § 1 of the PCPC is the source for liability for enforcing the security.

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?

No, there are none.

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 fort*), or would it apply the substantive law applicable pursuant to the general international private law rules of its country?

This is dubious that the Polish Court would have jurisdiction with respect of such a claim. First – art. 6 of 1952 Arrest Convention seems to prevent Polish Court from finding itself competent. Second – Polish internal law does not contain regulations that would enable the claimant to pursue such a claim.

Thus, the position rather is that Polish courts will not be competent to hear dispute for damages caused by arrest of a vessel in foreign jurisdiction (other than Polish).

GENERAL COMMENTS

Polish law contains rather narrowly designed regulation of that nature. Below quoted provisions relate all sorts of securities imposed by the Polish courts in security procedure, among them the vessels. Since these regulations are very broad in their application, they do not take into consideration shipping as such and a special position of the vessel as an object of security.



Basically, an arrestor can be held liable in damages for the arrest of a ship only if the litigation as to the merits of the claim are terminated without issuing a judgment against the debtor. According to art. 746 of PCPC the debtor (and only the debtor) can claim damages for losses sustained by the debtor (and only by the debtor) as a consequences of arresting any object, including sea-going the vessel, if:

- (i) litigation as to the merits has not been commenced at all or in a time prescribed by the arresting court, or
- (ii) the writ of summons was withdrawn by the claimant or returned or repudiated by the court, or
- (iii) the litigation was terminated – for any reasons - without issuing a judgment, or
- (iv) the claim was dismissed.

The arrestor's liability is not subject to being at fault; his liability depends strictly and only on the outcome of litigation on the merits of the claim. The arrestor must prove that a particular loss has arisen as a consequence of the arrest. The loss may comprise both *damnum emergens* and *lucrum cessans*. Claim for such damages must be pursued in a separate litigation devoted only to this particular problem.

As a consequence, the owner of the arrested vessel or any "innocent party" who was not a debtor himself and actually was the third party with regard to the dispute, but who sustained certain losses as a result of the arrest, has in practice (nonetheless see response to point 4 above) no legal means to claim any damages from the arrestor.

Bearing in mind the above picture, rather strict and short catalogue of situations where the debtor (and only the debtor, nonetheless see response to point 4 above) is entitled to claim damages from the arrestor, it can be alleged that the Polish law does not recognize concept of "wrongful arrest" as such. In particular there is no point in our legal system to examine and consider whether the subject action of the arrestor was (grossly) negligent, or whether the arrest was not justified or not, either for legal or purely commercial reasons.

The responses were contributed by: Mr Krzysztof Kochanowski and Mr Pawel Mickiewicz – Members of the Polish MLA.

In case of any doubts or questions, please feel free to ask anytime.

With Best Regards,



MAREK CZERNIS

Vice-President



PAWEŁ MICKIEWICZ

Secretary