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## Replies of the Russian International Maritime Law Association

### to the CMI Questionnaire 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

**Answer:** Since 1999 the Russian Federation has been a party to Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1993. Besides, chapter XXVIII of Russian Merchant Shipping Code 1999 contains rules on arrest of ships basically coinciding with the provisions of Arrest Convention 1952. Since by the time of coming into force of Merchant Shipping Code 1999 (MSC) the preliminary wording of new Arrest Convention 1999 had already been prepared, some proposed provisions being still internationally discussed at that time of future new convention were included in MSC chapter XXVIII "Arrest of ships". Following the Constitutional principle on superiority of International Law and international conventions adopted and recognized by the Russian Federation, the Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1993 are part of Russian Legislation.

(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?*

**Answer:** Basically, in accordance with the provisions of Arrest Convention 1952 a ship may be arrested only if a claimant has a valid maritime claim. However, item 5 of art.388 of MSC provides for 3 additional categories of State Authorities rights whereupon the rules on arrest contained in the relevant chapter would not apply/interfere to public law issues. These are rights of detention of a ship by Harbor Master, including when a ship is unseaworthy, right for preliminary detention of a ship for 72 hours by Port Authorities having maritime claims against the ship and rights to arrest a ship by other State Authorities such as, for instance, Customs Authorities.

The ship may be also arrested for the enforcement of court decision in compliance with Federal Law on Enforcement Procedure.

In compliance with part 2 of art 6 of Arrest Convention 1952 all procedural rules connected with the arrest of a ship shall be the rules of the state where the arrest is carried out or where the claim for arrest has been made. Therefore, an arrest of a ship in Russia is carried out in accordance with the rules provided by the Code of Civil Procedure or the Arbitration Procedural Code of the Russian Federation, i.e. the Code of Procedure for Russian Arbitration (Commercial) Courts. The APC rules are applicable, however, to the extent where they do not contradict provisions of Arrest Convention 1952 and Merchant Shipping Code of Russia.

## 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?*

**Answer:** Part 1 of art 393 of MSC provides that the court may, when considering the arrest case, request a person claiming the arrest of a ship to provide a security in amount and on terms determined by the court in connection with any damages that may arise due to unlawful or wrongful arrest. The same rule applies if a person claiming the arrest is pleading for prolonging of the arrest period. Meantime, as was mentioned above, the procedure of the arrest is subject to procedural rules of the Russian Federation, and in majority of cases the Arbitration Procedural Code of the Russian Federation (APC) would apply. Part 4 of art 99 of APC "Preliminary security measures" states that "when the application on security measures is delivered to the court, the applicant shall also submit the document confirming the putting up by him of counter security in the amount as declared in the application for security of his property interests". In other words, initially the amount of counter security shall be equal to the amount of the security requested. If this document is not submitted, the court may, after having assessed the case, leave the application for the arrest motionless until the counter security is put up. According to part 1 of art 94 of APC the amount of counter security in this case shall not be less than half of the amount of property claim, i.e. half of the amount of the security requested.

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?

**Answer:** Rules of APC mainly part 10 of Art. 99 of APC provide, that any other person whose rights and/or lawful interests were infringed by putting up of the security before filing claim on the merits of the case are entitled (after the final decision of the case on merits has come into force wherein the claim was rejected or when claim on the merits of the case was not filed) to claim damages from a person on whose request the security was produced. As evident from the above, there are two key items to be present for claiming damages under the above provisions, i.e. the claim on merits shall be rejected, and the person shall prove that his rights and lawful interests were infringed by the arrest action simultaneously producing the evidence for the amount of damages sustained. Since a

claim for unlawful arrest is a claim for compensation of damages (in tort) the claimant shall bring evidence of breach of law by the arrestor, prove the amount of damages and cause-effect relationship between the unlawful action and the damages sustained. Proving of absence of fault in order to release himself from liability is the burden of the defender and type of fault for such claims (negligence, gross negligence or malice) is irrelevant. In other words the rejection of the claim is sufficient ground to claim damages in case of wrongful arrest.

**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?

**Answer:** The court that allowed the arrest of a ship and on whose decision the counter security was put up by the claimant is entitled according to part 2 of art 393 of MSC to establish the amount of claimant's liability for any damages caused including those that were incurred due to unlawful or wrongful arrest or claiming and obtaining of grossly exaggerated security. However, if the arrest was subsequently repealed by the appeal court without deciding on the merits of the claim and the case on wrongful or unlawful arrest was not tried on merits either, then it would be impossible to establish whether the claimant was liable and the arrest case may either be closed or postponed until the final decision on merits has come into force.

**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?

**Answer:** The arrestor will still be liable in damages, even if the arrest claim was not against the owners of the ship and could not be enforced against the ship..

**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?

**Answer:** The Respondent, whose ship was arrested or any other person who suffered of the arrest shall produce evidence that their rights and lawful interests were infringed by the arrest and by putting up of grossly exaggerated security.

The infringed rights may derive from extra cost of the security required, losses incurred by the owner of the ship by reason of the delay caused by the greater time required to produce security, losses incurred as a result of the owner being unable to provide the excessive security or any other reason connected with putting up of grossly exaggerated security.

**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?

**Answer:** If the person allegedly liable for the arrest claim is largely solvent and it is possible to enforce judgments and arbitration awards against him elsewhere abroad the arrest cannot be considered wrongful, but the security measures may be not allowed by the court depending on the circumstances of the case. According to Russian legal practice and in compliance with part 2 of art.90 of APC the security measures are allowed if failure to take such actions may impede or make impossible the enforcement of the future court decision, including when the enforcement is supposed to take place outside of the Russian Federation, as well as for the purposes of preventing of considerable damage, that may be sustained by the applicant. Accordingly, notwithstanding principle provisions of the Arrest Convention 1952 whereas the main purpose of the arrest is to obtain security for maritime claim and as the adequate security is put up the ship shall be immediately released, there were Arbitration Court decisions supported by High Arbitration Court of Russian Federation where the security measures were not allowed as the arrestor failed to have proved that without the arrest of a ship the claim on merits may otherwise not be secured and the enforcement of the decision may be seriously impeded or made impossible.

**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?*

**Answer:** As was pointed out in item 3 above the court that allowed the arrest of a ship and on whose decision the counter security was put up by the claimant is entitled according to part 2 of art 393 of MSC to establish the amount of claimant's liability for any damages caused including those that were incurred due to unlawful or wrongful arrest or claiming and obtaining of grossly exaggerated security. The Respondent, whose ship was arrested or any other person (for instance, the manager, the charterer, etc) who suffered of the arrest measures shall produce evidence that their rights and lawful interests were infringed by the unlawful arrest or by putting up of grossly exaggerated security. In latter case the infringed rights may derive from extra cost of the security required, losses incurred by the owner of the ship by reason of the delay caused by the greater time required to put up security, or losses incurred as a result of the owner being unable to provide the excessive security.

As the procedure of the arrest shall be subject to national procedural law, art 99 "Preliminary security measures" of APC shall apply for arrest of a ship carried out according to Arrest Convention 1952 and art 393 of MSC. Part 10 of art 99 of APC provides that an applicant may claim damages or from the arrestor, if the latter has not started the proceedings on merits within the term established by the court, or if the claim on merits was rejected by the court's final decision. Meantime, if the damage was caused, for instance, by claiming and obtaining by the arrestor of grossly exaggerated security and the claim on merits was not rejected, but satisfied by the court however in lesser amount than was requested and the security obtained, the applicant may encounter with procedural difficulties formally trying to claim damages following part 10 of art 99 of APC providing for his right to claim damages only if the claim on merits was fully rejected. The way out for the applicant may seem to be claiming damages not according to part 10 of art 99 APC "Preliminary security measures", but using general provisions of APC on obtaining security for the claim. However, formally general provisions of APC on obtaining security for the claim are directed for obtaining security in cases when the claim on merits has already been lodged with the arbitration court of Russian Federation. The above may cause procedural problems in arresting a ship under Arrest Convention 1952 and art 393 of MSC when the claim on merits shall be considered abroad and the claimant arrestor seeks for the arrest in Russia. Since practice of Russian Arbitration Court on claiming damages for the unlawful or wrongful security measures and arrest of ships is very limited (if there is any at all), up to now it is unclear how to avoid the above difficulties under Russian Law.

**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?*

**Answer:** No, our national law does not provide for a penalty or other sanction to be levied upon the arrestor of ship, separate and distinct from any damages,<sup>9</sup>. 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.** *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?*

**Answer:** If Russian Court has to consider a claim for damages for the arrest of a ship in another country with participation of foreign interests and since, the claim for damages for the arrest of a ship is a claim on commitments arising out of inflicting of harm, the Court will have to follow Russian International Private Law rules in determining the applicable legislation to the dispute. In accordance with part 1 of art.1219 of Russian Civil Code the law of the country where an action being basis for the claim in damages took place will apply. If as a result of such action the damage manifested in another country the law of this country may apply providing a person who caused the damage envisaged or should have envisaged the outcrop of the damage in this country. If both parties are citizens or legal persons of one country or both are residents of this country, the law of this country shall apply. The parties may also agree to apply *lex fori*.