

MLAANZ / CMI QUESTIONNAIRE

INTERNATIONAL CONVENTIONS

Question

- 1 *Please advise which, if any, of the following Conventions your jurisdiction is a party to and has given effect to in its legislation:*
- 1.1 *Arrest Convention 1952*
 - 1.2 *Arrest Convention 1999*
 - 1.3 *Maritime Liens and Mortgages Convention 1926*
 - 1.4 *Maritime Liens and Mortgages Convention 1993*

Response

Australia: is not party to the Arrest Convention 1952, the Arrest Convention 1999, the Maritime Liens and Mortgages Convention 1926 or the Maritime Liens and Mortgages Convention 1993. There are many similarities between the Australian *Admiralty Act 1988 (Cth) (AUS Act)* and the *Arrest Convention 1952 (1952 Arrest Convention)*

New Zealand: is not party to the Arrest Convention 1952, the Arrest Convention 1999, the Maritime Liens and Mortgages Convention 1926 or the Maritime Liens and Mortgages Convention 1993.

Question

- 2 *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?*

Response

- 2.1 Australia: The AUS Act provides certain maritime claimants entitlements to arrest ships and other *res* in order to obtain security for their claims. The rights to arrest a vessel in Australia are set out under Part III of the Admiralty Act. These are:
- 2.1.1 Section 15 provides a right to proceed in rem on a maritime lien;
 - 2.1.2 Section 16 provides a right to proceed in rem on proprietary maritime claims;
 - 2.1.3 Section 17 provides a right to proceed in rem on owner's liabilities;

- 2.1.4 Section 18. provides a right to proceed in rem on demise charterer's liabilities; and
- 2.1.5 Section 19. provides a right to proceed in rem against a surrogate (sister) ship.
- 2.2 The grounds upon which a vessel may be arrested under those provision are:
 - 2.2.1 maritime liens;
 - 2.2.2 proprietary maritime claims; or
 - 2.2.3 general maritime claims.
- 2.3 Section 15(2) provides that a maritime lien includes a reference to a lien for:
 - 2.3.1 salvage;
 - 2.3.2 damage done by a ship;
 - 2.3.3 wages of the master, or of a member of the crew, of a ship; or
 - 2.3.4 master's disbursements.
- 2.4 The above is not a closed list. The recent decision in the “Sam Hawk”¹ has established that Australian Courts will recognise the applicability of foreign maritime liens arising under the proper law of any incident/transaction.
- 2.5 Section 4(1) provides that a reference to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.
- 2.6 Section 4(2) provides that a reference to a proprietary maritime claim is a reference to:
 - 2.6.1 a claim relating to:
 - (a) possession of a ship;
 - (b) title to, or ownership of, a ship or a share in a ship;
 - (c) a mortgage of a ship or of a share in a ship; or
 - (d) a mortgage of a ship's freight;
 - 2.6.2 a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;

¹ *Reiter Petroleum Inc v The Ship "Sam Hawk"* [2015] FCA 1005.
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- 2.6.3 a claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other property in a proceeding *in rem* in the nature of a proceeding in Admiralty; or
 - 2.6.4 a claim for interest in respect of a claim referred to in paragraph (a), (b) or (c).
- 2.7 Section 4(3) provides that a reference to a general maritime claim is a reference to (the entire section is extracted below):
- 2.7.1 a claim for damage done by a ship (whether by collision or otherwise); or
 - 2.7.2 a claim in respect of the liability of the owner of a ship arising under Part II or IV of the *Protection of the Sea (Civil Liability) Act 1981* or under a law of a State or Territory that makes provision as mentioned in subsection 7(1) of that Act; or
- (ba) a claim under:
- (a) the applied provisions (within the meaning of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*); or
 - (b) a law of a State or Territory of a kind referred to in subsection 10(1) of that Act; or
- 2.7.3 a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship; or
 - 2.7.4 a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:
 - (a) the owner or charterer of a ship;
 - (b) a person in possession or control of a ship; or
 - (c) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable;

being an act or omission in the navigation or management of the ship, including an act or omission in connection with:

 - (d) the loading of goods on to, or the unloading of goods from, the ship;

- (e) the embarkation of persons on to, or the disembarkation of persons from, the ship; and
 - (f) the carriage of goods or persons on the ship; or
- 2.7.5 a claim for loss of, or damage to, goods carried by a ship; or
- 2.7.6 a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise; or
- 2.7.7 a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land); or
- 2.7.8 a claim in respect of general average; or
- 2.7.10 a claim in respect of towage of a ship; or
- 2.7.11 a claim in respect of pilotage of a ship; or
- 2.7.13 a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance; or
- 2.7.14 a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched); or
- 2.7.15 a claim in respect of the alteration, repair or equipping of a ship; or
- 2.7.16 a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship; or
- 2.7.17 a claim in respect of a levy in relation to a ship, including a shipping levy imposed by the *Protection of the Sea (Shipping Levy) Act 1981*, being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia; or
- 2.7.18 a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship; or
- 2.7.19 a claim for an insurance premium, or for a mutual insurance call, in relation to a ship; or
- 2.7.20 a claim by a master, or a member of the crew, of a ship for:
- (a) wages; or

- (b) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including the operation of the law of a foreign country; or
- 2.7.21 a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the International Arbitration Act 1974) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs; or
- 2.7.22 a claim for interest in respect of a claim referred to in one of the preceding paragraphs.
- 2.8 New Zealand: The national law applicable to arrest of a vessel is the *Admiralty Act 1973 (NZ Act)*. Arrest is available under the NZ Act for claims that are maritime liens under the common law or claims by virtue of section 4(1) of the Act. Maritime liens are limited to damage caused by a ship, salvage, seafarers' wages and bottomry and respondentia and are available irrespective of the beneficial ownership of the ship. Unlike Australia, there has been no recent review by the Courts as to whether the above is a closed list of maritime liens.
- 2.9 For statutory *in rem* claims, the debtor against which the *in personam* claim arises must be the owner or demise charterer of the vessel at the time the action is brought. Those claims under section 4(1) of the NZ Act are:
 - 2.9.1 Possession or ownership of a ship or of any share therein
 - 2.9.2 Any question arising between the co-owners of a ship as to possession, employment, or earnings of that ship
 - 2.9.3 Mortgage of or charge on a ship
 - 2.9.4 Damage done by ship
 - 2.9.5 Damage received by ship
 - 2.9.6 Loss of life or personal injury sustained in consequence of any defect in a ship or her apparel or equipment, or of the wrongful act, neglect, or default of the owners, charterers, or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects, or defaults the owns, charterers, or persons in possession or control of a ship are responsible, being an act, neglect, or default in navigation or management of the ship, in the loading, carriage, or discharge of foods on, or in the embarkation, carriage or disembarkation of persons

- 2.9.7 Loss or damage to goods carried in a ship
 - 2.9.8 Any agreement relating to the carriage of goods in a ship or use or hire of a ship
 - 2.9.9 In the nature of salvage
 - 2.9.10 In the nature of pilotage in respect of a ship or an aircraft
 - 2.9.11 Goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship in its operation or maintenance
 - 2.9.12 Construction, repair or equipment of a ship or for dock or port or harbour charges or dues
 - 2.9.13 By a master, shipper, charterer, or agent in respect of disbursements made on account of a ship
 - 2.9.14 An act which is or is claimed to be a general average act
 - 2.9.15 Bottomry
 - 2.9.16 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, or for droits of admiralty.
- 2.10 Claims under section 4(1) of the Act, except those listed in sub-paragraphs (a), (b), (c) or (p) above, may be brought against a sister ship if the debtor against which the *in personam* claim arises was the owner or charterer of the ship when the cause of action arose and is the beneficial owner or demise charterer of the sister ship at the time the action is brought.

QUESTIONS RELATING TO WRONGFUL ARREST

Question

- 3 *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?*

Response

- 3.1 Australia: It is not. However, section 41(1) of the AUS Act provides that the Governor-General may make Rules that are consistent with the with the AUS Act. These rules are in relation to the practice and procedure to be followed in courts in exercising jurisdiction under the Act and matters incidental to such practice and procedure.

- 3.2 Section 41(2)(h) provides that the Rules may make provision for the furnishing of security.
- 3.3 Rule 41(1) of the Admiralty Rules 1988 (Cth) (Rules) provides an application for an arrest warrant (being a warrant for the arrest of a ship or other property, r3) constitutes an undertaking to the court:
- 3.3.1 if the application is made by the applicant personally--by the applicant; or
 - 3.3.2 if the application is made by an Australian legal practitioner on behalf of the applicant--by the Australian legal practitioner; or
 - 3.3.3 if the application is made by any other agent of the applicant--by the applicant;
- to pay to the Marshal, on demand, an amount equal to the amount of the costs and expenses of the Marshal in relation to the arrest, including costs and expenses in relation to the ship or other property while it is under arrest.
- 3.4 Rule 41(2) provides that in addition to any undertaking, the Marshal may demand from the applicant payment of an amount of money that the Marshal considers necessary as a deposit to enable the Marshal to discharge his or her duties effectively in relation to the arrest, including duties while the ship or other property is under arrest.
- 3.5 If the arrest is challenged, the Courts are at liberty to order that a party give security for the payment of costs that may be awarded against either party.²
- 3.6 New Zealand: Security is not required other than:
- 3.6.1 an indemnity for and power to request security for the fees, expenses, and harbour dues (if any) of the Registrar and of the Registrar's appointed officers and agents (High Court Rule 25.34); and
 - 3.6.2 the Registrar may require (and usually does) that he be given additional security to cover fees, expenses, and harbour dues (if any) (High Court Rule 25.35).

While the funds advanced by the arresting party are paid out in priority when the vessel is sold, the arresting party has to pay these in the meantime. The arresting party is not liable for expenses incurred by the Registrar which were not reasonably required or were incurred as a result of deceit on the

² *Tisand Pty Ltd v The Owners of the Ship MV "Cape Moreton" (Ex "Freya")* [2004] FCA 1191 (unreported, Allsop J, 10 September 2004).

part of the shipowner or the crew: *Wallace & Cooper Engineering (Lyttelton) Ltd v Orlovka* (1999) 14 PRNZ 213.

Question

4 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:

4.1 The mere rejection of the claim?

Response

4.2 Australia: No.

4.3 New Zealand: No.

Question

4.4 Or would proof be required about the arrestor's:

4.4.1 Awareness/knowledge that his claim had no foundation, or

4.4.2 Negligence in bringing such a claim, or

4.4.3 Bad faith or gross negligence or, otherwise, malicious bringing of such a claim?

Response

4.5 Australia: Section 34 of the AUS Act provides the basis for a damages claim for wrongful arrest. It provides:

“Damages for unjustified arrest etc.

(1) Where, in relation to a proceeding commenced under this Act:

(a) a party unreasonably and without good cause:

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

(2) The jurisdiction of a court in which a proceeding was commenced under this Act extends to determining a claim arising under subsection (1) in relation to the proceeding.”

- 4.6 Section 34 of the AUS Act codifies the common law principles formerly applying in Australia. Unfortunately, since the section was introduced, there have been no Australian decisions providing guidance upon the principles that are to govern applications under section 34. The CMI is referred to the paper by Michael Woodford (**Woodford**), entitled *Damages for Wrongful Arrest: section 34, Admiralty Act 1988* (2005) 19 *MLAANZ Journal* in which Mr Woodford offers some comments about how section 34 may be interpreted by the Australian Courts. His views are, for the most part, adopted by the writer. A short summary/key excerpts of the key points of his paper follow. The questions will be answered giving the writer's best assessment of how an Australian Court would answer that question but the CMI should bear in mind the above caveat.
- 4.7 In 1982 the Australian Government referred all aspects of the Admiralty jurisdiction in Australia to the Australian Law Reform Commission (**ALRC**) for inquiry, review and report, the product of which was the ALRC 1986 report entitled "Civil Admiralty Jurisdiction" (**ALRC Report**)³. The ALRC considered the traditional test in Admiralty for obtaining damages for wrongful arrest and proposed that a provision providing a cause of action for such damages be included in the Admiralty legislation making it less onerous for shipowners to make successful claims.⁴ Section 34 of the Act is in the same terms as proposed by the ALRC.
- 4.8 The Second Reading Speech of the AUS Act demonstrates that the Australian Parliament was very much guided by the ALRC Report in reforming the Admiralty jurisdiction generally and specifically in relation to s 34. Both the text of the Act and the accompanying Explanatory Memorandum are virtually identical to the draft Admiralty Bill 1988 (**Bill**) and Explanatory Memorandum produced by the ALRC and are both identical in relation to s 34. A strong case is made out for referring to the

³ Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33, (1986), Canberra: Australian Government Publishing Service, p. xii. ("ALRC Report").

⁴ ALRC Report, 256-7.

ALRC Report as an aid to the construction of s 34 which is supported by domestic statutory interpretation legislation.⁵

4.9 In suggesting the inclusion of section 34, the ALRC noted that under the common law, a power imbalance existed between those arresting ships and shipowners, arising out of the commercial pressures placed upon shipowners through an arrest. The ALRC concluded that a provision was required to make it less onerous for shipowners to obtain damages for wrongful arrest. The ALRC referred to the South African provisions of the time and noted that they had been criticised as being too broad and vague. The Australian provision, it said, "... should attempt to strike a more precise balance between plaintiff and defendant".

4.10 While there have been no Australian decisions which have provided guidance upon the principles that are to govern applications under section 34, a number of decisions have made reference to section 34, largely in the context of adjourning the issue of damages *sine die* without any consideration of the merits of the claim. In the most recent decision referring to section 34, Rares J in refusing to enter default judgment against an arrestor who had defaulted in filing a defence said:

*"It is not in the interests of justice that this be the first case to apply the important provisions of s 34(1)..."*⁶

4.11 The other decisions to have referred to section 34 since its introduction are:

4.11.1 *Malaysia Shipyard and Anor v "Iron Shortland" as the Surrogate for the ship "Newcastle Pride"* (1995) 131 ALR 738;

4.11.2 *Paul Allison and APAI Pty LTD v The Owners of the ship "Greshanne"* (Unreported, Supreme Court of Tasmania, Zeeman J, 12 February 1996);

4.11.3 *Laemthong International Lines Co Ltd v. BPS Shipping* (1995) 127 FLR 91⁷;

4.11.4 *KMP Coastal Oil Pte Ltd v The Owner of Motor Vessel "Iran Amanat" & Ors* [1996] FCA 1122 (20 December 1996);

4.11.5 *Lloyd Werft Bremerhaven GmbH v The Owners of the ship Zoya Kosmodemyanskaya as surrogate for the ships Taras Schevchenko, Delphin and Kazakhstan and Tor Shipping Co* (1997) 79 FCR 71;

⁵ *Acts Interpretation Act 1901* (Cth) s 15AB(2)(b).

⁶ *Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd* [2015] FCA 682 (Unreported, Federal Court of Australia, Rares J, 21 May 2015), [24].

⁷ The matter ultimately went to the High Court on the sole issue of whether or not "charterer" in s 19 of the Act included a voyage charter; s 34 did not receive any comment in the High Court; (1997) 149 ALR 675.

- 4.11.6 *The Owners of the Ship Carina v The Owners or Demise Charterers of the Ship MSC Samia* (1997) 148 ALR 623 (“*The Carina*”);
- 4.11.7 *McConaghy Pty Ltd v The Yacht “Ragamuffin”* [2004] FCA 433 (30 April 2004);
- 4.11.8 *Tisland Pty Ltd v Owners of the Ship MV “Cape Moreton”* (Unreported, Federal Court of Australia, Allsop J, 21 September 2004);
- 4.11.9 *Comandate Marine Corp v The Ship Boomerang I* [2006] FCA 1345 (9 October 2006);
- 4.11.10 *EMAS Offshore Pte Ltd v The Ship “APC Aussie 1” (No 2)* (2009) 194 FCR 484;
- 4.11.11 *Atlasnavios Navegacao, LDA v The Ship “Xin Tai Hai” (No 2)* (2012) 301 ALR 357;
- 4.11.12 *Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd* [2015] FCA 682 (Unreported, Federal Court of Australia, Rares J, 21 May 2015)⁸.
- 4.12 Woodford notes that in *Laemthong International Lines Co Ltd v. BPS Shipping*,⁹ Mildren J in *obiter dictum* referred to the ALRC report and said:
- “... s34 applies only to arrests which are made unreasonably as well as without good cause so as to avoid the possibility of a penalty when the arrest appeared reasonable at the time but turned out to be unjustified. In other words, even if the respondent ultimately fails in its action in rem that does not automatically entitle the applicant to damages.”*¹⁰ (my emphasis).
- 4.13 Woodford further notes that in *The Carina*, Tamberlin J appears to be indicating that “unreasonableness”, at least in the context of the continued detention of a vessel, for which under s34 there is also a potential claim for damages, may be found where:

*“...the arrest is frivolous, vexatious, unjust, oppressive or an abuse of the processes of the court.”*¹¹

⁸ The background circumstances of the arrest and release of *Bulk Peace* can be gleaned in the reasons of Allsop CJ, Rares and McKerracher JJ in *Shagang Shipping Co Limited v Ship “Bulk Peace” (as surrogate for Ship “Dong-A Astrea”)* (2014) 314 ALR 230.

⁹ (1995) 127 FLR 91, ALRC Report, 256.

¹⁰ (1995) 127 FLR 91, [103].

¹¹ Woodford, 142.

- 4.14 Damien J Cremean (**Cremean**), a well-regarded Australian academic and established legal author,¹² suggests that under s34 it is not necessarily the case that acting in bad faith is equivalent to acting “unreasonably and without good cause”. Rather, acting “unreasonably and without good cause, is a wider notion, not necessarily related to malice, or “implied malice” at all. This view is consistent with the stated purpose of the introduction of section 34 by the ALRC.¹³
- 4.15 On this basis it is highly unlikely that the arrestor would be liable in damages by reason of the mere rejection of the claim alone – that is “without good cause”. Rather, the arrestor would *also* be required to have acted “unreasonably”. This position is supported by academics such as Damien J Cremean.¹⁴ Proof of any of matters referred to in (a) to (c) of the *Question* may be sufficient to establish that a party acted “unreasonably”.
- 4.16 New Zealand: Damages are only available at common law where the arresting party has acted in bad faith or with gross negligence. An arresting party will be guilty of mala fides where, on a subjective assessment, it has no honest belief of its entitlement to arrest. That party will be guilty of gross negligence when, on an objective assessment, the basis for arrest is so inadequate that the Court can infer that the party did not have the requisite belief (in this sense malice is implied): Colman J's test in *Centro Latino Americano de Comercio Exterior S.A. v Owners of the Ship Kommunar (The Kommunar) (No 3)* [1997] 1 Lloyds Law Reports 22 applied in *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2005] 3 NZLR 698.

Question

- 5 *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):*
- 5.1 *Would the arrestor be liable in damages for the consequences of the arrest, and, if Yes, in what circumstances?*

Response

- 5.2 Australia: As above.
- 5.3 New Zealand: Not unless there is a finding of bad faith or gross negligence.

¹² DJ Cremean, *Admiralty Jurisdiction: Law and practice in Australia and New Zealand* (Federation Press, Sydney, 3rd edn, 2000).

¹³ Reference for ALRC Report

¹⁴ DJ Cremean, *Admiralty Jurisdiction: Law and practice in Australia and New Zealand* (2003), Sydney: Federation Press.

Question

- 5.4 *For liability under the above, if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?*

Response

- 5.5 Australia: As above.
5.6 New Zealand: Yes, as above.

Question

- 6 *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:*

- 6.1 *Would, under your national law, the arrestor be liable in damages?*

Response

- 6.2 Australia: Potentially. Section 34 provides that:

"...the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result." (my emphasis).

- 6.3 New Zealand: Potentially yes, in light of the principles in answer 5 above.

Question

- 6.4 *For liability under the above, if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?*

Response

- 6.5 Australia: As above. Proof that the party acted unreasonably and without good cause would be required.
6.6 New Zealand: Bad faith or gross negligence, as above.

Question

- 7 *If the amount of the arrest claim was grossly exaggerated:*

- 7.1 *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:*

- 7.1.1 *For the extra cost of the security required,*

- 7.1.2 *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*
- 7.1.3 *For losses incurred as a result of the owner being unable to provide the excessive security?*

Response

- 7.2 Australia: Section 34(1)(i) provides a cause of action for damages if:
- “a party unreasonably and without good cause...demands excessive security in relation to the proceeding”.*
- 7.3 The recovery is limited to loss directly resulting to a party to the proceedings, or a person with a legal interest in the ship of property in question.¹⁵ In *The Bulk Peace*¹⁶, without reaching any definitive determination, Rares J commented on the arrestees’ difficulty in establishing that the loss and damage it suffered in respect of a third party’s termination of charter parties of other related vessel was as a direct result of the arrest.¹⁷ Arguably, the losses recoverable would include overheads, and expenses, including legal costs, incurred or thrown away by reason of the conduct.¹⁸ Cremean argues that in the case of a claim under section 34(1)(a)(ii), the salaries of the crew, insurance and the like would be losses directly consequent on an arrest,¹⁹ but that interest on a guarantee, given to obtain funds to have a vessel released, would be too remote²⁰
- 7.4 The ALRC noted that:
- “rather than allowing recovery for anyone suffering loss or damage ‘as a result’ of the arrest as in the South African Act, the right to recover should be restricted to only those parties (or persons with an interest in the property) who have suffered loss or damage as a direct result of the arrest. Third parties (not having an interest in the property) or those suffering consequential loss, would thus be excluded”²¹*

¹⁵ The Parliament of the Commonwealth of Australia, House of Representative Admiralty Bill 1988, Explanatory Memorandum, 21.

¹⁶ *Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd* [2015] FCA 682 (Unreported, Federal Court of Australia, Rares J, 21 May 2015).

¹⁷ *Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd* [2015] FCA 682 (Unreported, Federal Court of Australia, Rares J, 21 May 2015, [11], [14], [19], [21]).

¹⁸ DJ Cremean, *Admiralty Jurisdiction: Law and practice in Australia and New Zealand* (Federation Press, Sydney, 3rd edn, 2000); *Compania Financiera Soleada SA v Hamoor Tanker Corp. Inc* [1981] 1 All ER 856..

¹⁹ *Compania Financiera Soleada SA v Hamoor Tanker Corp. Inc* [1981] 1 All ER 856, 859.

²⁰ *Compania Financiera Soleada SA v Hamoor Tanker Corp. Inc* [1981] 1 All ER 856, 862, 864.

²¹ ALRC Report, 302.

- 7.5 On the basis of the above, it is submitted that items (a) to (c) may be considered “direct” losses for which the arrestor may have liability.
- 7.6 New Zealand: There is no local case authority on the scope of losses recoverable but commentators liken wrongful arrest to a claim in tort.

Question

- 7.7 *For liability under the above, if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?*

Response

- 7.8 Australia: Yes, as above. The phrase “unreasonably and without good cause” is a prerequisite to liability for each of the three bases of claim under section 34 (demanding excessive security, obtaining an arrest or failing to give consent for release). As there has been no local case authority on the interpretation of the phrase, Wooford notes that the Australian Parliament would have ordinarily intended that the phrase have the same meaning with reference to each base, but that the presumption may be rebutted. Section 34(1)(a)(i) deals with demands for excessive security and section 34b(1)(b) deals with a failure to give consent for release. Wooford argues that, since neither of those grounds calls for an assessment of the basis in law for the initial arrest – i.e. whether it was “without good cause” (perhaps “justified”, in the civil law sense), that the phrase “without good cause” serves no purpose. He highlights an alternative interpretation which is that in the context of those sections the phrase “unreasonably and without good cause” is an instance of hendiadys, meant to express a single idea of “reasonableness”.²²
- 7.9 New Zealand: Proof of bad faith or gross negligence is required. The arresting party is entitled to security for its 'best arguable case': *Det Norske Veritas AS v The Ship "Clarabelle"* [2002] 3 NZLR 52, [2002] 2 Lloyd's Rep 479, applying *The "Moschanthy"* [1971] 1 LLR 37. The assessment of security may, upon application, be subject to judicial oversight, distinct from a decision of the Registrar.

Question

- 8 *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:*
- 8.1 *Can the arrest be considered wrongful as a result, so as to attribute liability to him under your national law?*

²² Woodford, 146.
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Response

- 8.2 Australia: No. The tests under section 34 would still need to be met.
- 8.3 New Zealand: No. Proof of bad faith or gross negligence is required.

Question

- 8.4 *For liability under the above, if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?*

Response

- 8.5 Australia: As above.
- 8.6 New Zealand: As above.

Question

- 9 *Are there other circumstances in which, under your national law, an arrestor can be held liable in damages for the arrest of a ship?*

Response

- 9.1 Australia: No.
- 9.2 New Zealand: No.

Question

- 10 *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?*

Response

- 10.1 Australia: No.
- 10.2 New Zealand: No.

Question

- 11 *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?*

Response

- 11.1 Australia: Section 34 appears on its face to be limited to provide for claims for unjustified arrest where the vessel was arrested in Australia only.

11.2 Section 34 opens by providing:

“(1) Where, in relation to a proceeding commenced under this Act...”

11.3 It then continues:

“(a) a party unreasonably and without good cause:

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act;
or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;

11.4 Despite this, if the section can apply in relation to arrests in another jurisdiction, Australian Courts would apply Australian law unless it is established that the law of another country should apply. Where practicable to do so, an Australian Court will apply Australian law consistently with international law.

11.5 New Zealand: The court would apply New Zealand law unless it is established that the law of another country should apply. Where practicable to do so, the New Zealand court will apply New Zealand law consistently with international law. For example, in the case of *Ocean Towing & Salvage (Vanuatu) Ltd v Custom Fleet (NZ)*²³ the ship was allegedly wrongfully arrested in Queensland Australia, but as the most significant issues dealt with in the case took place in New Zealand, New Zealand law was applied (lex fori).

²³ High Court, Auckland, 30/11/2006, CIV-2005-404-3457, Associate Judge Abbott
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