

ASSOCIAÇÃO LEX MARIS PORTUGAL

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REPLY BY THE PORTUGUESE 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 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*

Portugal is party to the Arrest Convention 1952 (ratified with Decree Law no. 41007, 16/02/1957).

(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?

Under the 1952 Arrest Convention, a vessel can be arrested in Portugal based on one of the maritime claims listed in article 1 (1) of said Convention. Outside the scope of application of the 1952 Arrest Convention, i.e. to obtain security to any other unlisted claim or when the vessel flies under the Portuguese flag and is physically within the Portuguese jurisdiction, the creditor must make use of Portuguese domestic law (articles 362-376 and 391-396 of the Civil Procedure Code, hereinafter CPC). In this case, further to a *prima facie* evidence of his claim (*fumus boni iuris*), the arrestor shall also produce evidence of the existence of a well-grounded fear of losing security for its claim, i.e. that the delay for obtaining a decision on the merits is likely to affect his right to enforce such judgement on the ship (*periculum in mora*).

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 judge has a discretionary power to decide on whether the arrestor has to provide security and if so for which amount. However, this is not a common practice in our courts.

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:

(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?

Under article 390 (1) CPC and article 621 of the Civil Code (hereinafter CC), the arrestor will be held liable for damages caused with fault to the arrestee provided that the arrestor has not acted with the normal prudence required. The mere rejection of the claim or the expire of the arrest order by reasons imputable to the arrestor are not sufficient to entail a wrongful arrest claim, as the arrestee has to require the proceedings and has the burden of proof of the alleged damages incurred in and of the fact that the arrestor acted without the normal prudence required.

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?

If the arrest order is repealed by an appeal court, upon the request of the arrestee a wrongful arrest claim could follow, and the arrested party has to give evidence of the alleged damages and that the arrestor acted without the normal prudence.

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?

It is worth mentioning that Portuguese law traditionally establishes three categories of liabilities related to a ship: i) the liability of the owner (*proprietário*) who is also the *armador*¹, ii) the liability of the mere manager and iii) the liability of the mere owner, which is subsidiary. In Portugal a ship may be arrested when the claim is against the bareboat charterer, as pursuant to articles 2 (1) and 5 of our Decree Law no. 202/98, 10/07/1998, the bareboat charterer is presumed (*juris tantum*) to be the manager of a ship and therefore is considered to be liable insofar as his relationship to third parties, *maxime* creditors, is concerned. There is a prevailing view in Portugal according to which the last sentence of article 3 (4) of the 1952 convention would include the arrest of a vessel in respect of claims against time charterers and voyage charterers. However, the fact that in such cases arrest would normally be granted does not mean that the forced sale of the arrested ship would be permissible, since it must be preceded by a judgment against the owner of the ship.

Also in this case, article 390 (1) CPC and article 621 CC will apply, as the arrestor will be held liable for damages caused with fault to the arrestee provided that the arrestor has not acted with the normal prudence required.

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 the losses incurred by the owner of the ship by reason of the delay caused by the greater time required to procure 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?

¹ Under article 1, paragraphs (c) and (d) of Decree Law 202/98, 10/07/1998, *armador* is the person or entity that, in its own interest, executes all legal and material acts necessary for the ship to be in a position to undertake her voyage.

Pursuant to article 390 (2) CPC, if part of the arrest claim has been considered justified, the judgement on the merits of the arrestor's claim, shall condemn the latter to pay back to the arrestee any undue amount received. In this case, the arrested party is not required to allege and give evidence on the negligence, bad faith or gross negligence of the arrestor.

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 or 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?

Under question no. 1 (b), it was already explained, where the 1952 Convention does not apply, the arrestor should plead a cause for arrest, i.e. that there is a material risk that the delay in obtaining a judgement on the merits could likely affect his rights to enforce the decision on the ship.

Aside from this legal constraint, there is no limitation to a creditor's right to proceed with the arrest of any of the debtor's assets, regardless of the latter's financial capacity and solvency.

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?*

Pursuant to articles 390 CPC and 621, an arrestor can also be held liable in damages for the arrest of a ship if it has expired, failing the applicant of the arrest to bring proceedings on the merits before the court within the legal delay.

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. Apart from the obligation to pay back any sum received from the arrestee, there is no further sanction or penalty to be levied upon the arrestor, except when the application for arrest was based on any criminal act.

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?

According to article 6 of the 1952 Arrest Convention, all issues arisen from an arrest and related to the arrestor's liability for a wrongful arrest shall be dealt with under the law of the contracting State where the arrest has been applied for and where the damages occurred. Under article 71 (2) CPC, Portuguese courts would not be competent in this case.

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