



REPLY BY THE BRAZILIAN MARITIME LAW ASSOCIATION TO THE CMI
QUESTIONNAIRE OF 27 MAY 2015 ON THE 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

Comments: Brazil is a party to the Maritime Liens and Mortgages Convention of 1926 (Brussels Convention), which was ratified by the Decree n° 351/1935. Brazil has not ratified The Arrest Conventions of 1952 and 1999 nor the Maritime Liens and Mortgage Convention 1993;

- (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?

Comments: In addition to the Brussels Convention, Brazilian Commercial Code and Brazilian Civil Procedure Code provide the rules for the arrest of vessels in Brazil.

II — QUESTIONS RELATION 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?**

Comments: In Brazil, providing security in order to obtain an arrest is not mandatory and is subject to Judge's discretion, taking into consideration the plausibility of the claim and the risk of losses to the opposing party. However, should a foreign company without assets in the Country files a claim in Brazil for an arrest of a vessel, the judge may request the presentation of a security between 10% to 20% claimed amount in order to guarantee the payment of court costs and fees to the lawyers of the opposing party, in



case of an unfavorable judgment, as per established by section 835 of Brazilian Civil Procedure Code.

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?

Comments: In respect to the mere rejection of the claim, the arrestor could be held liable, in principle, only for the payment of loss of suit expenses (i.e. reimbursement of the court expenses incurred by the arrested party and fees to its lawyers up to 20% of the amount under dispute).

It is important to mention that Brazilian Law does not have any specific provision ruling on wrongful arrest. Therefore, the damages incurred by the arrested party due to the wrongful arrest should be analyzed under general civil liability rules, based in the Brazilian Civil Code, which provide that anyone who causes damage to the other party must fully compensate the damages caused.

If the arrest claim is rejected — summarily or in the merits - the arrested party may be entitled to file a separate claim in order to pursue the damages caused by the arresting party.

Even when the claim is rejected on its merits, the arrested party will remain entitled to file a separate claim in order to pursue any damages arising from the arrest.

(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?**

Comments: As mentioned above, due to the lack of specific provision in respect to wrongful arrest, such is governed by the Brazilian Civil Code, which set the general provisions in respect to civil liability.

Tort liability in Brazil is governed by sections 186 and 927 of the Brazilian Civil Code, which provide, as follows:

186. A person who, by voluntary act or omission, negligence or imprudence, violates rights and cause damage to another, even though the damage is exclusively moral, commits an illicit act.



927. *Anyone who, though an illicit act (arts. 186 and 187) causes damage to another is obliged to repair it.*

Sole paragraph. The obligation to repair the damage will exist, regardless of fault, in the cases specified by the law or when the activity normally carried out by the person who caused the damage entails, by its nature, risk to the rights of the other.

Therefore, a claim for damages based on the wrongful arrest of a vessel, would have to be brought in tort and the arrested party would have to prove that the arrested party acted (or omitted itself) with fault (negligence, imprudence or malpractice) and that the undue arrest of the vessel is the direct cause of the damage claimed (causal connection).

Kindly note that the damages suffered by the owner/arrested party should be, in principle, discussed in a new lawsuit to be filed by the owner, unless the owner files a counterclaim on the records of the arrest proceedings.

Regardless of the above, should the owner be able to evidence that the arrest claim was filed with bad faith, gross negligence or malicious, the arrestor could be held liable in the records of the arrest proceedings, not only to pay loss of suit expenses but also to a penalty for bad faith litigation on the range of 1% plus all the damages suffered and lawyer fees, as per section 17 of Brazilian Civil Procedure Code. Bad faith litigation includes filing a claim under false pretensions, false arguments, against undisputed facts or with illegal purposes.

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?

Comments: If the arrest is repealed in second instance and, by consequence, the arrest claim is dismissed even without analysis of its merits, the arrestor will be liable for the payment of loss of suit expenses, as mentioned above, and maybe subject to a penalty for bad faith litigation, should it be characterized. Any claim for damages arising from the arrest will need to be pursued in a new lawsuit, by evidencing the requirements mentioned in our previous answer in connection to general civil liability (fault act or omission, causal connection and damages claimed).



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?

Comments: Please note our previous comments to question 2 in respect to the lack of specific provisions in respect to wrongful arrest and the need of the arrested party needing to seek compensation for the damage related to an undue arrest in a separate claim (or in the same lawsuit if a counterclaim was presented in the arrest proceedings), should it be proved that the arrestor acted with fault and due to that caused damage to the arrested party.

However, should it be proven that the arrestor was aware in respect to the non-enforceability of the claim toward the vessel, he could be considered a bad faith litigator, and condemned to the penalties mentioned in question 2(b) together with the payment of loss of suit expenses in the records of the arrest proceedings.

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?



Comments: If the arrested party can prove that it incurred in the losses listed in (i), (ii) and (iii) in view of arrestor fault or gross negligence on establishing the amount of the arrest claim, it could claim such damages from the arrestor.

In case of bad faith litigation, arrestor could be subject to the penalties previously mentioned on question 2(b).

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?

Comments: There are two possible ways of seeking the arrest of a vessel in Brazil: the arrest *in rem*, when arrestor has a maritime claim towards the vessel; and the arrest *in personae*, when the arrestor has a claim towards the Owner.

In case of the arrest *in rem*, it can be granted by the court regardless of proof of risk of frustration of the credit, i.e., with mere proof of the maritime lien over the vessel, as per provisions of the Brazilian Commercial Code.

Nevertheless, for the arrest *in personae*, arrestor would have to prove not only its credit but also the risk of frustration of such credit, evidencing that the vessel is the only asset available in Brazil to guarantee the future payment of the claim and is aiming to leave Brazilian Waters or that Owner is disposing of its assets, with a risk of becoming insolvent.

Therefore, should the arrest be *in personae*, i.e., not based in a maritime lien properly constituted over the vessel, the arrestor can be considered liable for wrongful arrest, if it is evidenced that the defendant was a solvent debtor and had other assets (fixed or moveable — e.g. ships) to make a future enforcement viable.

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

Comments: It will be necessary to prove that the arrestor was aware that the defendant had other assets to respond the claim, without the need of obtaining security/arresting a vessel before the enforcement of a *res judicata*.



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?

Comments: As mentioned in respect to question 2, under Brazilian Law a claim for wrongful arrest must be brought in tort and claimant would have to prove the existence of the general requirements of civil liability, as per Brazilian Civil Code, i.e., act or omission with fault and that the damage claimed were directly caused by such act or omission.

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?

Comments: There are no specific penalties under Brazilian Law for a wrongful arrest claim, except if the action is considered as bad faith litigation, where a penalty may be applied to the arrestor, as mentioned in question 2(b).

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?

Comments: In order to pursue damages arising from a wrongful arrest in Brazil, the party must prove that the jurisdiction of the Brazilian Courts apply in the case by evidencing one of the following circumstances: (i) that the defendant, whatever its nationality, is domiciled in Brazil; (ii) that the obligation is to be performed in Brazil; or (iii) that claim derives from a fact occurred or an act performed in Brazil.

Should none of the above circumstances be evidenced, Brazilian Courts would not have jurisdiction for the case.

Furthermore, if Brazilian Courts accept jurisdiction for the case, Brazilian Law shall apply. However, it is possible that the Brazilian judge would examine the arrest rules of the country where the wrongful arrest occurred, in order to better analyze the merits of the claim.

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