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Replies of the MMLA to the CMI Questionnaire on the Study Relating to Liability for wrongful arrest

Introduction

The CMI Executive Council has decided to set up an International Working Group to study certain areas of the law concerning the arrest of ships with particular emphasis on the law in relation to wrongful arrest.

The possibility and extent of greater uniformity in this area of maritime law may be worthy of consideration.

The issues which the study intends to investigate are covered by the following questions:

1) International Conventions:

Q 1(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

A) Malta is not a signatory to any of the listed conventions. The legal framework regulation arrests in rem are found in Articles 742B- 742D of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta (hereinafter referred to as COCP).

Q 1(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?

Under Maltese law, a creditor may seek to arrest a ship *in personam* or in rem. An arrest *in personam* may be effected as security for a debt owed by the owner of the vessel being arrested in those cases where the Maltese courts would have '*in personam*' jurisdiction over the owner.

The grounds upon which a court will exercise jurisdiction *in personam* are normally limited to claims with a strong connection to Malta – for instance with either the debt or the debtors being in Malta or based in Malta. These grounds are listed in Article 742(1) of our Code of Organization and Civil Procedure.

An arrest *in rem* may only be brought if the claim would fall under one of the grounds contemplated under article 742B¹ of the COCP. The grounds listed therein are based upon those found under the Arrest Conventions of 1952 and 1999.

¹ Article 742B of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta
Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction in rem against ships or vessels in the following maritime claims:

- (a) any claim to the possession, ownership or title to or of a ship or to the ownership of any share therein;
- (b) any question arising between the co-owners of a ship as to the ownership, possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage, hypothec or charge on a ship or on any share therein;
- (d) any claim arising out of the contract for the sale of the ship;
- (e) any claim for damage received by a ship;
- (f) any claim for damage done or caused by a ship, either in collision or otherwise;
- (g) any claim for loss of life or personal injury caused, whether on land or on water, by any ship or occurring in connection with the operation of any ship or sustained in consequence of any defect in a ship or in her apparel or equipment or in consequence of the wrongful act, neglect or default of –
 - (i) the owners, charterers or persons in possession or control of a ship; or
 - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods in, 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, including baggage, carried in a ship;
- (i) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship, whether by charter party or otherwise;
- (j) any claim in the nature of salvage operations or any salvage agreement including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- (k) any claim for –
 - (i) damage or threat of damage caused by the ship to the environment, coastline or related interests;
 - (ii) measures taken to prevent, minimize or remove such damage; and for compensation for such damage;
 - (iii) costs of reasonable measures of reinstatement to the environment actually undertaken or to be undertaken;
 - (iv) loss incurred or likely to be incurred by third parties in connection with such damage; and
 - (v) for damage, costs or loss of a similar nature to those listed in subparagraphs (i) to (iv);
- (l) any claims regarding costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of her crew;
- (m) any claim in the nature of towage in respect of a ship;
- (n) any claim in the nature of pilotage in respect of a ship;

Maltese law does not recognize the concept of “maritime liens”² as such. That said, there are a number of maritime claims which would be considered as constituting a ‘special privilege’ in terms of Article 50³ of the Merchant Shipping Act.

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- (o) any claim in respect of goods, materials, provisions, bunkers, supplies and necessaries supplied or services rendered to a ship for her operation, management, preservation or maintenance;
 - (p) any claim in respect of the construction, reconstruction, repair, conversion or equipping of a ship;
 - (q) any claim in respect of port, dock or harbour dues and charges;
 - (r) any claim by the master, officers, or member of the crew, or complement of a ship, for wages and other sums due to them in respect of their employment on the ship including costs of repatriation, and social security contributions payable on their behalf;
 - (s) any claim by a master, shipper, charterer or agent in respect of disbursements made by them on account of a ship or her owners; (t) any claim for commissions, brokerages, or agency fees payable in respect of the ship, by or on behalf of the ship owner or demise charterer;
 - (u) any claim arising out of an act which is or is claimed to be a general average act;
 - (v) any claim arising out of bottomry;
 - (w) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried in a ship or for the restoration of a ship or any such goods after seizure;
 - (x) any claim for insurance premia, including mutual insurance calls, in respect of the ship payable by or on behalf of the ship owner or demise charterer;
 - (y) any claim for fees and other charges due to the Registrar-General of Shipping and Seamen arising under the provisions of the Merchant Shipping Act, and any claim for tonnage dues.

² With the exception of a possessory lien afforded to any ship repairer, shipbuilder or other creditor in whose care and authority a ship has been placed for the execution of works or other purpose (Article 54 of the Maltese Merchant Shipping Act, Chapter 234 of the Laws of Malta

³ Article 50 of the Merchant Shipping Act, Chapter 234 of the Laws of Malta

The debts hereunder specified are secured by a special privilege upon the vessel, as well as any proceeds from any indemnity arising from collisions and other mishaps as well as any insurance proceeds:

- (a) judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
- (b) fees and other charges due to the registrar of Maltese ships arising under this Act;
- (c) tonnage dues;
- (d) wages and expenses for assistance, recovery of salvage, and for pilotage;
- (e) the wages of watchmen, and the expenses of watching the ship from the time of her entry into port up to the time of sale;
- (f) rent of the warehouses in which the ship’s tackle and apparel are stored;
- (g) the expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port;
- (h) wages and other sums due to the master, officers and other members of the vessel’s complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- (i) damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
- (j) moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage: Provided that such privilege shall not be competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
- (k) ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in paragraphs (a) to (i), though in any case for a sum in the aggregate not in excess of four thousand units;
- (l) moneys lent to the master for the necessary expenses of the vessel during her last voyage, and the reimbursement of the price of goods sold by him for the same purpose;
- (m) moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage: Provided that such privilege shall not be competent where the debt has

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Essentially those claims which attract a special privilege in terms of Article 50 attach to the vessel and survive the voluntary sale of a ship for a period of up to one year. Moreover, those claims listed under Article 50 would enjoy a higher ranking than ordinary maritime claims *in rem*.

Under Maltese law, the arrest of ships is regulated by articles 855- 865 of the COCP. A warrant of arrest may be issued against a sea vessel exceeding 10 meters in length for the sole purpose of securing a claim whether '*in rem*' or '*in personam*'

II) Questions relating to wrongful arrest:

Q 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?

1. There is no legal requirement under Maltese Law on the claimant to provide security as a prerequisite that must be fulfilled to enable the arrest of a vessel. Security, however may be needed in order to *maintain* an arrest. According to Article 862 of the COCP, the court may, upon good cause being shown by the applicant order the claimant to provide "sufficient security for the payment of penalties, damages and interest." Damages may include, for instance, the expenses necessary to maintain the vessel and crew whilst under arrest. That said, although the law does not specifically state so, a Court would likely order the payment of security if there is good cause that the warrant of arrest may be unlawful. If the claimant fails to post security when so ordered by the court, the arrest will be rescinded by the court. Such security may not be less than €11,600.

Q 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?

2)(a) Under Maltese law the arrestor is not liable to pay damages by reason of mere rejection of the claim on its merits.

2)(b) Under general principles the arrestor may be ordered to pay damages in very specific circumstances, which are contemplated in Article 836(8) of the COCP.

not been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;

(n) damages and interest due to the freighters for non delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master or the crew;

(o) damages and interest due to another vessel or to her cargo in cases of collision of vessels;

(p) the debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a ship

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Amongst other things the law provides that if the arrest was requested by the arrestor *frivolously* or *vexatiously* damages and penalties will arise. The situations described in paragraphs (i),(ii) and (iii) of the above question may be tantamount to frivolous or vexatious requests for the arrest of the vessel. In reply to the question being posed we confirm that in such cases, the arrested party would have to file a separate claim for damages and will need to produce proof to the court that will demonstrate that the request for the arrest was indeed frivolous and/or vexatious. The burden of proof rests on the arrested party. There is no limit on the damages that can be claimed.

Q 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?

3)(a) The arrestor is not automatically subject to damages simply because a court overturns the arrest. Under Maltese law, a claim for damages will only arise where one or more of those specific circumstances contemplated at law subsist. Apart from the cases mentioned above (where damages and penalties arise if it is proven that the arrestor in requesting the arrest acted maliciously, frivolously or vexatiously), damages and penalties will also arise in the following circumstances:

(i) if the arrestor fails to bring the action in respect of the claim within the time established by law, or

(ii) where the arrestor fails to call upon the debtor for payment 15 days before the request for the arrest is made unless there is urgency, or

iii) where it is shown that there is no doubt on the solvency of the debtor.

The question whether the arrest is overturned by a court of first instance or by an appellate court is irrelevant to the determination of damages and penalties.

3)(b) The circumstances that give rise to liability for damages and penalties are described in the reply to Q3(a).

Q 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?

4)(a) As discussed above, the arrested party will need to demonstrate to the Court that the arrestor was acting either maliciously, frivolously or vexatiously when the arrest

was requested, for the Court to be convinced to order the arrestor to pay damages and penalties. If the arrest was issued and enforced contrary to the requirements of the law, the arresting party will need to successfully argue that the arrest was therefore issued frivolously in order to claim damages and/or penalties.

If the vessel is arrested outside Malta and a claim is brought in Malta by the ship against the arrestor for damages, the Maltese courts will first have to determine whether the vessel was lawfully arrested or otherwise under the law of the State where the vessel was arrested. If it is determined that the vessel was unlawfully arrested in that other State, a Maltese court would most likely apply the '*lex loci delicti*' to determine the damages, if any, that the arrestor will be liable to pay the ship for the wrongful arrest.

4(b) If the wrongful arrest took place in Malta, proof of the malicious, frivolous or vexatious nature of the arrestor's issuance of the arrest will need to be presented in court. If the wrongful arrest took place outside Malta, proof that the law of that jurisdiction was violated will need to be produced as well as proof that a claim for damages may be brought under the law of that State.

Q 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?

5(a) Damages are not defined under Maltese Law. There is nothing to prohibit a court of law from including the item list (i) as part of damages suffered by the arrested party. A Court may consider items (ii) and (iii) as being too 'remote' to be included in the quantum of damages payable by the arrestor. Questions of '*causa proxima*' may arise: here the courts have taken different approaches towards what will or will not be accepted as damages recoverable from the tortfeasor. The courts will often be influenced by the general circumstances of the case.

5(b). The determination by a court that the claimant in the arrest was grossly inflated is not sufficient to give rise to a claim for damages. As explained above the ship must demonstrate that the amount was exaggerated by the arrestor maliciously, frivolously or vexatiously. Proof, will therefore be required. An arrested party may also ask the court to reduce the amount of the arrest order.⁴

Q. 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

⁴ Article 836(1) of the COCP, Chapter 12 of the Laws of Malta.

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?

6)(a) Our law provides that if a creditor *inter alia* arrests a vessel where the standing of the debtor is notorious in that there is no reasonable doubt as to the solvency of the debtor and he is considered to be capable of meeting his dues,⁵ the arrestor will be found liable to pay the penalty found in Article 836(8).

6)(b) The requirements for liability to arise are explained in the preceding paragraph. Proof of negligence or bad faith is not required. What is required is proof of the notoriety of the debtor's healthy financial state.

Q.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?

7. These circumstances have been mentioned in previous answers. Under Maltese law an arrest of a ship is considered to be a precautionary act obtained as security for a claim until the claim on the merits is determined. Article 836⁶ of the COCP lists down those instances where the applicant for the issuance of a precautionary act may be found liable to pay damages or penalty.

1. Where the applicant does not pursue with the claim within 20 days after the issuance of the arrest.⁷
2. Where the defendant applies for the rescission of the precautionary act yet the claimant (arrestor) fails to show why the arrest should remain in vigore or if 15 days prior to the application for the arrest, there is no proof that the creditor demanded payment from the debtor.⁸

⁵ Article 836 (8)(c) of the COCP, Chapter 12 of the Laws of Malta

(c) if the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor were notorious;

⁶ Article 836(8) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta;(8) The court may condemn the applicant at whose request a precautionary act was issued to pay a penalty of not less than one thousand and one hundred and sixty-four euro and sixty-nine cents (1,164.69) and not more than six thousand and nine hundred and eighty-eight euro and twelve cents (6,988.12) in favour of the person against whom the precautionary act was issued, in each of the following cases:

⁷ Article 836(8)(a) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta; ... if the applicant, without any valid reason, does not bring the action in respect of the claim, within the time established by law;

⁸ Article 836(8)(b) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta; ... if, on demand of the defendant for the rescission of the precautionary act, the plaintiff fails to show that the precautionary act had to be issued or that within the fifteen days previous to the application for

3. if the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor were notorious;
4. if applicant's claim is malicious, frivolous or vexatious.

Q. 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?

8. Apart from damages, the arrested party may also request the court imposes a penalty on the arrestor, which would be payable to the arrested party. In such cases the penalty may not be less than €1,164.69 but may not exceed €6,988.12.

However, if the arresting party successfully proves to the court that the warrant of arrest was requested by the arrestor *maliciously* (as opposed to just frivolously or vexatiously), Article 861⁹ of the COCP provides that in such cases the penalty that the arrestor may be subject to is not less than €11,646.87. The onus of proof rests on the person alleging it.

Q. 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?

9. Our Courts would apply Maltese private international law rules to determine this matter. In such case Private International Law will refer Maltese courts when dealing with a case for damages for a wrongful arrest to the *lex loci delicti*. In this case the *lex loci delicti* will equate with the *lex forum arresti*. Thus if a Maltese court is seized with the wrongful arrest of a ship in Italy it would apply the *lex loci delicti* being Italian law to determine the question whether the arrest is wrongful or otherwise and whether damages are due to the ship as the aggrieved party. Different courts have taken different positions on which law should apply to the quantification of damages. Today the position is regulated by the EU Regulation on the law applicable to non contractual obligations¹⁰ more commonly known as the Rome II Regulation. Article 4 of the Regulation stipulates that unless otherwise provided for, "*the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*" The scope of this Regulation is universal

the precautionary act, he had in any manner called upon the defendant to pay the debt, or, if the debt be not a liquidated debt, to provide sufficient security:

Provided that the provisions of this paragraph shall not apply where it is shown that there were reasons of urgency for the issue of the warrant;

⁹ Article 861 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta;

Where it is found that the warrant was obtained upon a demand maliciously made, the penalty in terms of article 836(8) shall not be less than eleven thousand and six hundred euro.

¹⁰ Regulation Number 864/2007



and every court in a European Court should apply the provisions of the said regulation wherever an cross border claim is brought before it.

30 October 2015