

Reply by the German Maritime Law Association

to the CMI Questionnaire of 27 May 2015

**“Study relating to Arrest of Ships with particular emphasis on the
Liability for Wrongful and Unjustified Arrest”**

1. Conventions: 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**
- (v) If none of the above, what is the nature of the Admiralty jurisdiction in your country?**

Germany has ratified the 1952 Arrest Convention by statute dated 21 June 1972¹. When making this ratification, Germany used the option to make reservations in accordance with Article 10 (a) and (b) of the said Convention.

Together with this ratification, the German legislator made small adaptations to the German law in order to implement the 1952 Arrest Convention², but decided against fully incorporating the provisions of the Convention in the relevant German codifications. Therefore, the 1952 Arrest Convention – within its scope of

¹ Gesetz zu dem Übereinkommen vom 10. Oktober 1957 über die Beschränkung der Haftung der Eigentümer von Seeschiffen und zu den auf der IX. Diplomatischen Seerechtskonferenz in Brüssel am 10. Mai 1952 geschlossenen Übereinkommen, BGBl. 1972 II 653, Article 1 No. 1.

² Gesetz zur Änderung des Handelsgesetzbuchs und anderer Gesetze (Seerechtsänderungsgesetz), BGBl. 1972 I 966, Articles 1 No. 3 (new section 482 of the Commercial Code) and 2 No. 4 (a) (new section 904 No. 3 of the Civil Procedure Code); see also the explanatory notes (*Gesetzesbegründung*) under the government bill for this statute, BT-Drs. VI/2225, page 14.

application³ – is of direct application in Germany and will supersede the general provisions⁴ on the arrest of a debtor's assets as a preliminary and protective measure⁵.

Germany has not ratified the Conventions addressed under (ii), (iii) and (iv). However, the 1972 statute on a reform of certain aspects of the maritime law⁶ implemented to a large extent the contents of the 1967 Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages⁷. Hence, national German law largely reflects the content of the 1967 Convention, despite the fact that this Convention has not entered into force.

2. Are there complementary rules, which deal with procedural aspects of arrest in your jurisdiction and if not do you think it would be helpful for CMI to prepare a set of Model Rules?

(i) Complementary rules

General provisions on the arrest of a debtor's assets as a preliminary and protective measure are to be found in the German Civil Procedure Code (*Zivilprozessordnung ZPO*), mainly in sections 916 to 934 and 943 to 945, and are also applicable to the arrest of vessels. Those rules are completed by a provision governing the service of court documents to the master of the vessel in section 619 of the Commercial Code. Under those general rules, German courts have jurisdiction to order the arrest of a vessel as a preliminary and protective measure, if the vessel has called a German port (sections 930 (4) and 931 (7) of the Civil Procedure Code) or when the German courts have jurisdiction over the case on the merits. These provisions are not only complementary to the 1952 Arrest Convention unless derogated by a specific provision of the Convention; they are also governing the arrest of vessels outside the scope of the Convention.

Germany ratified the 1926 Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships and the additional Protocol of 1934. Finally, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement on judgments in civil and commercial matters applies.

³ Also considering the reservations in accordance with Article 10.

⁴ See answer to question 2.

⁵ See page 37 of the explanatory notes (*Denkschrift*) under the government bill for the statute of ratification, BT-Drs. VI/2224.

⁶ *Seerechtsänderungsgesetz*, see Fn. 2.

⁷ See in particular Article 1 No. 43 (new sections 754 – 764 of the Commercial Code) of the *Seerechtsänderungsgesetz*, see Fn. 2, providing a new statutory regime on maritime liens. This legal regime is – to a large extent – still in force (today: 596 – 604 of the Commercial Code).

(ii) Model Rules

The working group has considered the question as to whether it would be helpful for the CMI to prepare a set of Model Rules dealing with procedural aspects of ship arrests, and if so, which aspects should reasonably be addressed. The working group has come to the conclusion that Model Rules aiming at an international harmonization of the following subjects should be considered and supported:

- Harmonized rules stipulating the type of security (other than a cash deposit) being acceptable to achieve the release from arrest:

The working group of the DVIS takes the view that a club letter of undertaking (LOU) should be accepted as suitable security. A Model Rule to that end may have better chances to meet acceptance if accompanied by a template defining the minimum standards for the wording of such LOU – although an adaptation to the law applicable may be required. Defining which organizations should be acceptable issuers of such LOU may amount to a sensitive task: One conceivable approach might be a rule stating that the courts of the State of arrest are to accept a LOU from an organization which – in this State – would also be an accepted insurer (issuer of blue card) for purposes of insurance certification, for instance under Article 12 of the Nairobi Convention, 2007, or Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

- Protective writ to be considered in ex parte proceedings

The working group is of the opinion that the procedural provisions in some jurisdictions are not sufficiently ensuring the principle of equality of arms. One approach in Model Rules may be the proposal of provisions for a "protective writ" instrument, allowing a sort of caveat in cases where a ship owner has reason to fear an abusive arrest and aims to ensure that his position will be considered by the court when deciding in ex parte proceedings. As an example, reference can be made to the German concept of "*Schutzschrift*" which satisfies that purpose.

- Strict liability for unlawful arrest

Furthermore, model rules on the liability for unlawful arrest could also lead to a strengthening of the principle of equality of arms. The working group is of the opinion that the strict liability system is a rather effective bar against abusive arrests and does on the other hand not hinder a claimant from seeking and obtaining security for a justified claim.

3. Upon what grounds can a vessel be arrested (if different from any of the Conventions to which your country is a party), as referred to in answer to question 1?

Regarding vessels flying the flag of a Contracting State of the 1952 Arrest Convention, Article 2 of that Convention applies, meaning that such vessels can be arrested only on grounds of a maritime claim as defined in the Convention⁸, except for the arrest made by public authorities for their claims under German law.

For vessels flying the flag of a non-Contracting State or vessels flying the German flag, Article 8 (2) of the Convention provides that those may be arrested in respect of any other claim for which the law of the relevant Contracting State permits arrest. In case of Germany, that means that there is no limitation to specific grounds:

All payment claims against the legal owner of the vessel (*in personam* claims), irrespective of the specific grounds for such claims, can justify an arrest of the vessel (and of any other assets of that owner within the jurisdiction of the court) to secure said payment claim. The same applies for claims which are not yet payment claims of a specific amount, but which may be transformed in such payment claim in the future⁹: a typical example would be a statutory or contractual indemnity against third party claims.

The concept of an *in rem* action is not familiar to German law.

- 4. a) With reference to whichever Convention you have identified in answer to question 1, what maritime liens are recognised in your jurisdiction?**
- b) In addition to the maritime liens identified in paragraph 4(a), are there any other circumstances in your law pursuant to which a right of arrest exists? (Common law countries refer to such rights (which do not run with the vessel notwithstanding its sale, as maritime liens do), as statutory rights *in rem*, which can only be exercised against the party who incurred the underlying debt or liability and is the owner or bareboat charterer of the vessel to be arrested.)**

⁸ Bearing in mind the German reservations, this does not apply to disputes as to the title to or ownership of any ship, and to disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship.

⁹ See section 916 (1) of the Civil Procedure Code.

a)

When the maritime lien is recognized under the applicable law, German courts will recognize the maritime lien (see question 5).

Where German law applies, only the following liens are recognized (section 596 of the Commercial Code)¹⁰:

- i. wages due to the master and other members of the crew;
- ii. public dues relating to the vessel, navigation, port call or pilotage;
- iii. liability for personal injury or loss of life or for damage to property in connection with the operation of the vessel, excluding, however, claims relating to damage to property capable to be based on contract;
- iv. salvage rewards, special remuneration and salvage cost; claims for general average contribution against the owners or against the carrier entitled to payment of freight; wreck removal claims;
- v. claims of social security bodies (including loss of employment insurance) against the owners.

b)

Prior to answering this question, we need to address an assumption implied in the wording thereof: The question implies that a vessel can be arrested in order to enforce a maritime lien. Under German law, there is an academic dispute as to whether an arrest is the suitable remedy for that purpose. This dispute is caused by an older case of the Hamburg Court of Appeal, which held that an arrest should be enforced by an injunction prohibiting the removal of the vessel and ordering the transfer of possession to a trustee (*Sequester*)¹¹. Some voices in the legal literature are of the opinion that this reflects today's status of law¹². However, there are more recent decisions of other German courts pursuant to which an arrest is a suitable remedy for enforcing a maritime lien¹³, and the Hamburg judges also seem to have adopted this view¹⁴. Accordingly, it can be expected that German courts will today

¹⁰ See also article 4 (1) of the 1967 Convention which served as model for the German legislation.

¹¹ OLG Hamburg, MDR 1967, 677.

¹² *Wedekind*, in: *Depré*, ZVG, 2014, § 165 no. 69 and § 169 no. 91.

¹³ OLG Rostock, TranspR 2000, 40 (and decisions of the lower courts in Rostock referred to in this judgement); OLG Bremen, TranspR 1995, 302 (and decision of the lower court in Bremerhaven referred to in this judgement).

¹⁴ OLG Hamburg, TranspR 1994, 69; OLG Hamburg, VersR 1989, 1164.

allow an arrest based on a maritime lien, and it is well arguable that the contrary opinion requiring the applicant to take a different procedural route is outdated.

Where the arrest is not based on a maritime lien, a vessel can be arrested in order to obtain security for *in personam* claims against the legal owner of the vessel at the time of the arrest.

The concept of an *in rem* action is not part of German law¹⁵.

Hence, in order to seek an arrest in connection with a claim against, for instance, the former owner, or the bareboat charterer, the applicant would have to show that there is a concurring personal liability of the current owner in relation to such claim (for instance based on tort or an applicable fraudulent transfer statute / insolvency avoidance provisions).

5. What are the connecting factors applicable to the identification of the proper law applicable to maritime liens? (For common law countries, the issue is whether the *lex loci* or the *lex fori* is applied to determine which maritime liens are recognised in the jurisdiction in which the arrest takes place.)

Article 45 (2) of the Introductory Law to the Civil Code provides specific rules of conflict of laws for statutory liens on means of transport, such as a maritime lien:

- The creation of a maritime lien is subject to the law of the secured claim, the *lex causae*. That means that German courts will recognize, for instance, a maritime lien for necessities securing the purchase price claim of a supplier of bunkers, if the law applicable to the relevant purchase price claim (i.e. the law of the contract) recognizes such maritime lien for necessities, which is not known to German law. The majority of legal authors takes the view that the reference to the law of the secured claim excludes a *renvoi* under the international private law of that jurisdiction¹⁶.
- For determining the law applicable to priorities of maritime liens, different connecting factors are applicable¹⁷.

¹⁵ See also answer to question 3.

¹⁶ *Mansel*, in: *Staudinger*, BGB, 2014, Art. 45 no. 213 with further references; *Wendehorst*, in: *Münchener Kommentar zum BGB*, 6th ed. 2015, Art. 45 no. 79 with further references; *Brinkmann*, in: *Prütting* and others, BGB, 6th ed. 2011, Art. 45 no. 7; contrary view suggested by *Spickhoff*, *Bamberger/Roth*, BGB, 3rd ed. 2012, Art. 45 no. 9.

¹⁷ See outline of this legal matter in the answer to question 18.

6. What, if any, security/undertaking as to damages is required to be provided by an arresting party?

See our answer to question 16, which appears to be addressing the same subject.

7. What form of security is acceptable to achieve the release from arrest?

The Civil Procedure Code provides (in section 923) that an arrest order needs to specify a specific amount of money to be deposited (in cash) in order to have the arrest lifted. This is a reference to a cash deposit with the local court or other competent public body under the applicable regional statutes. The amount will be the amount of the arrest claim plus a lump sum for expected cost of the main proceedings, as well as interest accruing during the main proceedings.

The court is entitled to order an alternative type of security to be provided.

Even without a specific court order, the cash deposit can be replaced by an irrevocable bank guarantee issued by a bank authorized to do business in Germany.

The defendant can apply for permission to provide security by other means than cash deposit or German bank guarantee, in accordance with section 108 of the Civil Procedure Code. The court has a discretionary power to grant such permission. In maritime matters, some judges may be willing to permit a guarantee from a foreign bank or insurer (including a club letter). Other judges may be reluctant to grant such permission. Hence, often the parties will try to reach an agreement on the type and wording of the security. The court will not interfere if the parties agree on any other type of security.

8. Are caveats against arrest or release from arrest available? If so what are the circumstances in which they may be applied for?

We understand that this question refers to a common law practice linked to *in rem* proceedings, where a party wishing to prevent an arrest (for instance the owner) may obtain the entry of a caveat against arrest in a "caveat book", but that such caveat usually does not prevent an arrest, but would only allow the applicant of the caveat to seek the discharge of the arrest and, under certain conditions, the condemnation of the arresting party in damages. If referring to this particular notion of "caveats", the answer to the question would be "no".

In Germany, there is, however, a motion which, to some extent, satisfied a comparable interest: the so called "*Schutzschrift*". When translating this term as

"caveat against arrest", one needs to bear in mind that the underlying legal concepts are however different.

An application for an arrest warrant would always be an application of the claimant against a specific defendant, usually the current owner of the vessel. Therefore, any party which has reason to believe that it may become subject to arrest proceedings as defendant may submit to the relevant court the "caveat against arrest" (*Schutzschrift*), which is basically a brief outlining why the expected application for an arrest warrant should be denied. A German court receiving a *Schutzschrift* is obligated to, if indeed arrest proceedings are submitted against the party that submitted the *Schutzschrift*, take the arguments set out in the *Schutzschrift* into consideration and, if needed, allow for a hearing. The rules regarding *Schutzschrift* are not explicitly mentioned in the German Civil Procedure Code but are the result of common practice¹⁸.

9. What insurance arrangements are put in place for arrested vessels by the Court, and/or the arresting parties?

In order to understand the position of German law, one needs to bear in mind that there is a clear distinction between (i) the arrest warrant which is a court order allowing the applicant to have assets of the defendant (such as a vessel) arrested, and (ii) the execution (*Vollziehung*) of the arrest warrant, i.e. the attachment (*Pfändung*) of the vessel.

The attachment of tangible assets (including a vessel) in Germany is handled by bailiffs (*Gerichtsvollzieher*), which are court officers.

Such attachment is a two-step process¹⁹:

- As a first step, the bailiff is taking the relevant asset into his or her possession (*Inbesitznahme*).
- This is (usually immediately) followed by a second step, which either consists in
 - the bailiff marking the item as attached, but handing it back to the person which had possession prior to the first step being executed, this person being supposed to hold the item in custody until

¹⁸ Cf. *Kessen*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, Anh § 935 no. B 2 with further references.

¹⁹ *Lüke*, in: *Wieczorek/Schütze*, *ZPO*, 4th ed. 2015, § 808 no. 33; *Münzberg*, in: *Stein/Jonas*, *ZPO*, 22nd ed. 2002, § 808 no. 31.

enforcement proceeds further (i.e. until a forced sale will be initiated),
or

- the bailiff taking the item into his custody (*Wegnahme*).

According to the relevant statutory law, handing the marked item back into the custody of the former possessor is the normal procedure, and taking it into the bailiff's own custody is the exception²⁰. However, in case of the arrest of a (sea-going) vessel, there will usually be exceptional circumstances justifying the taking over into the bailiff's custody (*Wegnahme*): In the first alternative (item being marked and handed back), the former possessor is entitled to use the item; in case of a vessel, that would often mean leaving the jurisdiction of the court; accordingly, this standard approach is not workable for an arrest of vessels.

When the bailiff carries out the attachment of the vessel, he would therefore usually take it in his or her custody, which includes a duty to guard the vessel and to keep it insured. The bailiff will be requiring the applicant to make advance payments covering the expected expenses, including an insurance premium.

The procedure described above regarding insurance of the vessel after seizure is not clearly governed in the relevant statutory and administrative rules, but reflects the current practice of the bailiffs acting in German ports.

10. Can a Court or a Court officer or official carrying out Court ordered arrests be sued if the vessel arrested sustains damage whilst under arrest?

In 2005, the German Federal Court of Justice revised its former case law according to which an arrest warrant issued in *ex parte* proceedings was not a decision on the merits for the purpose of section 839 (2) of the German Civil Code (BGB), meaning that the state (and ultimately the judge) could theoretically be liable for a wrong decision in case of (gross) negligence; since that landmark case, an *ex parte* arrest warrant is considered as a decision on the merits (for liability purposes), so that it is almost impossible to engage the liability of the state (and ultimately the judge) for a wrong decision²¹, liability would require that the decision qualifies as criminal offence on the part of the judge.

Once the vessel has been arrested, there is a certain risk that physical damage might occur as a result of acts or omissions of the bailiff. Regarding custody after arresting a vessel, reference is made to the answer to question 9 above. While the vessel is in the custody of the bailiff, the bailiff has a duty of care. In case of a breach of this

²⁰ See section 808 of the Code of Civil Procedure.

²¹ BGH, NJW 2005, 436, 437.

duty of care leading to damage to the vessel, there can be a basis for a claim, not against the bailiff, but against the public entity which employs the bailiff (section 839 of the German Civil Code)²².

In (rare) cases where the vessel is seized, but remains in the owner's custody, it is rather unlikely that the bailiff (or more precisely, the public entity employing the bailiff) can be held liable for damage sustained by the vessel whilst under arrest. A liability claim might however be based on the bailiff's decision not to take the vessel into his or her custody, if that choice was unreasonable.

11. Does your national law allow a ship owner to obtain damages for wrongful or illegal arrest?

Yes. Section 945 of the Civil Procedure Code provides that the applicant is liable for loss sustained by the defendant (i.e. usually the legal owner of the vessel) in cases where the arrest was not justified at the time the arrest warrant was issued, or where the arrest is lifted because main proceedings for payment are not commenced within the time limit set by the court.

The provision only applies to loss suffered as a result of the enforcement (*Vollziehung*) of an arrest order²³.

This liability does not depend on whether the applicant acted negligently or in bad faith, it is a strict liability²⁴. The liability is unlimited. However, a general rule is that the defendant in the arrest proceedings being entitled to claim under section 945 of the Civil Procedure Code may only ask for compensation of its own loss, but normally not for loss sustained by third parties (for instance charterers)²⁵. This general rule has been confirmed by the German Federal Court of Justice²⁶; however, this decision leaves some room to argue that there might be specific circumstances in cases under which the owners should be entitled to claim for third party damage as well.

²² Nies, *Praxis der Mobiliarvollstreckung*, 1998, Part IV no. 135 to 136.

²³ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 20 with further references; Grunsky, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 6; Walker, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 25.

²⁴ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 2; Grunsky, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 19.

²⁵ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 24 with further references; Walker, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 29.

²⁶ BGH, NJW 1994, 1413, 1416.

12. If the claim for which security was requested by the arrest has been rejected by the court hearing the case on the merits, in what circumstances would the arrestor be liable for damages?

(i) Would the mere rejection of the claim suffice?

(ii) Would it instead be necessary that the claimant was or should have been aware that its claim had no basis, and would proof of its bad faith or gross negligence be required?

(i)

Under German law, obtaining an arrest warrant requires the applicant to put forward a specific claim for which security is sought. In order to obtain the arrest, there is no need to fully prove such claim. Therefore, if it later turns out that there was no justified claim to be secured, that would mean that the arrest was – from the beginning – not justified. That would be a typical case for liability under section 945 of the Civil Procedure Code²⁷.

In proceedings for compensation under section 945 of the Civil Procedure Code, the court would have to follow the decision on the merits in the main action, if that decision (of a court or arbitral tribunal) is considered to be binding on the defendant/arrestor. That is determined under the general rules on the binding effect of German court judgements or the recognition of foreign judgements or arbitral awards²⁸.

Thus, in the typical case that the judgment or arbitral award rendered in the action on the merits (and rejecting the claim on the merits) will be considered as binding on the defendant/arrestor, the court deciding on a liability claim will find that the defendant/arrestor is liable under section 945 of the Civil Procedure Code without having to review the case on its own²⁹.

²⁷ See also answer to question 11 above; *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 9; *Grunsky*, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 19.

²⁸ BGH, NJW-RR 1992, 998, 999 with further references; *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 16 with further references; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 15 with further references.

²⁹ Cf. BGH, NJW 1989, 106, 107.

(ii)

As explained in 11 above, there is no additional requirement of negligence or bad faith of the applicant when applying for the arrest. The mere rejection of the claim will suffice³⁰.

- 13. If the claim was not against the owner of the ship and under the law of the country in which the arrest was effected it could not be enforced on that ship, would the arrestor be liable for damages or would proof of its bad faith or gross negligence be required also in this case?**

We understand that this question relates to one specific example of the situation contemplated in question 12 above, i.e. the case on the merits against the legal owners being rejected (and potentially a third party, such as a charterer, being held liable):

Under German law, that would be a case governed by the principles outlined under question 12 above; as there was no claim against the legal owners justifying the arrest (from the beginning), the enforcement of the arrest will give rise to strict liability under section 945 of the Civil Procedure Code.

If the claimant, knowing that there is no case against the legal owners named as defendant in the arrest proceedings, commences the case on the merits against a third party only, the defendant in the arrest proceedings would request the court to fix a time limit for commencing proceedings on the merits against such defendant and after expiry of this time limit (usually between two weeks and one month), the arrest would be lifted by the court, section 926 of the Civil Procedure Code. That immediately engages the applicant's liability under section 945 of the Civil Procedure Code, the main proceedings against a third party not being relevant.

In another similar case, where the applicant has named a third party (instead of the legal owner) as defendant in the arrest proceedings because it intends to commence the case on the merits against such third party, the court – if properly reviewing the application – should not grant an arrest warrant, and if it did grant the warrant in *ex parte* proceedings not noticing the issue, it will set aside the arrest after the defendant has raised the issue. Again, that would engage strict liability without regard to the outcome of the case on the merits.

³⁰ See also Fn. 24.

Accordingly, in Germany, an applicant should only seek the arrest of a vessel if there is a claim against the current owner, or security title (maritime lien, mortgage, other foreign security title recognized in Germany) on the vessel for a third party claim. Otherwise, the applicant will be facing strict liability.

14. If the amount of the claim was grossly exaggerated, would the arrestor be liable for the damages caused to the owner of the ship:

- (i) for the extra cost of the security,**
- (ii) for the delay due to the greater time required to procure the security, or**
- (iii) for the owner being unable to provide the security?**

If only a part of the claim was justified, the arrest for securing a claim beyond that amount was unjustified. Accordingly, to that extent, there will be a liability for an arrest having been (partly) unjustified from the beginning³¹, see also answer to question 11 above, without the requirement of a "grossly exaggerated" claim.

However, the element of causation will limit liability under section 945 of the Civil Procedure Code:

(i)

Extra cost incurred for putting up security for the unjustified part of the claim was caused by the unlawful part of the arrest claim and would therefore be recoverable under section 945 of the Civil Procedure Code, for example loss of interest on the part of the (unnecessary) security amount³².

(ii) and (iii)

If a part of the arrest claim was justified, the seizure of the ship was resulting from a justified arrest, and therefore also the according delays and loss resulting therefrom.

Accordingly, it may be very difficult for the owner to prove that he suffered specific delay and associated loss only because of the unjustified part of the arrest claim.

³¹ *Drescher*, in *Münchener Kommentar zur ZPO*, 4th ed. 2012, § 945 no. 9; *Haertlein*, in: *Kindl/Meller-Hannich/Wolf*, *Gesamtes Recht der Zwangsvollstreckung*, 3rd. ed. 2015, § 945 no. 10; for an excessive interlocutory injunction also: BGH, NJW 1981, 2579, 2580.

³² *Thümmel*, in: *Wieczorek/Schütze*, *ZPO*, 4th ed. 2014, § 945 no. 22.

Thus, the risk for the applicant regarding this type of claim can be considered as rather limited.

However, in case of a grossly exaggerated claim where the owner was unable to provide the security because of the gross exaggeration, but would have been able to provide it for the justified claim, such proof of causation might be possible; hence, the applicant would then be liable for that particular loss. Generally, loss of use is a type of loss recoverable under section 945 of the Civil Procedure Code³³.

15. If the person allegedly liable for the claim for which the arrest of the ship is made is largely solvent, e.g. it owns many ships that call regularly at the port in which the ship had been arrested, is the arrest justified or not and if it is not justified, would the arrestor be liable in damages?

Under German law, the arrest of a ship does no longer require the applicant to put forward that there is a material risk that he or she will not be able to enforce a future judgement or arbitral award on the merits without obtaining security via arresting (referred to as "cause for arrest", "*Arrestgrund*"), see section 917 (2) of the Civil Procedure Code ("No grounds for a writ of seizure need be given if the seizure is being implemented solely by way of securing the compulsory enforcement against a ship.").

As there is no requirement for a "cause of arrest", a missing "cause of arrest" is not (no longer) a suitable case to present a claim under section 945 of the Civil Procedure Code.

That is different for any other arrest under German law, i.e. arresting any other asset of an alleged debtor but a ship: Here, the applicant would have to plead a "cause for arrest", and missing cause would justify a compensation claim. The allegation of a missing cause would be reviewed and resolved by the court in the proceedings on the liability action under section 945 of the Civil Procedure Code.

16. Is a claimant, in order to obtain an order for arrest, required to provide security on a reasonable basis?

Under sections 921, 108 of the Civil Procedure Code, the judge has a discretionary power to decide on whether the applicant is required to provide security, and if so, for which amount³⁴.

³³ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 22; Walker, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 26.

³⁴ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 921 no. 1; Walker, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 921 nos. 6 and 12.

Where judges have a discretionary power, decisions are less predictable. However, a general rule of thumb could be described as follows: The more solid the claim documentation in the arrest application (*Grad der Glaubhaftmachung*), the greater the chance to obtain an arrest without having to provide security³⁵.

Furthermore, there are cases where the applicant may have an interest in developing and sharing (with the court) thoughts on the likely loss which could be caused to the defendant as a result of the enforcement of the arrest, because this potential exposure should determine the security amount³⁶.

17. Does your national law provide for a penalty to be paid by the arrestor in case of a wrongful or illegal arrest separate and distinct from any damages payable to the owner?

No, except where obtaining the arrest involved fraud or other criminal acts (for instance a false affidavit), which may obviously give rise to criminal proceedings / prosecution.

18. What are the laws of priorities concerning creditors in relation to ship sales which are applied in your jurisdiction?

(i) German law

The priorities under German law, in case of the forced sale of a sea-going vessel registered in Germany, or a similar foreign vessel³⁷, are as follows³⁸:

1. costs of the forced sales' proceedings (section 109 (1) of the Forced Sales Act (*Zwangsversteigerungsgesetz*));
2. rarely applicable³⁹: in case of bankruptcy of the owners, costs of the insolvency estate for the valuation of the assets to be auctioned (section 10 (1) no. 1a of the Forced Sales Act);

³⁵ Cf. *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 921 no. 2.

³⁶ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 921 no. 8; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 921 no. 5.

³⁷ For non-registered crafts, the provisions of the Forced Sales Act do not apply (see also *Wedekind*, in: *Depré*, ZVG, 2014, § 171 no. 28). The result as regards priorities will be rather similar. Because of the limited practical relevance in commercial shipping, we have not outlined the alternative provisions of the Civil Procedure Code.

³⁸ *Cranshaw*, in: *Depré*, ZVG, 2014, § 10 nos. 148 et seq.; *Wedekind*, in: *Depré*, ZVG, 2014, § 169 nos. 37 et seq.

³⁹ *Cranshaw*, in: *Depré*, ZVG, 2014, § 10 no. 30.

3. creditors secured by a maritime lien (sections 10 (1) no. 4 and 11 (1) of the Forced Sales Act and section 602 of the Commercial Code); amongst those creditors, the following priorities apply (see section 603 (1) of the Commercial Code):
 - a) wages due to the master and other members of the crew;
 - b) public dues relating to the vessel, navigation, port call or pilotage;
 - c) liability for personal injury or loss of life or for damage to property in connection with the operation of the vessel, excluding, however, claims relating to damage to property capable to be based on contract;
 - d) salvage rewards, special remuneration and salvage cost; claims for general average contribution against the owners or against the carrier entitled to payment of freight; wreck removal claims; and
 - e) claims of social security bodies (including loss of employment insurance) against the owners;

Note: If a maritime lien secures interest or other periodic claim items, only the positions for the current year and the two years before that are sharing this priority;

4. creditors secured by a mortgage (section 10 (1) no. 4 and 11 (1) of the Forced Sales Act and section 602 of the Commercial Code)⁴⁰ or a mortgage-like position obtained by a ship arrest⁴¹; amongst those creditors, the following priorities apply (see section 11 (1) of the Forced Sales Act and section 25 of the Act on Ownership and Mortgages in Vessel (*Schiffsrechtgesetz*):
5. claims of the creditor(s) initiating the forced sales' proceedings (unless such claim already covered by one of the items listed above);
6. claims of secured creditor(s) having acquired their security rights after commencement of the forced sales' proceedings;

⁴⁰ Note: A mortgage on a ship registered with the German ships' register can be registered on the basis of the owners' consent, but also by court order. Such court order would be granted on application of a creditor having an enforceable judgement or arbitral award against the owner of the vessel; in order to obtain such registration of a mortgage by court order, the vessel does not need to have called a German port.

⁴¹ Note: In case of a ship arrest as a preliminary protective measure, the creditor is not granted a mortgage. However, the execution of the arrest (i.e. the actual attachment by the bailiff) creates a specific lien to the benefit of the creditor arresting the vessel (*Arrestpfandrecht*), this lien being granting security title similar to the security interest of a mortgagee, see section 931 (2) of the Civil Procedure Code for vessels registered in Germany and sections 930 (1), 804 (1) of the Civil Procedure Code for foreign vessels.

7. interest claims / other periodic claims of creditors secured by a maritime lien or by a mortgage (or other creditors referred to in no. 4 above) for time periods earlier than two years prior to the current year.

(ii) German International Private Law

Whereas the above relates the priorities under German substantive law, another interesting aspect is whether German courts would always and automatically apply German law in case of a forced sale taking place in Germany:

(a) Secured creditors in general

As German law stands today, it has yet to be determined what general rule of conflict of laws applies to the priority of security rights / interests in a vessel, in particular to mortgages:

1. According to an older case of the Federal Court of Justice⁴², the priority of secured creditors in general is determined by the relevant *lex fori*⁴³.
2. In most conceivable cases, the *lex fori* corresponds to the *lex rei sitae*⁴⁴. A reference to the *lex rei sitae* has been specifically enacted for priorities of maritime liens and more generally all security rights in article 45 (2) of the Introductory Law to the Civil Code⁴⁵. A part of the voices in the legal commentaries are suggesting that this provision does not only apply to priorities of maritime liens, but to priorities of security rights / interests in a vessel in general⁴⁶.
3. If arguing that article 45 (2) of the Introductory Law to the Civil Code does not apply, a further conceivable approach would be to apply the general rule in article 45 (1) no. 2 of the Introductory Law to the Civil Code, according to which rights in a vessel in general are governed by the law of the state of registration (first register, not an additional bareboat register).

⁴² BGH, NJW-RR 1991, 1211, 1213.

⁴³ *Spickhoff*, Bamberger/Roth, BGB, 3rd ed. 2012, Art. 45 no. 9; *Brinkmann*, in: *Prütting* and others, BGB, 6th ed. 2011, Art. 45 no. 8.

⁴⁴ *Eckardt*, in: *Münchener Kommentar zum HGB*, 3. Aufl. 2014, vor § 596 no. 7; *Mansel*, in: *Staudinger*, BGB, 2014, Art. 45 no. 215 f.

⁴⁵ See also section (b) below.

⁴⁶ *Mansel*, in: *Staudinger*, BGB, 2014, Art. 45 no. 217 with further references; *Wendehorst*, in: *Münchener Kommentar zum BGB*, 6th ed. 2015, Art. 45 no. 81.

This dispute would usually not have to be resolved where a German vessel is auctioned / sold in Germany, but it can be decisive in case of the sale of a foreign vessel. The fact that this discussion is still ongoing can create some legal uncertainty when it comes to the priority of security right in case of the sale of a foreign vessel in Germany.

(b) Maritime Liens

Furthermore, there is some discussion in German doctrine regarding the priority position of foreign maritime liens which are recognized in Germany:

As a general rule, the *lex rei sitae* is applicable to the priority of maritime liens, pursuant to article 45 (2), 2nd sentence of the Introductory Law to the Civil Code. Hence, in case of an arrest in Germany, the ranking / priority of more than one maritime lien is usually subject to German law.

At the same time, a German judge would refer to the law of the secured claim (*lex causae*) in order to determine whether a maritime lien securing such claim has come into existence (see article 45 (2), 1st sentence of the Introductory Law to the Civil Code)⁴⁷.

That leads to the question of the priority of a foreign maritime lien recognized in Germany under the aforementioned rule, but not known in the German Commercial Code:

Without provisions on such specific lien (for instance for necessities), there are no statutory provisions on the priority of such particular maritime lien. The following arguments are conceivable:

1. Being a proper maritime lien, such foreign maritime lien arguably should have priority over a mortgage in case of an auctioning of the vessel. Not appearing in the catalogue of section 603 (1) of the Commercial Code, those foreign maritime liens should – however – have a priority ranking below the liens listed in the Commercial Code.

⁴⁷ See also the answer on question 5 above.

2. However, the view outlined above is disputed: There is an older court decision ruling that a foreign maritime lien which – under the *lex causae* – would have a lower ranking than a mortgage should not be recognized in Germany as having priority over the mortgage⁴⁸. Some voices in the legal literature are interpreting this in a way that mortgages shall always have priority over such foreign maritime lien which is not known to German law⁴⁹.

This dispute has yet to be resolved by the German courts.

⁴⁸ OLG Oldenburg, VersR 1975, 271.

⁴⁹ Eckardt, in: Münchener Kommentar zum HGB, 3. Aufl. 2014, vor § 596 no. 8.