

## Reply to CMI Questionnaire

### Study Relating to Liability for Wrongful Arrest

The British Maritime Law Association responds to the questions raised on the basis of English law\* :

#### I. INTERNATIONAL CONVENTIONS:

The United Kingdom is a party to the Arrest Convention 1952. Although the text of the Convention has not been reproduced or enacted in English law, its substance is effectively reflected in Sections 20 and 21 of the Senior Courts Act 1981. Neither the Maritime Liens and Mortgages Convention 1926 nor the Maritime Liens and Mortgages Convention 1993 nor the Arrest Convention 1999 have been implemented in English law.

#### 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:** There are no court rules or other rules of law which require the arresting party to provide security as a condition to obtaining or maintain an arrest. The arresting party is, however, obliged to provide the Admiralty Marshall, who effects the arrest on behalf of the Court, with an undertaking to pay his charges.

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?

**ANSWER:** No

(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:** Under English law a shipowner can only recover compensation for wrongful arrest if the arrest was obtained where there was *mala fides* or *crassa negligentia*. (See *The Evangelismos* (1858) 12 Moo PC 352, *The Strathnaver* [1875] 1 AC 58 and *The Kommunar (No 3)* [1997] 1 Lloyd's Rep. 22.) *Mala fides* is self-explanatory: it is bad faith or malice. It would be taken to exist where the arresting party had no honest belief in its entitlement to arrest. What amounts to *Crassa negligentia* is more elusive. Recently it has been described as the case where "*objectively there is so little basis for the arrest that it may be inferred that the*

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\* The Answers reflect the position in English law, which may not necessarily be the same in Scottish law.

*arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel” (The Kommunar (No 3)), or the absence of any “serious regard to whether there were adequate grounds for the arrest of the vessel”. (Gulf Azov Shipping Co v Idisi [2001] EWCA (civ) 491.)*

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?

**ANSWER:** No: were the arrest to be set aside on appeal, it would be a matter for the court of first instance to determine, on the application of the Respondent shipowner, whether the original arrest was wrongful.

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

**ANSWER:** N/A.

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?

**ANSWER:** The test of *mala fides* or *crassa negligentia* would still be applied. However the inference that an arrest in these circumstances was made with *mala fides* or *crassa negligentia* would be easier to draw.

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

**ANSWER:** See 2(b) above.

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?

**ANSWER:** The right of arrest is not a discretionary remedy but one to which the Claimant is entitled, provided he complies with the requirements of the court rules.

(See *The Varna* [1993] 2 Lloyd's Rep. 253.) There is, therefore, no obligation, in contract with discretionary remedies, to provide full and frank disclosure in any statement supporting an application for an arrest. The claim can properly be advanced on the best arguable basis. It is however, open to the Respondent to challenge the level of any bail or security provided. There is some support in the older authorities for the principle that where the party has demanded excessive bail he should be ordered to pay the costs of the excessive bail. (See *The George Gordon* [1884] 9 P 46 and *The Irish Fir* [1943] 76 Lloyd's List L. Rep. 51.) At least as regards the cost of maintaining bail, a similar result was suggested by the decision in *The Kos* [2010] EWCA (Civ) 772 where it was held that the costs of putting up security to avoid the threat of arrest could be recoverable as costs "*incidental to the proceedings*" and, accordingly, recoverable from the Claimant in the event the underlying claim failed.

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

**ANSWER:** See 2(b) above.

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?

**ANSWER:** No – see 5(a) above.

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

**ANSWER:** N/A.

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:** There are circumstances, in principle, where arrest proceedings may amount to a breach of contract upon which a claim for damages could be founded. Examples could include appropriately drafted arbitration or exclusive jurisdiction clauses, at least insofar as the arrest proceedings are instituted in order to pursue a claim rather than solely for the purposes of obtaining security. (Compare *Marazuira Navigacion SA v Oceanious Mutual Underwriting Association (Bermuda) Limited* [1997] 1 Lloyd's Rep. 283 and *The Lisboa* [1980] 2 Lloyd's Rep. 546.) Damages have also been awarded where to thwart an English arbitration clause the arresting party insisted on a bank guarantee answerable to a foreign judgment (*The Kallang (No 2)* [2009] 1 Lloyd's Rep. 124).

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, absent, for example, fraud on the uttering or forged documents.

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:** A claim for wrongful arrest is a claim in tort. If and so far as the English courts had jurisdiction to determine a claim in respect of a foreign arrest said to be wrongful, the court would apply the proper law of the tort established pursuant to international private law rules, that is to say Rome II.