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## REPLIES BY THE ITALIAN 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

*Italy is a party to and has given effect in its legislation to:*

- *the Arrest Convention 1952 which was ratified with Law 25/10/1977 no. 880 (entry into force 9/11/1979), with the reservation to apply the national law and not the Convention to the maritime claims under article 1 (o) and (p); and not to apply the first paragraph of article 3 to the arrest granted in its territory for the maritime claims under article 1(q);*

- *the Maritime Liens and Mortgages Convention 1926 which was ratified with R.D.L. 6/1/1928 converted into Law 19/7/1929 no. 1638 (entered into force 7/12/1949), with the reservation to apply its national law in respect of the extension of the maritime liens to the vessel's appurtenances, in addition to the so called "accessories" enumerated in article 4; and the ranking immediately after the claims arising out of the contract of engagement of the master and crew, of the claims for sums advanced by the National Administration or Consular Authority for assistance and repatriation of crew members.*

- (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 Italian law there are two kinds of arrest of ships: the "judicial" arrest and the "conservative" arrest.*

*The judicial arrest is granted to prevent the sale of the ship when her ownership or possession is disputed.*

*The conservative arrest is granted in order to secure the enforcement of a claim on the ship in respect of which the claim has arisen (or a sister ship).*

*In both cases, the claimant must:*

- provide prima facie evidence that his claim is likely to be successful when proceedings for its enforcement are brought (*fumus boni juris*);
  - prove that the delay for obtaining a judgment on the merits is likely to adversely affect the right of the claimant to enforce such decision on the ship (*periculum in mora*). However, as regards a conservative arrest, if the claim is secured by a maritime lien in accordance with Italian law (Italy has enacted the maritime liens enumerated in the 1926 Convention on maritime liens and mortgages in art. 552 of the Code of Navigation - C.N.) the claimant does not need to provide evidence of the *periculum in mora*, since the arrest of the ship is necessary in order to prevent the extinction of the lien (article 558, last para., C.N.).
- When the Arrest Convention 1952 is applicable, the claimant does not need to prove the *periculum in mora* and appears to be only required to “allege” that he has a maritime claim. Whether that means that he is not required to provide even a prima facie evidence of his claim (*fumus boni juris*) is not settled.

## 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 669-undecies of the Italian Code of Civil Procedure (C.C.P.) states that the Court, when issuing a warrant of arrest or also subsequently, when confirming or amending the warrant may order to the claimant, taking into due consideration all the material circumstances, to provide a security for the settlement of any damages suffered as a result of a wrongful arrest.

If the warrant of arrest is issued subject to providing security, the arrest cannot be enforced unless the security is provided and, if the claimant fails to do so within the given time limit, the warrant of arrest becomes null and void. If security is ordered after the arrest, the failure to provide it can be raised before the Court in order to have the arrest lifted.

### 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?

(a) The mere rejection of the claim does not entail liability in damages.

(b) In article 96, para. 1, of C.C.P., there is a general rule, that is applicable also in respect of arrest of ships, pursuant to which if it appears that the losing party acted in bad faith or with gross negligence the Court on request of the other party condemns it, in additions to pay the costs, to pay damages, taxed in the judgment.

*There follows a specific rule applicable inter alia to arrest of property, pursuant to which where the Court finds that the claim in respect of which action was brought (i) did not exist and (ii) the claimant acted without the normal prudence, it holds him liable to settle the damages.*

*In respect of (i) in a recent judgment of the Court of Appeal of Genoa damages were assessed on the basis of the market time charter rate for the period during which the ship remained under arrest<sup>1</sup>.*

*The situation where the arrestor had been negligent has been considered in several judgments. It has been held by the Italian Supreme Court (Corte di Cassazione)<sup>2</sup> that where it is found that the claim in respect of which property has been arrested had no basis whatsoever (the Court qualified the situation as “non-existence of the claim”), the arrestor is liable for the damages caused to the owner of the property and that to that effect it suffices, pursuant to art. 96 C.C.P., that the claimant acted without the “ordinary prudence”.*

**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?**

*As mentioned in 2(b), an arrestor would not be liable in damages merely because the arrest was subsequently repealed by an Appeal Court. An arresting party may be liable in damages on the basis of art. 96 C.C.P..*

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

*As provided in art. 96 C.C.P. the liability also arises if the claimant has acted merely without the ordinary prudence. The Courts have interpreted that behaviour to be equal to negligence.*

**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?**

*It is worth mentioning that Italian jurisprudence has not yet adopted an unequivocal position in relation to the controversial issue of whether, under article 3, para. 4, of the 1952 Arrest Convention, a claimant has the right to arrest a ship in respect of a maritime claim for which a person other than the owner of that ship is liable when such claim is not secured by a maritime lien. Some courts have held that an arrest cannot be granted if the claimant has not the right to enforce his claim on the ship through her judicial sale. Conversely, other Courts held that the Arrest Convention merely regulates the right of arrest, as a conservative measure, irrespective of whether or not*

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<sup>1</sup> Court of Appeal of Genoa 25 July 2014, *J.S. United Volga River Shipping Company v. Speter S.p.A. – The “Sormovskij 32”*, (2014) *Dir. Mar.* 639.

<sup>2</sup> Corte di Cassazione 2 February 1994, No. 1037, *Gianneri v. Moschetto*.

*the maritime claim can be successively enforced on the ship the arrest of which is applied for.*

*Damages could be assessed either by a judgment issued in proceedings brought by the owner of the ship against the arrestor from which damages are claimed or in the proceedings on the merits brought by the arrestor against the person allegedly liable for the claim in respect of which the ship has been arrested. If that person is not the owner of the ship, the arrestor ought to bring proceedings against both the debtor and the owner of the ship. If he fails to bring proceedings against the owner, the owner may join the proceedings brought by the arrestor against the person liable or bring himself proceedings against the arrestor.*

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

*Proof of negligence would at least be required.*

**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?**

*As mentioned in 2 (b) art. 96 C.C.P. deals with the aggravated liability of a party, either claimant or defendant, who loses his case.*

*In a case decided by the Court of First Instance (Tribunal) of Genoa<sup>3</sup>, a claimant arrested a yacht he had taken into tow, requesting a salvage reward.*

*The Court held that the claimant was entitled only to be paid for the towage services in a sum much lower (1/20) than that for which the yacht was arrested.*

*In finding that the claimant acted with gross negligence in having applied for an arrest in an amount enormously higher than that adjudged, the Court held that he had to pay damages to the owner of the yacht who was unable to provide the excessive security.*

*The damages were taxed having reference to the average of the market freight for the yacht over the summer season in the years during which the yacht remained under arrest and having also reference to the warehousing costs which were to be paid by the owner of the yacht over that period.*

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

*Still as mentioned in 2(b) para. 1 of art 96 C.C.P. provides, as a general rule, that the party losing his case and that in the course of the proceeding acted with bad faith or*

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<sup>3</sup> Tribunal of Genoa 27 December 1989, *Fallimento Fast Ferries S.r.l. v. Stefano Licata – Yacht “Briso II”*, (1990) Dir. Mar. 406.

gross negligence, is condemned to pay, in addition to costs, damages to the other party upon motion of this latter.

The damages may be taxed also *ex officio* by the Court and on an equitable basis.

Para. 2 of said article deals specifically with arrest proceedings and contemplates that when the Court holding on the merits finds that the claim for which the arrest was executed is “non existent”, the claimant acting without ordinary prudence is condemned to pay damages upon motion of the arrested party. There is therefore no need of a behavior in bad faith or grossly negligent.

Notably it has been held<sup>4</sup> that a claim is non existent also when there is substantial disproportion between the sum adjudged and that claimed.

**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 attribute liability to him under your national Law ?**

There are no precedents, except a case<sup>5</sup> where the arrest of a ship was applied for under art.47(1) of EC Regulation 44/2001 on jurisdiction and enforcement of judgments pursuant to which nothing shall prevent the person applying for the recognition of a judgment to avail himself of provisional, including protecting measures. It was held that the arrest of a ship in a case where there is a macroscopic disproportion between the amount of the claim and the value of the ship would be in breach of the principle of loyalty and probity stated in art. 88 C.C.P., such behaviour consisting in using legal instruments for the purpose of exercising a strong pressure on the debtor in order to force him to effect payment of the sum claimed. These arguments appear to be applicable also in case of an arrest under the 1952 Arrest Convention.

It must however been considered that art. 669 undecies C.C.P. provides that with the decision granting or confirming o amending (the arrest) the Court may order the petitioner, all circumstances being assessed, to provide a security for the possible settlement of damages.

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

Article 96, para. 2, of C.C.P. provides for a specific liability of the arrestor who acted without ordinary prudence. See response to no. 2.

**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?**

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<sup>4</sup> Supreme Court of Cassation 10 February 1983 n. 1068 *Caputi v. Gallo*; Supreme Court of Cassation 2 February 1994 n. 1037 *Gianneri v. Moschetto*.

<sup>5</sup> Court of Appeal of Cagliari 8 July 2009, *Zeppelin Power System GmbH & Co. KG v. Stradeblu S.r.l.*, The “*Strada Gigante*” (2010) Dir. Mar. 117.

*Article 96, para. 2 C.C.P. provides that the Court may, at the request of the owner of the property that is arrested, order the arrestor to pay damages for the arrest also if the arrestor acted without ordinary prudence.*

**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?**

*Article 96, para. 3 C.C.P. provides that the Court, also on its initiative, when issuing an order on costs, may also hold the party liable to pay to the other party a sum equitably determined. According to this provision the arrestor may be ordered to pay such sum when his application for arrest is merely rejected.*

**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?**

*It appears that Italian Courts would refuse jurisdiction in respect of such claims since pursuant to art.6 of the 1952 Arrest Convention all questions whether the claimant is liable in damages for the arrest of a ship or for the cost of the bail or other security furnished to release or prevent the arrest of a ship, must be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.*

*A claim for damages as a consequence of a wrongful arrest of a ship might, if the arrest is not based on a contract between the claimant and the owner of the ship, be subject, within the European Union, to the rules of the EC Regulation No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II).*

*According to the above Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict is the law of the country in which the damage occurs (so called *lex loci damni*), 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.*

*Anyway, section 28(1) of the Rome II Regulation provides that “This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations”. In any case, such a provision should be interpreted according to the recent trend adopted by the Court of Justice of the European Union in examining the parallel Article 71 of EC Regulation No. 44/2001 (Brussels I Regulation), now replaced by Regulation No. 1215/2012 (also called “Brussels I bis” or “Recast”) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Both provisions should be interpreted as “integration clauses”, aimed at incorporating in the EU law system not the whole wording of international conventions to which EU Member States are parties, but specific provisions only, as long as they can be interpreted and applied in compliance of EU law principles (a sort of “fictitious implantation”).*

*Article 6 of 1952 Arrest Convention could therefore be interpreted as a specific provision of an international convention whose application would not be barred by Rome II Regulation and therefore in respect of damages caused by a wrongful arrest, Italian courts would apply as lex forum arresti the law of the Contracting State in whose jurisdiction the arrest was made or applied for.*

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