

**Responses to questionnaire
related to “Study relating to liability for wrongful arrest”
(ref. letter of President of CMI of 27 May 2015)**

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:

Ukraine is the party to **the Arrest Convention 1952** according to the Law of Ukraine No. 3702-VI of 07.09.2011 and to **the Maritime Liens and Mortgages Convention 1993** according to the Law of Ukraine No. 240-IV of 22.11.2002.

(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:

The legal grounds for arrest of vessels in Ukraine are the following:

- ***For the arrest to secure a maritime claim*** – Arrest Convention 1952, *Merchant Shipping Code of Ukraine* No. 176/95-BP of 23.05.1995 (hereinafter – “**MSC**”), as well as *Civil Procedural Code of Ukraine* No. 1618-IV of 18.03.2004 (hereinafter – “**CivPC**”) and *Commercial Procedural Code of Ukraine* No. 1798-XII of 06.11.1991 (hereinafter – “**ComPC**”) (partly as soon as these procedural codes stipulate only territorial jurisdictions);
- ***For the arrest to secure a claim as provisional remedy*** – CivPC and ComPC;
- ***For the arrest in criminal proceeding*** - *Criminal Code of Ukraine* No. 2341-III of 05.04.2001 and *Criminal Procedural Code of Ukraine* No. 4651-VI of 13.04.2012.

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:

First of all, it is necessary to note that in spite of accession to the Arrest Convention 1952 four years ago, till present Ukraine has not stipulated any special procedural legal rules in relation to arrest of vessels. For this reason, the court practice in this field is mainly limited by arrest of the vessel as provisional remedy.

Furthermore, there are two possible instances and sets of procedural rules that can be used to arrest the vessel, mainly

- General courts, based on procedural rules of the CivPC for civil cases;
- Commercial courts, based on procedural rules of the ComPC for commercial cases.

According to the mentioned procedural rules, arrest of vessels can be decreed as *a measure of securing a claim* (under CivPC and ComPC) and as a *pre-trial measure of restraint* (merely under ComPC).

So, giving an answer to the question above we would like to note that the court may define and require the claimant **to post a security** for potential damages to the defendant **in the amount which does not exceed the amount of his claim**:

- In case of arrest of vessel as a *pre-trial measure of restraint* under ComPC (Article 43-4, section 4);
- In case of arrest of vessel as a *measure of securing a claim* under CivPC (Article 153, section 4).

The court's right to define and require the above security from the claimant is of general character and may be used also when considering the possibility to arrest the vessel for securing maritime claim.

At the same time, part 2 Article 46 of the MSC comprises the respective special provision. Thus, when deciding whether to arrest the vessel or to prolong the arrest which is already enforced, the court may oblige the claimant to provide security for his marine claim in the amount and on conditions determined by the court. Such security shall be placed to reimburse the vessel's owner or the charterer under the bareboat charter for any damages which may be resulted from the wrongful arrest or excessive bail or other security being furnished for the vessel's release and for which such claimant might be liable.

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:

I. In case of arrest of the vessel to secure a maritime claim the arrestor will not be liable only by reason of the mere rejection of the claim.

As a general rule, according to Article 1166 of the Civil Code of Ukraine and the court practice in this situation the arrestor will be liable if the following is proved:

- wrongful act of arrestor;
- damages; and
- causal link between the damages and the wrongful act.

According to part 2 of Article 1166 of the Civil Code of Ukraine a person who has caused damages shall be released from the obligation to compensate therefor if he proves that such damages were caused through no fault of his own. It means that there is a presumption of guilt of the arrestor.

For this reason, answer on the second part of the question above depends mainly on what '*wrongful act*' means and whether it includes awareness/knowledge that the claim has no foundation, or it is an act of negligence or act in bad faith or even malicious act.

The legislation in force and court practice does not give a clear answer to this question. However, it is generally accepted that '*wrongful act*' is an act, which has not been duly authorized or has infringed the legal rule.

Part 1 Article 46 of the MSC expressly provides for the claimant's liability for any damages incurred by the owner of the vessel or the charterer under a bareboat charter resulted from the wrongful arrest or excessive bail or other security being furnished for the vessel's release. However, such liability shall be assigned according to the above general rules of the Civil Code of Ukraine.

II. In case of arrest of the vessel by General courts to secure a claim as provisional remedy, Article 155 of the CivPC stipulates that in case of

1. cancellation of pre-award relief,
2. entry into force of the decision on rejection of the claim,
3. entry into force of the decision on termination of proceedings in case, OR
4. dismissal of an application without prejudice,

the person, against which the measures on securing a claim had been taken, is entitled to damages, caused by such measures.

At the same time the court requires to prove wrongfulness of the arrestor, damages and causal link between them.

III. In case of arrest of the vessel by Commercial courts as pre-trial measure of restraint, Article 43-10 of the ComPC stipulates that in case of

1. cancellation of pre-trial measure of restraint,
2. renunciation of suit,
3. entry into force of the decision on rejection of the claim,

the person, against which the measure of restraint had been taken, is entitled to damages, caused by such measures.

At the same time the court requires to prove wrongfulness of the arrestor, damages and causal link between them.

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:

Answer to these questions can be found in answers to the questions above, i.e. there is no difference between cancellation of the arrest either by a court of first instance or by an appeal court.

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:

- I. In case of arrest of the vessel to secure a maritime claim the arrestor can be liable in damages and in this case, as already mentioned above, it is necessary to prove
 - a. wrongful act of arrestor;
 - b. damages; and
 - c. causal link between the damage and the wrongful act.
- II. In case of arrest of the vessel by General courts to secure a claim as provisional remedy or by Commercial courts as pre-trial measure of restraint, it is possible to presume that in this case the court will dismiss the claim. In this situation the arrestor can be liable for damages. However, the court will require to prove wrongfulness of the arrestor, damages and causal link between them.

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:

Except in Article 46 of the MSC, the Ukrainian law does not specify particular cases for liability of arrestor; it only stipulates the general rules of liability in case of wrongful arrest, which are described above and may be used in case of grossly exaggerated claim. However, we believe that in this case it is required as well to prove wrongfulness of the arrestor, damages and causal link between them.

In the event the above is proved, pursuant to general rules the arrestor may be hold liable for damages incurred in the form of losses, expenses as well as the lost profit (Article 22 of the Civil Code of Ukraine).

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?

ANSWER:

The arrest will not be considered as wrongful in this case.

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:

Presumably it is possible if the vessel is arrested in criminal proceeding.

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.

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:

Article 49 of the Law of Ukraine “*On International Private Law*” stipulates the following: the rights and duties for the obligations, arising due to damages, shall be determined by the law of the State in which an action or other circumstance, that gave rise to the claim for damages, has taken place.

The rights and duties for the obligations, arising due to damages abroad, if the parties are residents of or domicile in one State, shall be recognized according to the laws of that State.

At the same time the law of a foreign State shall not be applied in Ukraine, if an action or other circumstance, that gave rise to the claim for damages, is not considered as wrongful under the laws of Ukraine.

Moreover, the parties may also agree to *lex fori* at any time after the event causing damages has occurred.