

LIABILITY FOR WRONGFUL ARREST A REPORT ON THIS STUDY AND ON THE ACTIVITIES OF THE IWG

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The 1952 and 1999 Arrest Conventions do not assist much with regard to providing uniform rules on the test for wrongful arrest and for the entitlement to damages.

In fact, while art. 6 of the 1952 Convention merely contains a general reference to the law of the State where the arrest is made, art. 6 of the 1999 Convention goes only a bit further and gives the Court powers to impose security and jurisdiction to determine the extent of liability, if any, of the claimant, for loss or damage as a consequence of the arrest having been wrongful or unjustified or of excessive security having been demanded and provided.

From the Preparatory Works of the 1999 Convention¹ it appears that an arrest is unjustified when there is no doubt about the solvency of the debtor as it would be the case if he owns many ships. But what is the standard for establishing when an arrest is wrongful and entitles to damages? Is the dismissal of the claim sufficient and liability is therefore strict, or either bad faith or gross negligence is required, or only lack of ordinary diligence should be proved?

The idea of this study started at the CMI Conference in Hamburg after Dr. Aleka Mandaraka-Sheppard made a presentation titled "*Wrongful arrest of ships: a case for reform*"². There the position on wrongful arrest in English law is outlined and is compared with other common law and some civil law jurisdictions. The author makes a plea for a reform of English law or, more importantly, reform of the law at an international level.

The test for wrongful arrest in English law is based on the decision of the Privy Council of 1858 in the "*Evangelismos*", relating to a casualty in the Thames at night when a ship navigating in the river collided with a ship at anchor but continued her course. Boats from the ship at anchor, the "*Hind*",

¹ CMI website - Work in progress - Study relating to liability for wrongful arrest - Documents of interest.

² On the basis of her article published in JIML (2013) vol 19, issue 1, pp 41-59; see CMI Yearbook 2014, 282.

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made searches of the other ship and the following day found a ship in a dock, the “*Evangelismos*”, which was believed to be the ship which had collided with the “*Hind*” as she had damages to her bow.

The “*Evangelismos*” was arrested but it was discovered that she was not the ship which collided with the “*Hind*”. Thereafter the owners of the “*Evangelismos*” claimed damages for wrongful arrest during a period of nearly three months. However the claim for wrongful arrest was dismissed on the basis that the arrest was made in the *bona fide* belief that the “*Evangelismos*” was the colliding ship.

That was confirmed on appeal by the Privy Council, which held that the identity of the colliding ship was not proved but there were grounds to believe that the “*Evangelismos*” was the one which collided and the owners of the *Hind*, in order to be entitled to damages, had the burden of proving that the arresting party acted with *mala fides* or *crassa negligentia*.

Apparently the test of the “*Evangelismos*” is applicable also in other common law countries.

In certain civil law countries the arresting party is faced with strict liability if the claim fails on the merits and there would be no need to prove bad faith or gross negligence. In Italy the test is that the arresting party may be held liable for damages by the Court holding on the merits if it is proved that he acted without ordinary diligence, the dismissal of the arrest claim not being sufficient. However damages may already be adjudged by the Court of the arrest if proof of bad faith or gross negligence is given, which are evidenced also by a disproportion between the size of the claim and that of the arrest.

The CMI therefore considered to look at the subject by constituting an IWG, with the initial task of preparing a Questionnaire aiming at inquiring on how wrongful arrest is regulated in the various jurisdictions.

With Aleka Mandaraka-Sheppard as Rapporteur, the IWG included the other Vice President of the CMI Christopher O. Davis, the Past President of the CMI Karl-Johan Gombrii and Ex.Co. member Ann Fenech.

The Group started drafting a Questionnaire and much debate took place on the various questions to be put to the NMLAs.

Eventually the CMI Questionnaire was finalized and circulated shortly before the Istanbul Colloquium.

In the CMI website, under “Work in progress”, a Section was devoted to the “Study relating to liability for wrongful arrest”, to list the members of the IWG and to contain certain documents including the Questionnaire, the correspondence with the Presidents of the NMLAs, the Responses to the Questionnaire and the Preparatory Works of articles 6 of the 1952 and of the 1999 Arrest Conventions.

Whilst the National Associations were commencing to answer the Questionnaire, the IWG was joined by Sir Bernard Eder, who has been

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campaigning for some 30 years to change the law relating to wrongful arrest in England.

He is convinced, as Aleka Mandaraka-Sheppard, that the English Courts should revise the test in the “*Evangelismos*” or, at the very least, that the arrestor should be required to provide a cross-undertaking in damages (if necessary fortified by proper security) as a pre-condition of any arrest in the same way as the grant of an ordinary injunction.

Also Sir Bernard Eder wrote an article: “*Wrongful Arrest of Ships: A time for change*”³. That was a speech for the 2013 lecture at the Tulane University. Interestingly enough, the article is followed by a reply from Professor Martin Davies, the Director of the Tulane Maritime Law Center, and by a rejoinder from Sir Bernard.

Incidentally, the position under U.S. law seems to be that the mere dismissal of the arrest claim is not sufficient to render the arresting party liable in damages. However a party, whose ship has been wrongfully arrested, may be entitled to damages but, as in U.K. law, proof of bad faith, malice or gross negligence is required.

There has been quite a positive reaction to the Questionnaire as 33 National Associations have answered so far: Australia and New Zealand, Brazil, Canada, Chile, Colombia, Croatia, Ecuador, Finland, France, Germany, Greece, Hong Kong China, Ireland, Israel, Italy, Japan, Denmark, Democratic People’s Republic of Korea, Malta, Mexico, Netherlands, Nigeria, Norway, Panama, Poland, Romania, Russian Federation, Senegal, South Korea, Spain, Turkey, Ukraine, United Kingdom, United States of America.⁴

The responses to each of the questions were summarised by the Rapporteur and the Synopsis is presented in alphabetical order of the countries which responded to the CMI Questionnaire by 10 March 2016. In addition, the responses are set into two tables: the first table presents a shorter summary of the answers to the CMI Questionnaire per question and country and the second table sets the answers out in a sequential order of the questions.⁵

A preliminary review of the responses has been made in order to see how great differences exist amongst the domestic laws of the States to which the National Associations belong, for the purpose of assessing the possibility of establishing a uniform law on liability for wrongful arrest.

It would appear that, although the national regimes vary considerably, there is a significant number of States with a certain degree of uniformity, or whose rules do not vary too considerably.

³ Tulane Maritime Law Journal, volume 38, Number 1 Winter 2013, 115.

⁴ CMI website - work in progress - study relating to liability for wrongful arrest - documents produced.

⁵ CMI website - work in progress - study relating to liability for wrongful arrest - documents produced.

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In fact most National Associations, albeit with different terminology, have stated that under their law the arrestor is liable for damages caused by the arrest if he has acted with gross negligence.

Depending also on how the debate will develop at the Session in New York, a further more in depth comparison between the national regimes could be made, also in view of the fact that additional responses to the Questionnaire are expected.

The IWG, possibly turned into an International Sub-Committee to allow that all National Associations have voice to the discussion, could then draw up a tentative draft uniform set of rules on liability for wrongful arrest, to be incorporated either into a Protocol to the 1999 Arrest Convention or into a model law or other instrument for their acceptance or implementation by national laws.