

QUESTIONNAIRE

STUDY RELATING TO LIABILITY FOR WRONGFUL ARREST

Answers of the Belgian MLA.

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

Belgium is a Party to the 1952 Arrest Convention and the 1926 Maritime Liens and Mortgages Convention. The Arrest Convention has been incorporated in Articles 1467 to 1480 of the Code of Civil Procedure (CCP), and the Liens and Mortgages Convention in Articles 23 to 37 of the Maritime Act.

Belgium has not ratified the 1999 Arrest Convention or the 1993 Liens and Mortgages Convention.

(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?

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?

The court, when allowing an arrest, may require the arresting party to provide security (Art. 1467, second paragraph CCP). Until recently, this possibility was only rarely used in practice. Since early 2016, however, and apparently as a result of the many arrests in OW Bunker cases, some courts in some circumstances have started to impose security.

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 the arrestor's:
 - (1) 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?

The mere rejection of the claim on the merits would certainly not be sufficient to make the arresting party liable for wrongful arrest.

Even the way in which the arresting party handled its claim on the merits would not be directly relevant to the question whether the arrest was wrongful. In order to answer that question, the court would only appreciate whether the decision to arrest the vessel was unreasonable in light of the circumstances and the information available to the arresting party at the time of the arrest. An arrest would only be considered wrongful if it was made in circumstances under which no reasonable, prudent party would have arrested the vessel.

It does take quite exceptional circumstances for an arrest to be considered wrongful under Belgian law, provided always that the arresting party fully disclosed all relevant facts in its ex parte application. The arrest Judges tend to take it rather personal if the arrest is challenged and it then turns out that the ex parte application did not give the full picture.

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

The fact that the arrest is appealed against and then repealed does not, in and of itself, make the arresting party liable for damages. If the ship owner, as part of his appeal, argues that the arrest was wrongful (i.e. made in circumstances in which no reasonable creditor would have arrested the vessel), and if the court accepts that argument (which it does not do often in practice), the arresting party can be ordered to pay damages.

The burden of proof of the ship owner is to show that the arrest, under the circumstances of the case, was in fact a tort within the meaning of Article 1382 of the Belgian Civil Code. A party commits a tort if it does not act as a normal, reasonable and prudent person (the *bonus pater familias*) would have done under the same circumstances.

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?

If the arresting party has a maritime claim against the vessel, it is entitled to arrest the vessel. The fact that the owner of the vessel is not the debtor of the claim does not destroy or prevent the right to arrest the vessel. In practice, one of the parties on the vessel's side will

put up security, and that security will cover both the debtor's and the owner's (possible) liability for payment of the maritime claim.

The fact that ultimately the claim cannot be enforced against the ship owner in person or against the ship in rem does not, in and of itself, make the arrest wrongful or the arresting party liable for damages.

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

A gross exaggeration of the claim could only lead to liability if such exaggeration amounts to a tort within the meaning of Article 1382 of the Civil Code. If indeed the arrest for a grossly exaggerated amount is considered a tort, the damaged party (ship owner) is entitled to full compensation, and should be put back in the position he would have been in had the tort not been committed. All (proven) loss or damage, *caused* by the tort, must in principle be compensated.

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

In general, an arrest (*bewarend beslag, saisie conservatoire*) is only possible if the arresting party can show urgency, i.e. can show that his claim will be endangered if he does not take action. With regard to the arrest of vessels, however, urgency is presumed. It is, therefore, the ship owner who will have to prove that there is no danger whatsoever of the claim not being satisfied. The courts will probably also take into account that the ship owner, if he is indeed that solvent, will have no trouble putting up security.

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?

No.

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?

No.

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?

As explained above, a wrongful arrest is essentially a tort within the meaning of Article 1382 of the Belgian Civil Code. The applicable law would be determined by the private international law rules.