

Bogotá DC, March 9, 2016

Mr.

Giorgio Berlingieri

Chairman

International Working Group on the Liability for Wrongful Arrest

Comite Maritime International – CMI

Genoa, Italy

Ref.: Questionnaire on the Liability for Wrongful Arrest

Dear Giorgio:

As per your kind request, I proceed to answer the questionnaire on the subject in reference.

I. International Conventions

- (a) Colombia is not party to any international convention on the arrest of ships; particularly, Colombia is not party to any of the conventions listed in question N° 1.

However, Colombia, as part of the Andean Community, applies Decision N° 487 (December, 2000) of the Commission of the Andean Community, which contains a regime on the arrest of ships, as well as on maritime liens and ship's mortgages. This Decision N° 487 was based on the text of the Arrest Convention of 1999 and the Maritime Liens and Mortgages Convention of 1999.

Decision 487 of the Andean Community was amended by Decision N° 532 (October, 2002), by which a new definition of ship was adopted, meaning any naval construction, which is apt to navigate, independently of her type, class or size.

- (b) As per application of Decision 487 of the Andean Community, a ship can be arrested in Colombia by the existence of a maritime credit listed in article 1 of said Decision 487. This list of maritime credits is exactly the same as the one included in article 1 of the Arrest Convention of 1999.

II. Questions relating to wrongful arrest

1. According to article 50 of Decision 487/2000 the arrestor could be asked by the tribunal to provide

security of the type and amount that the tribunal so requests, in order to provide the arrest order, or once this has been provided, to keep it in force.

2. Under Colombian Law there is no specific test for wrongful arrest, since Colombian courts have not yet dealt with this issue. However, article 51 of Decision 487/2000 establishes that the tribunals of the country in which the arrest has been carried out would also be competent to decide on the liability of the arrestor if the arrest was illegal or unjustified, or the requested and obtained guarantee was excessive. Article 80 of the General Procedure Code of Colombia provides for responsibility of the parties who have acted either recklessly or in bad faith in exercising their rights in court proceedings. By applying this provision, responsibility to pay damages caused by a wrongful arrest would need that the arrestor had acted either recklessly or in bad faith. The law enumerates certain conducts as implying recklessness or bad faith of a party acting before the courts.

3. Under Colombian Law, if an appeal judge revokes a ship's arrest order issued by a first instance judge (without deciding on the merits of the claim), the arrestor could be condemned to pay court costs and expenses. However, the same test mentioned above applies for the responsibility to pay damages arising out of the arrest; i.e.: if the arrest was illegal or unjustified, or the requested and obtained guarantee was excessive, provided that the arrestor acted either recklessly or in bad faith. The law enumerates certain conducts as implying recklessness or bad faith of a party acting before the courts.

4. In this case, the same test applies, as it was mentioned before; i.e., that the arrestor had acted either recklessly or in bad faith. The law enumerates certain conducts as implying recklessness or bad faith of a party acting before the courts.

5. The arrestor can be held liable to pay damages to the owner of the ship if the arrest claim was grossly exaggerated or the guaranteed asked for and obtained was excessive. There is no specific provision in Colombian Law as to the extent of the damages that the arrestor could be condemned to pay in this case. However, general liability rules would lead to a full condemn for all damages directly derived from the wrongful arrest, provided that the arrestor had acted either recklessly or in bad faith.

6. Decision 487 of the Andean Community [based on the Arrest Convention of 1999] does not make the right of arrest subject to the previous verification that the person allegedly liable for the arrest claim is largely solvent or not, or if it would be possible to enforce judgements or arbitrations awards against him. Therefore, our view is that the mere evidence that the person allegedly liable for the arrest claim is largely solvent, or that it would be possible to enforce judgements or arbitrations awards against him does not turn, in itself, the arrest into a wrongful arrest. In any case, the liability of the arrestor would be subject to the evidence that the arrestor acted either recklessly or in bad faith.

7. There are not specific circumstances in which the arrestor would be deemed as liable of a wrongful arrest, apart from those mentioned above.

8. As mentioned before, in case the arrest is revoked, the arrestor might be subject to pay court costs and expenses.

9. According to article 51 of Decision 487 of the Andean Community, the law applicable to determine the liability of the arrestor in the case of a wrongful arrest is the national law of the country where the arrest

was executed. This decision is only applicable to the countries that are parties to the Andean Community (Colombia, Venezuela, Peru and Bolivia). Therefore, if the country where the arrest was executed is not a country that is party to the Andean Community, it is likely that a Colombian judge would apply the national law (*lex fori*).

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If you have any further inquiries on the subject in reference, please do not hesitate to contact me.

Best regards,



José Vicente Guzmán

Presidente

Asociación Colombiana de Derecho Marítimo

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