

**REPLY BY THE PANAMANIAN 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**

Panama is not party, nor signatory of any of the above mentioned Conventions.

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?

The relevant statute is contained in Law No. 8 of 1982 and its amendments, which constitutes the Code of Maritime Procedure.

Generally, the Panamanian Maritime Courts will order vessel arrests based on *prima facie* evidence. When granting an arrest, the Maritime Court is not required to perform an analysis on the merits, only to determine whether there is basis to bring a claim. Defendant has the burden of proof to demonstrate the arrest was not properly granted.

The grounds for enforcement of an arrest application can be any of the following: (i) as security for the claim, and prevent defendant from disposing or transferring assets prior to judgment, (ii) to grant jurisdiction to the Panamanian Maritime Courts by serving a defendant with proceedings through the seizing an asset of the defendant, in connection with claims arising outside of Panamanian jurisdiction, or in connection with local claims, (iii) for the enforcement of maritime liens (*in rem*), in which case the arrest shall have the effect of service of proceedings.

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?

If the purpose of the arrest is to secure the claim (i.e. *in personam* action), then claimant would be required security in an amount between 20% and 30% of the amount of the claim. The amounts would be affixed discretionarily by the Judge within such percentages. Security must be posted in cash, certified checks issued by banks licensed to operate in Panama, Panamanian public debt titles.

If the purpose of the arrest is to grant jurisdiction to the Maritime Court and serve defendant with proceedings through the arrest of the vessel, or to enforce

a maritime lien (*in rem* claim), then only a security of USD\$1,000.00 would be required.

In any case, the initial amount of USD\$2,500.00 would have to be consigned as maintenance and conservation expenses, further advancements may be required by the Marshall, otherwise the arrest can be lifted for lack of sufficient maintenance and conservation funds.

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 arrestor's

(i) awareness/knowledge that this claim had no foundation, or

(ii) negligence in bringing such claim, or

(iii) bad faith or gross negligence or, otherwise, malicious bringing of such claim?

The mere rejection of the claim on the merits by itself would not be a cause for the arrestor to incur in liability, as if the Maritime Court finds that claimant litigated in good faith, then no mandatory legal costs would be imposed on claimant (only expenses), and the general principle is that a declaration of "bad faith" regarding claimant's action be included in the decision, in order for liability for damages to arise. Bad faith would generally qualify in the cases listed in (b) (i) through (iii).

We clarify that in Panama, a special, wrongful arrest motion is available in the following cases: (i) when due to error, fault, negligence or bad faith of the arresting party, an asset that is not property of the defendant is seized; (ii) when assets are seized/arrested in violation of a previous express agreement not to arrest the assets; and (iii) when assets are arrested to secure the execution of an extinguished or inexistent privileged or *in rem* maritime lien in accordance with the applicable substantive laws. The party requesting wrongful arrest motion bears the burden of proof. If the Maritime Court grants the motion, the prevailing party may claim damages and payment of the costs and expenses arising out of said action. The decision on the wrongful arrest motion is an interim decision that does not decide the case on the merits.

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.

If the appeal deals with a wrongful arrest motion in the cases listed above, then it would be possible to bring a claim for damages against the arrestor as indicated above, the extent of damages has to be proven by the affected party.

If the appeal deals with an appeal against the arrest order, the affected party would still have to prevail on the merits in order for liability of claimant to arise.

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

If the appeal deals with a wrongful arrest motion: “when due to error, fault, negligence or bad faith of the arresting party, an asset that is not property of the defendant is seized”, such events constituting acts of negligence would be required. In the other cases liability arises directly from such actions.

If the appeal deals with an appeal against the arrest order, the affected party would still have to prevail on the merits in order for liability of claimant to arise, and liability would arise depending on whether the Maritime Court finds that claimant acted in bad faith. In any case, the extent of damages has to be proven by the affected party.

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?

The cases above could be subject of a wrongful arrest motion (see answer to Q.2 above); liability for damages would therefore arise.

Proof of negligence may be required in certain cases. See answer to Q.3 (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 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?

The determination of the arrest/claim amount, is a matter that is dealt with upon judgment. Claimant is responsible for proving the claim amount. Claimant's failure to produce evidence on the facts of the claim, which would include the claim amount, is an event that excludes good faith and could lead to a declaration of bad faith by the Judge. In such event, the defendant or affected party would be entitled to claim damages from the arrestor; the losses above could in principle be part of a claim for damages.

On the other hand, if defendant prevails in its wrongful arrest motion, as part of its damages claim, such expenses could potentially be included as expenses required to release the arrest.

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

A declaration of bad faith from the Judge in the relevant judgment would be required. In case of a wrongful arrest motion, proof of evidence would be required only in the case when the cause of the arrest is “when due to error, fault, negligence or bad faith of the arresting party, an asset that is not property of the defendant is seized”.

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 to attribute liability to him under your national law?

No. Solvency or lack thereof is not a cause for a wrongful arrest motion, nor a criteria required in order for a precautionary measure to be granted. It should be noted that *in rem* claims require the arrest within Panamanian jurisdiction in order to commence proceedings, and that the arrest is also a means of serving defendant with proceedings.

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

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?

N/A. The main causes are those discussed above (i) because defendant prevails in his wrongful arrest motion, (ii) because the Court finds that claimant acted in bad faith.

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?

Yes. Except in cases when the Court finds that claimant acted in good faith, the Court will impose judicial costs on the claimant who failed to prevail / prove his claim, in favor of the prevailing party. These costs represent a percentage of the claim amount, and are set in accordance with the existing Bar tariff (usually 20% of the claim amount in maritime matters).

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 the 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?

The general rule in Panama is that the competent court to hear a claim for damages from a wrongful arrest is the court that ordered the arrest. This could potentially limit direct access to Panamanian jurisdiction.