

REPLIES BY THE SPANISH MLA TO THE 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**

Spain is party to the Arrest Convention 1999 as well as to 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?

The internal legal framework for an arrest is contained in the Spanish Shipping Act (hereinafter referred to as the SSA) and in the Civil Procedure Act (hereinafter referred to as the CPA).

Arrest of ships is ruled by articles 470 et seq. of the SSA. Article 470 of the SSA refers the arrest of ships to the provisions of the Arrest Convention 1999 which would be applied together with the provisions of the SSA and the CPA.

It is worth to be mentioned that pursuant to article 473 of the SSA, ships sailing under the flag of a country that has not ratified the Arrest Convention 1999 may be arrested both for maritime credits as well as for any other credits. In addition, Spanish ships that are physically within the Spanish jurisdiction may also be seized both for maritime credits as well as for any other rights or credits against the debtor owning the ship whose arrest is requested, always provided that the arrestor has its usual residence or its main place of business in Spain.

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?

Pursuant to article 472.2 of the SSA, the arrestor must post a security or bond for at least a 15% of the amount of the maritime claim alleged to obtain the enforcement of the arrest order. However, it is up to the discretion of the arresting Court to require security for an amount over such a minimum.

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?

Pursuant to article 745 CPA, once the claim on the merits is rejected, the Court shall ex officio lift the arrest and, upon the request of the arrested party, a procedure for assessing the damages arising from the arrest would follow. The arrested party shall have the burden of proof of the alleged damages.

(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?**

Liability of the arrestor is a strict one, not being needed any evidence showing negligence, gross negligence or bad faith from the arrestor' side.

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?**

If the arrest order is repealed by an appeal court, the arrestor would be liable for wrongful arrest and shall be obliged to pay damages arising from the consequences of the arrest.

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

Liability of the arrestor is a strict liability, not being needed any evidence supporting negligence, gross negligence or bad faith from the arrestor' side.

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?**

Under the system introduced by the Arrest Convention and by the SSA the right to arrest of a ship not owned by the debtor of the claim is subject to the condition that any future Judgment to be delivered on merits can be enforced against that ship by judicial or forced sale. This condition may be only alleged (not evidenced) by the arrestor to obtain the arrest but the owner of the ship would be entitled to challenge the arrest order –among others- on the basis that the above condition is not complied with. If the arrest order is reversed and the arrest lifted, the arrestor shall be obliged to pay damages. This is the general course of action. However, in the case that the arrest is not challenged by the owner of the ship and, at the end of the proceedings on merits, the Judgement, as matter of law, cannot be enforced against that ship (or against the security posted in substitution of the ship for obtaining her release) the arrestor would also be obliged to pay damages always provided that the owner brings a claim for damages. In both cases, the liability is a strict liability one and, therefore, there would be no need to prove negligence, gross negligence or bad faith.

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?**

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

Within the Spanish procedural law regarding arrest of vessels or assets there is no specific provision governing such situation. Moreover, there is no judicial precedent in the Spanish Case law under the former system (Arrest Convention 1952). However, in theory, and as matter of law, owners would have the possibility to proceed with a claim in tort against the arrestor commencing separate proceedings, under the regime of Section 1902 of the Spanish Civil Code. Damages referred in paragraphs (i), (ii) and (iii) could be included in the owners' claim. However, in this kind of action, owners would have the burden of proof of the arrestor's negligence, gross negligence or bad faith.

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?

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

Creditors are entitled to proceed with the arrest of a ship under the specific system provided by the Arrest Convention 1999 and by the SSA. There is no limitation of this right for the fact that the person allegedly liable for the claim is largely solvent or has other assets available to be seized or enforced. However, if the arrestor has previously seized other assets of the debtor to secure the same claim, the further arrest of the ship could be contested by the owners and, if successful, the arrestor would be obliged to pay damages irrespective of the concurrence of negligence, gross negligence or bad faith.

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?

According to article 730.2 CPA, the arrestor can also be held liable in damages for the arrest of a ship in case that he does not bring proceedings on the merits before the competent Court within the period of time given by the arresting Court or within a twenty days period when Spanish Courts have jurisdiction on merits.

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?

Separate and distinct from any damages, which shall be assessed in a separate procedure, article 741.2 CPA sets forth that if the arrestor is held liable for the arrest, he shall have to bear the legal costs. This is the sole penalty or sanction to be levied upon him separate and distinct from any damages.

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?

According to Spanish law, the arresting court is the competent court to hear any claim for damages arising from a ship arrest. Therefore, we understand that Spanish Courts would lack jurisdiction in a claim for damages for the arrest of a ship in another country.