

STUDY RELATING TO LIABILITY FOR WRONGFUL ARREST

Summary of NMLAs answers to the CMI questionnaire

By the Rapporteur¹ to the CMI IWG

Aleka Sheppard

[Where there are [] in the text is the Rapporteur's comment in an attempt to explain the meaning of the particular answer]

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a) In case of mere rejection of the claim, the arrestor could be held liable only for the payment of loss of suit expenses (i.e. court expenses and lawyers' fees up to 20% of the amount of the claim. General damages incurred due to wrongful arrest would be dealt with under civil liability rules (tort). These damages will be sought through a separate claim.	26
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ANSWERS TO THE ABOVE QUESTIONS BY INDIVIDUAL NMLAs

I. INTERNATIONAL CONVENTIONS:

1. 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
2. iv) Maritime Liens and Mortgages Convention 1993
 - 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?

A. Australia and New Zealand:

- a) Australia and New Zealand are not parties to any of the listed Conventions.

A creditor can arrest a vessel in Australia on the grounds of [Articles of the Australian Admiralty Act 1988 \(Cth\) \(AUS Act\)](#) and in New Zealand on the grounds of [Articles of the Admiralty Act 1973 \(NZ Act\)](#).

B. Brazil:

- a) Brazil is a party to the Maritime Liens and Mortgages Convention 1926.

b) In addition to the Maritime Liens and Mortgages Convention 1926, Brazil Commercial Code and Brazilian Civil Procedure Code provide the rules for the arrest of vessels in Brazil.

C. Canada:

a) Canada is not party to any of the listed conventions, but has incorporated various aspects of the listed conventions into its national law.

b) A warrant for arrest of a ship is available to secure a claim recognized under Canadian Maritime Law as defined and delineated in [Federal Courts Act, R.S.C. 1985, c. F-7 as amended](#). (see sections [2](#), [22](#) and [42](#)).

D. Chile:

a) Chile is not a party to any of the listed Conventions.

b) A creditor can arrest a vessel under Chilean law on the grounds of Articles of the Code of Commerce (C. Com).

E. Colombia:

a) None.

b) Andean Community of Nations (Decision 487, 2000 as amended by Decision 532, 2002) based on the Arrest Convention 1999 and Maritime Lines and Mortgages Convention 1993.

F. Croatia:

Croatia is a party to the Arrest Convention 1952, which applies to ships flying the flag of a contracting state. For other ships the provisions of the [Maritime Code 2014](#) applies. Some of the provisions of this Code are very similar to the respected provisions of the 1952 Convention. In addition, some procedural issues are governed by the Enforcement Act 2012.

G. Ecuador:

Maritime Warranties (Maritime Lines and Mortgages) and Arrest of Ships – Decision 487 – Andean Community of Nations CAN (February 5th 2001).

H. Finland:

a) Finland has incorporated most of the provisions of the Arrest Convention 1952 into its [maritime code \(FMC\) \(Chapter 4\)](#).

I. France:

a) France is party to the Arrest Convention 1952 and the Maritime Liens and Mortgages Convention 1926.

In addition, if a vessel is not flying the flag of a contracting State of the 1952 Arrest Convention, she could be arrested either on the grounds of this Convention or according to the general rules of the article L. 511-1 of the [Code of Enforcement of Civil Proceedings](#) under which any claimant who has prima facie claim can apply to the Court for a protective attachment of his debtor's assets, if he proves that recovery of the claim is in jeopardy.

J. Germany:

a) Germany is a party to the Arrest Convention 1952 (exercised option to make reservation pursuant to art.10 (a) (b) of the Convention and decided against full incorporation of the convention provisions).

b) In addition to the Arrest Convention 1952, German Commercial Code and German Civil Procedure Code provide the rules for the arrest of vessels in Germany, which govern the arrest of ships outside the scope of the Convention.

K. Greece:

a) Greece is a party to the Arrest Convention 1952.

b) In cases where the Arrest Convention 1952 is not applicable, vessels may be arrested, on the grounds of [Articles 682 seq. and 707 seq. of the Greek Code on Civil Procedure \(GCCP\)](#), for any type of claims, provided that the claimant can show on a prima facie basis that :

- It has a good claim; and

- There is a risk that the claim will not be satisfied unless security is granted or urgent circumstances exist making necessary the arrest of a vessel as security for the claim.

L. Hong Kong:

The Arrest Convention 1952 was extended to Hong Kong in 1963 and still continues to apply. The High Court Ordinance HCO (ss. 12A and 12B) give effect to the Convention although not in identical wording.

M. Ireland:

a) Ireland is a party to the Arrest Convention 1952.

b) The ships of both Convention and non- Convention States can be arrested in Ireland for maritime claims enumerated in art. 1 of the 1952 Convention and not otherwise. In addition, a ‘sister’ ship registered in a Convention State may be arrested in Ireland.

N. Israel:

a) Israel is not a party to any of the listed Conventions.

b) The admiralty court’s authority today is derived from the British Admiralty Court Act 1861, the Admiralty Rules 1883 and the Israel Maritime Court Law 1952.

O. Italy:

a) Italy has ratified: the Arrest Convention 1952 with the reservation to apply the national law to maritime claims under art. 1 (o) and (p) and not to apply the first paragraph of art. 3 under art. 1(q). It has also ratified the Maritime Liens and Mortgages Convention 1926 with the reservation to apply its national law in respect of the extension of maritime liens to the vessel’s appurtenances in addition to the so- called ‘accessories’ of the art. 4.

P. Japan:

a) Japan is not a party to any of the above mentioned Conventions.

b) Due to absence of a particular legal framework in the Japanese admiralty jurisdiction, arrest of vessels is regulated by domestic enactments, like the Civil Preservation Act and the [Civil Execution Act](#) which apply generally to all cases.

Under Japanese Law the available types of arrest are the following:

- i) “Provisional Attachment” to preserve the property for the enforcement of judgment.
- ii) “Public Auction to execute Security Rights” (like Maritime Liens and Mortgages) and
- iii) “Compulsory Execution” which is an attachment leading to the sale of the attached property through public auction in order to satisfy the claim via the sale.
- iv) Arrest under the “Lien on movables”, according to Article 321 of the [Japanese Civil Code](#).

Q. Korea:

a) Korea is not a party to any of the listed Conventions.

b) Provisions of the Civil Enforcement Act of Korea apply.

R. Malta:

a) Malta is not a signatory to any of the listed conventions. The legal framework regulation for arrests in rem is found in Articles 742B – 742D of the [Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta \(the COCP\)](#).

b) Under Maltese law, a creditor may seek to arrest a ship:

- In personam: When Maltese courts have in personam jurisdiction over the owner, and when the claim has a strong connection with Malta. Maltese courts can order the arrest of the person (on the grounds listed in Article 742(1) of the [COCP](#)), as security for a debt owed by the owner of the vessel.

- In rem: an arrest in rem may only be brought if the claim falls under one of the grounds listed under article 742B of the [COCP](#), based upon those found in Arrest Conventions of 1952 and 1999.

S. Mexico:

Mexico is not a party to any of the listed Conventions, but Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1993 are incorporated in Mexico’s internal legislation.

T. Netherlands:

a) Netherlands is a party to the Arrest Convention 1952. At the ratification, Netherlands reserved the right not to apply the Convention to the arrest of ships for claims enumerated in paragraph (o), (p) and (q) of article 1.

b) Netherlands has a civil law tradition, therefore the (in rem) arrest is not known. Thus the term “attachment” of a vessel is used.

U. Nigeria:

a) Provisions of the Arrest Convention 1952 are incorporated to the Admiralty Jurisdiction Act 2004 (“AJA”).

V. Norway:

Norway is a party to the Arrest Convention 1952, party to the Arrest Convention 1999 and party to the Maritime Liens and Mortgages Convention 1993.

W. Panama:

a) Neither a party nor a signatory of any of the Conventions.

b) The relevant statute is contained in law No. 8 of 1982 and its amendments, the CMP. Arrest can be sought for i) security for the claim ii) to grant jurisdiction to the Court iii) for the enforcement of maritime liens.

X. Poland:

a) Poland is a party to the Arrest Convention 1952 and the Maritime Liens and Mortgages Conventions 1926.

b) Provisions of the [Polish Civil Procedure Code \("PCPC"\), Part II, Security Procedure, art. 730-757](#) apply.

Y. Romania:

a) Romania is a party to the Arrest Convention 1952 and to the Maritime Liens and Mortgages Convention 1993.

b) The grounds on which a vessel can be arrested in Romania are the provisions of the Arrest 1952 Convention along with articles 959 to 968 of the [Romanian Civil Procedural Code](#).

Z. Russia:

a) Russia is a party to the Arrest Convention 1952 and the Maritime Liens and Mortgages Convention 1993.

b) In accordance with the provisions of the Arrest Convention 1952, a ship may be arrested only if a claimant has a valid maritime claim. An arrest in Russia would be carried out in accordance with the rules provided by the Code of Civil Procedure or the [Arbitration Procedural Code of the Russian Federation](#) (APC).

AA. Senegal:

a) Senegal has ratified the Arrest Convention 1952.

BB. Spain:

a) Spain is a party to the Arrest Convention 1999 and the Maritime Liens and Mortgages Convention 1993.

b) Arrest of ships in Spain is ruled by articles 470 and seq. of the [Spanish Shipping Act \(the SSA\)](#) which refer to the provisions of the Arrest Convention 1999 and to the [Civil Procedure Act \(the CPA\)](#).

CC. Turkey:

- a) Turkey is a party to the Maritime Liens and Mortgages Convention 1926.
- b) Arrest of ships in Turkey is ruled by the 5th book of the 6102 [Turkish Commercial Code \(TCC\)](#).

DD. Ukraine:

- a) Ukraine is a party to the Arrest Convention 1952 and to the Maritime Liens and Mortgages Convention 1993.

EE. United Kingdom:

The UK is a party to the Arrest Convention 1952 (the substance of the Convention is reflected in ss. 20 and 21 of the SCA 1981).

FF. United States:

- a) The U.S. is not a party to any of the listed conventions.
- b) - Insofar as *arrest of a vessel* is concerned, U.S. law ([Supplemental Admiralty Rule C to the Federal Rules of Civil Procedure](#)) requires the claimant to have a valid maritime lien (also known as an in rem right) against the vessel at the time the action is filed.
- Insofar as *attachment of a vessel* is concerned, U.S. law ([Supplemental Admiralty Rule B to the Federal Rules of Civil Procedure](#)) requires the claimant to have a valid maritime claim against the vessel's owner personally (as opposed to an in rem claim against the vessel).

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?**

A. Australia and New Zealand:

There is no such requirement for counter-security under Australian and New Zealand laws.

B. Brazil:

There is no such requirement under Brazilian Law, but the judge has discretion, when he is considering the plausibility of the claim and the risk of losses to the opposing party. For example, should a foreign company without assets in Brazil file a claim to arrest a vessel, the judge may request security from the claimant - corresponding to between 10% and 20% of the claimed amount- to guarantee the payment of court's costs and lawyer fees.

C. Canada:

There is no such requirement under Canadian law, however at any stage in the procedure a claimant might be called upon to provide a security.

D. Chile:

Security for wrongful arrest depends on the judge's discretion.

E. Colombia:

The arrestor could be asked by the Tribunal to provide counter- security (art.50 Decision 487, 2000).

F. Croatia:

On an application for arrest, as a provisional measure, the debtor has the burden of providing prima facie evidence of his claim and the probability of a danger that without such a measure the debtor may prevent enforcement of the claim. It is presumed that such a danger exists if the claim has to be executed abroad (art. 344 Enforcement Act 2012).

However, the court may order an arrest at the claimant's application, even if he has not shown, prima facie, that the claim and the probability of the danger (mentioned above) exist, if the claimant provides counter-security for possible damages to the debtor, within a time limit set by the court (art.349 Enforcement Act 2012). If the claimant does not provide the security deposit within the set time limit, the court shall reject the application for the arrest. Furthermore, depending on the circumstances of the case, the court may at the debtor's application, require a deposit to be provided by the claimant even when the claimant has shown a prima facie case of the existence of the claim and the danger. Failing to provide a security, within a set time limit, the court shall suspend the proceedings and set aside the actions related to the arrest. However, the debtor's application for counter-security does not postpone the implementation of the arrest until the court reaches a decision on the debtor's application. Finally, the claimant always has to pay an advance related to the costs of the arrest procedure.

G. Ecuador:

No obligation for counter security is provided in the legislation. However, the Tribunal has discretion.

H. Finland:

For a vessel to be arrested, the arrestor needs to provide security, usually a bank guarantee (its amount is decided by the bailiff and is usually considerable), to cover the costs and economic losses in case the arrest is proved unnecessary at a later stage. A supplemental guarantee is also usually demanded from one or two persons.

I. France:

There is no such requirement under French law but the possibility is not excluded but it is very rare in practice.

J. Germany:

Security for wrongful arrest depends on the judge's discretion. The more solid the claim documentation in the arrest application is, the greater the chance to obtain an arrest without having to provide security.

K. Greece:

There is no such requirement under Greek law, unless the Court requires the claimant to do so ex officio or at the request of the owner of the vessel under arrest and at its discretion.

L. **Hong Kong:**

Counter security is not required.

M. **Ireland:**

[The answer is not related to counter-security for wrongful arrest but it states that an undertaking is required to indemnify the Admiralty Marshall in respect of charges and expenses.]²

N. **Israel:**

No counter-security is required.

O. **Italy:**

Under art. 669 of the [Italian Code of Civil Procedure](#) (C. C. P.), the court has discretion to require security for the settlement of any damages suffered in case of wrongful arrest taking into consideration all the material circumstances.

If the warrant is issued subject to providing security, the arrest cannot be enforced unless the security is provided within a time limit. If the security is ordered following the arrest, failure to provide it can result in the lifting of the arrest.

P. **Japan:**

The Japanese Law requirements for security in order to obtain and maintain an arrest depend on the type of the attachment as mentioned on answer one. Consequently, counter security must be provided by the claimant to issue a writ of arrest in case of Provisional Attachment. The amount of security is in the region of one third of the value of the claim. On the contrary, there is no such requirement for counter- security inasmuch as the other instances of arrest are concerned.

Q. **Korea:**

In order to obtain an order of arrest, a claimant is required to provide security, which equates to 10 % of the claim amount. This security may be provided in the form of performance guarantee insurance policy.

R. **Malta:**

There is no requirement under Maltese Law on the claimant to provide security as a prerequisite to obtain an order for arrest. The court may, on good cause being shown by the defendant (i.e. if there is good cause that the warrant of arrest may be unlawful), order the claimant to provide “sufficient security (not less than €11,600) for the payment of penalties, damages (which may include the expenses necessary to maintain the vessel and crew) and interest”.

S. **Mexico:**

Security must be provided to obtain an arrest order and the amount is entirely upon the Judge’s discretion.

T. **Netherlands:**

² Comments in [...] are of the rapporteur

Attachment can be ordered provided security is put up (for the loss that may be caused by the attachment), up to an amount to be determined by the judge. However, in practice this is not applied very often and the shipowner would have better chances to obtain counter-security if he applied for it.

Ordinarily, a claimant seeking an arrest order must be able to establish counter-security to satisfy a wrongful arrest counter-claim.

U. **Nigeria:**

Security for costs.

V. **Norway:**

The Court has discretion to decide that the claimant provide counter security for potential liability claims (NMC s.33-3).

W. **Panama:**

Security only for the Marshall's expenses.

X. **Poland:**

Polish Law provides that the Court may require counter-security (bail), as a condition of the arrest, from the claimant in case of wrongful-arrest. In practice this almost never happens.

However, after the vessel is arrested, the debtor may apply to the court for sufficient bail to be provided by the claimant.

Y. **Romania:**

In order to obtain an order of arrest, a claimant is required to provide security, fixed by the court (generally 10% of the value of the claim, but no more than 20%) and will need to be placed in cash. In cases, in which there is no evidence of a commercial relationship between the creditor and the debtor, the amount of the security will be fixed at 50% of the claimed amount and will take the form of a bank letter of guarantee.

Z. **Russia**

Under Russian law, a claimant is requested to provide security in an amount and in terms determined by the court to cover any damages that may arise due to wrongful arrest. A claimant must confirm the posting of such security. If not, the court may, (after having assessed the case) leave the application for the arrest in abeyance until the counter security is put up.

AA. **Senegal:**

The arrestor provides security: a) when vessel in question flies Senegalese flag and b) the claimant/arrestor is a foreign national.

BB. **Spain:**

A claimant must post security or bond for at least 15% of the amount of the maritime claim, subject to the discretion of the court to require a higher security.

CC. **Turkey:**

Yes, a claimant should provide security in the amount of 10,000.00 SDR.

DD. Ukraine:

The Court may require the claimant to provide security for potential damages to the defendant which may result from wrongful arrest or excessive bail or security demanded for the claim. The amount should not exceed the amount of his claim.

EE. United Kingdom:

No court rules or other rules require the arrestor to provide security as a condition to obtaining or maintaining an arrest (other than an undertaking to the Admiralty Marshall to pay his charges).

FF. United States:

A claimant is not required to provide security (except “security for costs” for the Marshall’s fees and expenses). Generally, Marshalls require in the range of \$5,000 to \$10,000.

- 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 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?**

A. Australia and New Zealand:

a) No

b) Under Australian law, the claimant will be held liable if he acted “unreasonably” and without a good cause.

Proof of bad faith or gross negligence is required in New Zealand.

B. Brazil:

a) In case of mere rejection of the claim, the arrestor could be held liable only for the payment of loss of suit expenses (i.e. court expenses and lawyers’ fees up to 20% of the amount of the claim). General damages incurred due to wrongful arrest would be dealt with under civil liability rules. These damages will be sought through a separate claim.

b) There is no specific provision in respect to wrongful arrest under Brazilian Law but general principles of negligence apply with regard to proof and the test. Should the owner of the vessel be able to prove that the arrest was filed in bad faith, or due to gross negligence or malice, the arrestor could be held liable to pay loss of suit expenses and also a penalty for bad faith litigation in the range of 1% of the claim plus all the damages suffered and lawyer fees.

C. Canada:

a) No.

b) Under (iii) yes, as decided by the Supreme Court of Canada in *Armada Lines v Chaleur Fertilizers* [1997] 2 S.C.R.617.

D. Chile:

a) No.

b) The arrestor may be held liable in tort. The burden of proof is on the defendant to show that damages were caused by the arrest obtained in bad faith or negligence (gross or not).

E. Colombia:

a) No specific test for wrongful arrest because the Colombian courts have not dealt with issue. However, art.51 of Decision 487, 2000 provides that liability may arise if the arrest was illegal or unjustified or the guarantee obtained was excessive.

b) The test is recklessness or bad faith of the claimant.

F. Croatia:

a) The debtor has a right to claim from the claimant damages he incurred from an arrest which has been determined as unfounded or unjustified. Unfounded or unjustified arrest is wrongful. Arrest is unjustified if the claimant has not in the prescribed time commenced appropriate action for the merits of the case to be determined, as well in a case in which his claim has been rejected by the court dealing with the merits of the case (art. 354 Enforcement Act 2012).

b) The claimant's liability for damages is strict liability.

G. Ecuador:

a) No.

b) Proof of illicit or unjustified arrest is required (art.51 Decision 487 CAN).

H. Finland:

There is strict liability imposed on the arrestor for the loss or damage if the arrest is proved to be unnecessary. The arrestor would thus be liable in damages by reason of the mere rejection of the claim.

I. France:

Recent case law requires proof of damages due to wrongful arrest by reason of abuse of rights, such as vexatious arrest, excessive security, arrest of wrong vessel, misuse of proceedings.

J. Germany:

a) Yes, under s. 945 of the German Civil Procedure Code, if the arrest was unjustified on the merits.

b) Strict liability.

K. Greece:

According to Article 703 of the GCCP, if the claim for which the vessel was arrested is rejected by the Court (hearing the case on its merits) by a final and unappealable judgement, arrestor's liability (in respect of any loss or damage caused as a result of the arrest or by granting security) will arise only if he was aware or, due to gross negligence, he ignored that the claim in respect of which the arrest was demanded did not exist.

There are very few precedents dealing with damages for wrongful arrest. The reason for this is that in order to arrest a vessel, a summary judgment is required and, therefore, the judge considers arguments and evidence from both sides. If the judge is persuaded that, on a prima facie basis, there is a good claim and a need for arrest or security, it is very difficult for the defendant to argue subsequently that the claimant knew he did not have a good case (unless the claimant used false evidence).

L. Hong Kong:

- a) No.
- b) Proof of bad faith, gross negligence or malice is required.

M. Ireland:

- a) No.
- b) Proof of iii is required.

N. Israel:

- a) No.
- b) As Israeli Law derives from British Law, it does not contain provisions for damages in the event of wrongful arrest, unless bad faith or malice can be shown.

O. Italy:

- a) The mere rejection of the claim does not entail liability in damages.
- b) According to Italian case law (Corte di Cassazione), the arrestor is liable for damages due to wrongful arrest and it must be shown he acted without 'ordinary prudence'.

P. Japan:

There are no statutory provisions dealing with liability for wrongful arrest. The issue is governed by the provisions of tort law under the Civil Code.

The arrestor will be held liable for wrongful arrest, if it is proved that his behaviour constitutes tort; mere rejection of the claim is not sufficient. However, rejection may give rise to a presumption of negligence and it is upon the arresting party to rebut the presumption and prove that he acted in good faith and on reasonable grounds.

Q. Korea:

- a) [The answer seems to be that the arrestor will not be held automatically liable in damages for the mere rejection of the claim because proof of either awareness or negligence by claimant is required (see (b) below)]

b) Proof of II. 2 (i), (ii) or (iii) is required.

R. Malta:

a) Under Maltese law, the arrestor is not liable to pay damages by reason of mere rejection of the claim on its merits.

b) Maltese law provides that if the arrest was requested by the arrestor frivolously or vexatiously (situation that may be tantamount to the ones described in III.2(b) (i) (ii)[sic] (iii), damages and penalties will arise. In such cases, the defendant will have to file a separate claim for damages and will need to provide evidence that the request for arrest was indeed frivolous and / or vexatious.

S. Mexico:

The arrestor will be liable in damages for the mere rejection of the claim; however the amount of damages must be proven at Court. It also must be proven that those damages are a direct and immediate consequence of the arrest.

T. Netherlands:

The Dutch Court of Cassation ruled in two separate cases that:

- if it appears that the attachment was effected wrongfully, the loss caused by the attachment must be compensated by the person who effected it, notwithstanding that the latter was convinced on reasonable grounds of the existence of his right of action and did not act light-heartedly (in Dutch, [ECLI: NL: HR: 1965:AC4076; NJ 1965, 331](#)). [i.e. strict liability]

- A further decision of the Dutch Court of Cassation ruled that the person effecting an attachment is liable for the consequences of an attachment if his claim was wholly unfounded (strict liability [ECLI: NL: HR: 2003:AL7059; NJ 2004, 150](#)).

U. Nigeria:

a) No.

b) The test for wrongful arrest is set out in s.13 of AJA. It requires proof of “unreasonably and without good cause” arrest.

V. Norway:

a) According to the Norwegian Dispute Act s.32.11 the claimant has strict liability for the defendant’s economic loss if he does not have a maritime claim at all.

b) The arrestor would also be liable in damages if it was negligent to bring such a claim (NDA s.32.11).

W. Panama:

a) No; a mere rejection of the claim will not qualify for wrongful arrest if the court finds that the arrestor litigated in good faith. In such a case, no mandatory legal costs will be imposed on the arrestor (only expenses).

b) Wrongful arrest motion is available in cases of i) error, fault, negligence or bad faith of the arresting party or if the asset is not the property of the defendant, ii) when the asset is arrested in violation of an express contractual term and iii) when the arrest is sought with regard to an extinguished maritime lien. Bad faith will be held in cases of II.2 (b)(i) (iii).

X. Poland:

Strict liability. An arrestor can be held liable in damages for the arrest of a ship for mere rejection of the claim or any other discontinuance of the litigation, and therefore its liability does not depend on proof of fault.

The debtor must prove his loss was caused due to the wrongful arrest.

Y. Romania:

The arrestor will be held liable for damages only if he acted in an abusive manner when he requested the arrest of the vessel. An abusive behaviour would notably be constituted by requesting a few times the arrest of the same vessel for the same claim with the intention to cause damages to the owner of the vessel or acting in a vexatious manner.

Z. Russia:

The defendant can claim damages for wrongful arrest if the court rejects the claim on its merits (strict liability); so proof of (i)(ii)(iii) is irrelevant. Defendant must prove his interests were infringed by the arrest and also the damages he suffered.

AA. Senegal:

a) Mere rejection of the claim does not trigger arrestor's liability.

b) Arrestor would be liable if evidence of i or ii or iii.

BB. Spain:

Strict liability of the arrestor applies in the event of wrongful arrest and the rejection of the claim may trigger that liability. The defendant can initiate proceedings for the assessment of damages arising from the arrest.

There is therefore no need for the defendant to prove negligence, gross negligence or bad faith of the claimant.

CC. Turkey:

a) TCC not clear about damages if the Court rejects the claim.

b) If the arrest is unjustified, the arrestor will be liable in damages but Turkish law has a gap in what circumstances the arrest would be unjustified.

DD. Ukraine:

a) In case of arrest to secure a maritime claim, the arrestor will not be liable for mere rejection of the claim.

b) In all instances, according to art. 1166 of the Civil Code of Ukraine and judiciary practice the arrestor will be held liable if the arrest was wrongful, and damages were caused by the arrest, unless the arrestor shows the damages were not due to his fault.

EE. United Kingdom:

a) No.

b) Under English law the owner of the arrested ship can only recover compensation for wrongful arrest if there is proof of malice (no honest belief in entitlement to arrest) or gross negligence.

FF. United States:

a) No. Under U.S. law, the fact that a claim is ultimately rejected does not, standing alone, render the arresting party liable in damages for the arrest.

The burden of proof is on the party claiming wrongful arrest/attachment to show specific facts of required conduct and to demonstrate that the arresting party acted in bad faith, malice, or gross negligence. Given this high standard, arrests and attachments are not often found to have been wrongful.

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?**

A. Australia and New Zealand:

- Australia: The claimant must have acted “unreasonably” or without a good cause.
- New Zealand: Proof of bad faith or gross negligence is required.

B. Brazil:

If the arrest is repealed in second instance, without analysis of its merits, the arrestor will be liable for the payment of loss of suit expenses, and may be subject to a penalty for bad faith litigation, if applicable. Any claim for damages arising from the arrest will need to be pursued in a new lawsuit provided there is evidence to support a liability in the tort of negligence as aforementioned.

C. Canada:

- a) Yes, but only in the circumstances set out in II.2. (b)(iii) (i.e. proof of gross negligence).
- b) For liability in the event of wrongful arrest, gross negligence or malicious intent to cause harm is required.

D. Chile:

a) No.

b) Should the arrested party seek indemnity for the damages suffered, he has to initiate an action in tort by separate proceedings. In this case, he has the burden to prove negligence or bad faith on behalf of the arrestor.

E. **Colombia:**

The arrestor could be condemned to pay court costs and expenses but the same tests mentioned above applies, i.e. bad faith or recklessness.

F. **Croatia:**

See II.2 (a) (b) (art. 354 Enforcement Act 2012) above.

G. **Ecuador:**

Under the Civil Procedural Code if the arrestor losses the arrest claim he will be ordered to pay costs and damages but this Code will be derogated by the General Procedural Code (22nd May 2016). Nevertheless, the arrestor will be responsible if the arrest was illicit or unjustified (art. 51 Decision 487 CAN).

H. **Finland:**

If an appeal court repeals an arrest decision by a court of first instance, the arrestor will be liable in damages for the consequences of the arrest as mentioned in II.2 (i.e. strict liability applies).

I. **France:**

The arrestor will be held liable for damages due to abuse of rights which would be a presumption of negligence or bad faith.

J. **Germany:**

a) Yes, if the arrest was not justified, or lifted because main proceedings not issued within the time limit.

b) Strict liability.

K. **Greece:**

Under Greek Law, the claim would be dismissed on the merits in the circumstances described under II.2. In case a claim is dismissed on formalities, it may be resubmitted to the competent Court.

L. **Hong Kong:**

a) No.

b) N/A.

M. **Ireland:**

a) Only in circumstances as under b below.

b) Liability only arises if the claimant acted in bad faith, gross negligence or maliciously.

N. **Israel:**

- a) Not usually.
- b) Yes but very seldom.

O. **Italy:**

- a) An arrestor will not be held liable in damages merely because the arrest was subsequently repealed by an Appeal Court. He will be liable in damages on the grounds of art. 96 C. C. P.
- b) According to art. 96 C.C.P. the liability arises if the claimant has acted merely without “ordinary prudence”. The Italian Courts interpret that behaviour as equal to negligence.

P. **Japan:**

Rejection of the claim in the judgement on the merits, *per se*, does not hold the claimant liable for the arrest action.

Q. **Korea:**

- a) Not automatically.
- b) Proof of the arrestor’s awareness or negligence is required.

R. **Malta:**

An arrestor is not automatically subject to damages simply because a court overturns the arrest. In addition to the circumstances contemplated under II.2 (if the arrestor acted maliciously, frivolously or vexatiously), damages and penalties would unless arise in certain circumstances.

S. **Mexico:**

The Superior Court decision will be the one that prevails in order to determine if the arrestor is liable or not for damages.

T. **Netherlands:**

See answer II.2.

U. **Nigeria:**

See II.2 above.

V. **Norway:**

See under II.2 above.

W. **Panama:**

Yes, possible if any of the grounds of II. 2 (b) apply.

X. **Poland:**

- a) The arrestor would not be liable in those circumstances.

b) Such liability does not fall within the provisions of the PCPC.

Y. Romania:

An arresting party would not be liable for damages simply because the arrest was repealed by an appeal court. An arresting party will be held liable for damages only if it is found to have acted in an abusive manner, as described in II.2.

Z. Russia:

If the arrest is subsequently repealed by the Appeal Court without deciding on the merits of the claim and the case on wrongful or unlawful arrest is not tried on merits either, it would be impossible to establish the liability of the arrestor until the final decision on the merits has been published.

AA. Senegal:

Answer same as II.2 above.

BB. Spain:

a) If the arrest order is repealed by an Appeal Court, the arrestor would be liable for wrongful arrest and shall be obliged to pay damages arising from the consequences of the arrest.

b) Liability of the arrestor is a strict liability, not requiring any evidence supporting negligence, gross negligence or bad faith from the arrestor's part.

CC. Turkey:

TCC is not clear.

DD. Ukraine:

Under the Ukrainian law, there is no difference between rejections of the arrest either by a court of first instance or by an appeal court.

EE. United Kingdom:

a) No (were the arrest to be set aside on appeal it would be a matter for the first instance court on the application of the respondent (owner) that the original arrest was wrongful)

b) Not applicable.

FF. United States:

An arresting party would not be liable for damages merely because the arrest was subsequently declared invalid by an appellate court. An arresting party may be liable for damages only if the arrest is found to have been "wrongful" as described above in response to II.2.

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?**

A. Australia and New Zealand:

- Australia: Potentially, if the claimant acted “unreasonably” or without a good cause.
- New Zealand: Potentially if bad faith or gross negligence is proved.

B. Brazil:

As mentioned in III.2, there is no specific provision under Brazilian Law in respect of compensation for wrongful arrest. The arrested party will need to seek compensation in a separate claim or counterclaim, should the fault and the causal connection be proved.

Should it be proved that the arrestor was aware of the non-enforceability of the claim toward the vessel, he could be considered as a bad faith litigator and condemned to the penalties mentioned in II.2 together with the payment of loss of suit expenses.

C. Canada:

- a) No, unless the arrestor is shown to have acted with gross negligence or malicious intent to cause damage.
- b) For liability under (a), proof of gross negligence or malicious intent to cause damage will be necessary.

D. Chile:

- a) Under the Chilean law, the arrestor would be liable in damages only according to the general tort rules as mentioned above.
- b) For liability in tort under (a), proof of negligence or bad faith will be required.

E. Colombia:

The same as per answer II.2 above.

F. Croatia:

- a) A ship may be arrested only if it is owned by the personal debtor (being liable for the claim) and who was the owner, operator or charterer of the ship at the time of the arrest (art. 954 Maritime Code 2004), except in cases of mortgages and maritime liens. If these conditions do not exist the arrest will be unfounded. Therefore, the debtor has the right to claim damages against the claimant on the grounds of wrongful arrest.
- b) Strict liability.

G. Ecuador:

Yes, if the arrest was illicit or unjustified.

H. Finland:

A vessel may be arrested only for claims against the shipowner. However, if the claim is secured by a maritime lien, a vessel may be arrested even if the debtor is an operator, a charterer or a manager. A mortgaged vessel may also be arrested.

I. **France:**

The arrestor is not liable according to art. 3-4 of the Arrest Convention 1952 under which the arrest of a vessel against which a claim arose is permitted even if the debtor is not the owner. However, there are a few cases which do not support this point of view (19 March 1996, Alexander III).

J. **Germany:**

See as per answer II.2 (a) (b) above.

K. **Greece:**

Under Greek law, the arrestor would be liable in damages only by virtue of the conditions set out in II.2. Further, under both regimes of Greek law and the Arrest Convention 1952, there is no requirement for the claim to be enforceable against the sole owner of the vessel to be arrested.

L. **Hong Kong:**

- a) No.
- b) Only liable if bad faith or gross negligence is proved.

M. **Ireland:**

- a) No, except in cases of bad faith, gross negligence or malice.
- b) Answer as above.

N. **Israel:**

- a) Not usually.
- b) Yes, on the basis of bad faith.

O. **Italy:**

- a) Jurisprudence not clear.
- b) Proof of negligence would at least be required.

P. **Japan:**

As mentioned above under II.2, if a claim is rejected then a presumption of negligence on behalf of the arrestor arises and he has the onus of proof that he acted in good faith and on reasonable grounds.

This presumption will equally apply in a case of arrest of a vessel not owned by the debtor. In Japanese practice, this mistake is held to be crucial and the claimant, in order to avoid being liable in damages, has to prove that he acted in good faith. In reality, the issue of the owner is complex in cases where a corporate veil exists.

Q. **Korea:**

- a) b) Yes, a presumption of negligence on behalf of the arrestor arises.

R. **Malta:**

For the Court to order the arrestor to pay damages and penalties, as discussed under III.2, the arrested party will need to demonstrate to the Court that the arrestor was acting either maliciously, frivolously or vexatiously when the arrest was requested.

S. Mexico:

The arrestor will be liable for damages if the arrest claim could not be enforced. If negligence, bad faith or gross negligence is proven, then the amount of damages to be awarded will be increased accordingly.

T. Netherlands:

The principles contemplated under III.2 would equally be applied in these circumstances.

U. Nigeria:

- a) Yes, assuming the arrest was in Nigeria.
- b) If test under II.2 is proved.

V. Norway:

- a) In such a case the arrest would normally not be granted under Norwegian Law (NMC s.93 (4)). However, if the arrestor mislead the Court he could be potentially liable under tort law.
- b) Yes, negligence would be required.

W. Panama:

Proof of negligence will be required.

X. Poland:

According to the PCPC, the arrestor would not be found liable in such circumstances. However, considering that there is no authority or doctrine on the matter, it cannot be totally ruled out that such liability of the arrestor towards the owner of the ship may be established under the PCPC, e.g. in cases in which the arrestor did not commence proceedings against the owner following the arrest, or if commenced, the proceedings were dismissed, rejected, returned.

Y. Romania:

Under Romanian law, there is no jurisprudence on any claim for wrongful arrest arising from a case where the claim couldn't be enforced against a ship.

Z. Russia:

Yes.

AA. Senegal:

The arrestor could be liable if the affected party provides evidence of any damage suffered due to negligence, bad faith, or gross negligence of arrestor.

BB. Spain:

Under Spanish Law and the Arrest Convention 1999 system, the right to arrest a vessel not owned by the debtor of the claim is subject to the condition that any future judgment to be delivered on the merits can be enforced against that ship by judicial or forced sale.

If the arrest order is reversed and the arrest lifted, the arrestor shall be obliged to pay damages.

If the arrest is not challenged by the owner of the ship but at the end of the proceedings on the merits the judgement cannot, as a matter of law, be enforced against that ship (or against the security posted for the release of the ship) the arrestor would also be obliged to pay damages.

In both cases the liability is strict, therefore, there is no need to prove negligence, gross negligence or bad faith of the arrestor.

CC. Turkey:

If the arrest is unjustified, arrestor liable to all parties affected – strict liability (neither TCC nor CEE require proof of negligence/bad faith/gross negligence).

DD. Ukraine:

The arrestor can be held liable in damages but the Court will require proof of (a) wrongful act of the arrestor, (b) damages and (c) causal link between the damage and the wrongful act.

EE. United Kingdom:

a) The test of malice or gross negligence would apply (it would be easier however to draw an inference that the arrest in these circumstances was made with malice or gross negligence).

b) See II.2b above.

FF. United States:

Under U.S. law, an arrest claim is considered as against the vessel itself (in rem), the arresting party would not be liable in damages for simply arresting a vessel for a claim that is not against the owner of the vessel.

In respect of an attachment of a vessel, the party seeking to attach the vessel must have an in personam, admiralty or maritime, claim against the owner. The attaching party could have liability to the vessel owner for attaching a vessel where the claim was not against the vessel owner, if the attaching party acted in bad faith, gross negligence or malice in bringing the attachment, as described in III.2.

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 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. Australia and New Zealand:

- Australia: The claimant would be liable for the "direct losses" arising from the grossly exaggerated claim, if he acted "unreasonably" or without a good cause.

- New Zealand: There is no relevant case law but the claimant can be held liable if there is proof of bad faith or gross negligence.

B. Brazil:

If the arrested party can prove that it incurred the losses listed in 5(a) (i) (ii) (iii) in view of the arrestor's fault or gross negligence in establishing the amount of the arrest claim, it could claim such damages from the arrestor. In case of bad faith litigation, the arrestor could be subject to the penalties previously mentioned under question III.2.

C. Canada:

a) Only if it is proved that the arrestor was grossly negligent or acted with a malicious intent to cause damage and the losses under 5(a) (i) (ii) (iii) were incurred.

b) Proof of gross negligence or malicious intent to cause damage is required.

D. Chile:

a) The arrestor is exposed to damages listed in 5 (a) (i) (ii) (iii) by reason of grossly exaggerated claim.

b) Such liability will be determined on the bases of Chilean law provisions for tort. Thus, the arrested party has to initiate a civil action and bears the burden to prove the damages. Proof of negligence or bad faith is required.

E. Colombia:

The same test as per answer II. 2 above.

F. Croatia:

There are no specific rules or court decisions dealing with this matter.

G. Ecuador:

Yes, if the arrest was illicit or unjustified.

H. Finland:

In Finland, the bailiff decides the amount and the type of the security (usually a cash deposit or a bank guarantee, but also a P&I Letter of Undertaking) is required in order to obtain the release of the vessel. In addition to the strict liability for unnecessary arrest mentioned in II.2, the arrestor may also be liable under tort law. Further requirements for liability are the loss or damage suffered by the victim and the causative link between the fault and the damage. Consequently, these rules may be applicable if the amount of the arrest claim is grossly exaggerated.

I. France:

If a party is grossly exaggerating the amount of the claim, he is likely to be held liable for damages on the grounds of abuse of rights, as mentioned above.

J. Germany:

a) i) Yes, the extra cost for putting up security for the unjustified part of the arrest claim would be recoverable.

ii) Yes, but, in practice, if part of the arrest claim was justified, practically it may be difficult for the arrested party to prove the delay and economic loss suffered only because of the unjustified part of the claim.

iii) Yes, in practice, the arrested party must prove that he was unable to provide security for the gross exaggeration but he would have been able to provide for the justified claim.

b) No, Strict liability would apply.

K. Greece:

As mentioned in III.2, for the arrestor to be held liable to pay damages, the Claimant should have known, or by gross negligence ignored, that his claim did not exist. This may apply for exaggerated claims. Greek tort law may alternatively be applied, which requires at least negligence on the part of the arrestor.

In case of liability of the arrestor in damages, such damages may cover any loss or damage causally connected with the wrongful arrest (i.e. reasonably foreseeable by the arrestor).

L. Hong Kong:

a) The issue does not arise. Security amount is based on a best arguable case.

b) N/A.

M. Ireland:

a) i) No, because the amount of security if disputed is fixed by the court at the time of the application for the release of the ship.

ii) No, see (i) above.

iii) No.

b) No.

N. Israel:

a) Theoretically yes.

b) [The answer is “yes” but considering their answer to II.2 (b) above, were the arrestor to be liable for a grossly exaggerated claim, the test should be bad faith or gross negligence]

O. Italy:

a) According to case law and 2 (b) art. 96 C. C. P. the arrestor will be held liable in damages for the losses incurred by a grossly exaggerated claim.

b) The arrestor would be held to be liable in damages if he acted without ordinary prudence. There is, therefore, no need to show bad faith or gross negligence.

P. Japan:

The arrestor will be liable for the losses mentioned in 5(a) (i) (ii) (iii) according to the provisions and principles mentioned in answer to question II.2.

Q. Korea:

a) There are no specific rules or court decisions dealing with this matter. Theoretically, yes depending on the circumstances.

b) Proof of negligence would be sufficient.

R. Malta:

The determination by a court that the claim was grossly inflated is not sufficient to give rise to a claim in damages. The shipowner must demonstrate that the amount was exaggerated by the arrestor maliciously, frivolously or vexatiously.

S. Mexico:

The arrestor would be liable for any expense incurred in connection with a grossly exaggerated claim, always provided that such extra expense is duly proven at Court and that those damages are a direct and immediate consequence of the grossly exaggerated claim. If negligence, bad faith or gross negligence is proved, the amount of damages to be awarded will be increased accordingly.

T. Netherlands:

The principles set out in II.2 above would equally be applicable in those circumstances.

U. Nigeria:

Yes, if the test as under II.2 is proved.

V. Norway:

a) Yes, potentially if the amount of the claim is exaggerated.

b) Yes, negligence would be required.

W. Panama:

a) Determination of the amount of the claim is a matter that is dealt with upon judgement. Arrestor's failure to provide evidence of the facts of the claim, including the amount, would be a presumption of bad faith and damages may be granted.

b) In a wrongful arrest motion proof of error, fault, negligence or bad faith is required.

X. Poland:

The arrestor would not be found liable in those circumstances.

Such liability would not fall within the provisions of the PCPC. It seems that a claim, not entirely justified, would be partially awarded and partially dismissed when judged on the merits.

Y. **Romania:**

Similarly as mentioned in II.2, the arrestor would be liable, if he exercised his rights in an abusive manner. He would be responsible in damages to the owner of the ship for the extra costs of the security, as stated in II. 5 (a) (i) (ii) (iii) of the question.

Z. **Russia:**

Yes, subject to proof of negligence and losses.

AA. **Senegal:**

a) Yes, if evidence shows damage was caused as a result of a grossly exaggerated amount of the claim for which security was sought.

b) Yes, any of these grounds could be the basis for a claim for damages.

BB. **Spain:**

Yes, subject to proof of negligence and losses.

CC. **Turkey:**

a) Neither TCC nor CEE govern the effect of grossly exaggerated arrest claims. Section 259 of CEE deals only with liability of the arrestor in damages suffered by the counter party and third person. The norm direct and indirect losses (i.e. losses incurred by delay, the extra costs to procure security).

b) If unjustified arrest, strict liability.³

DD. **Ukraine:**

Ukrainian law only stipulates the general rules of liability in case of wrongful arrest which can be applied in case of grossly exaggerated claim.

EE. **United Kingdom:**

a) The arrest claim can properly be advanced on the best arguable basis – the right of arrest is not a discretionary remedy under English law, meaning that the arrestor is entitled to the arrest, provided he complies with the court rules, and he is not obliged to provide full and frank disclosure. However, the respondent can challenge the level of any security provided. Some older authorities (the George Gordon [1884], the Irish Fir [1943]) support the principle that the arrestor who demanded excessive bail should be ordered to pay the costs of the excessive bail. More recently (the Kos [2010]) a similar result was suggested with respect to the cost of maintaining the security, in the event the underlying claim failed.

b) See II2b above.

³ The author is guessing here, there is no direct answer but it can be inferred from the context.

FF. United States:

Some courts have recognized a claim for losses under 5(a) (i) (ii) (iii) by reason of tortiously demanding an excessive bond to secure the release of a vessel.

- 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 where enforcement can take place:**
- a) Can the arrest be considered wrongful as a result, so as to attribute liability to the arrestor under your national law?**
 - b) For liability under (a) if any, would proof of negligence, bad faith or gross negligence on part be arrestor be required?**

A. Australia and New Zealand:

- Australia: No.

- New Zealand: No.

B. Brazil:

a) The arrestor can be considered liable for wrongful arrest (in cases of non-maritime lien claims), if it is evidenced that the defendant was a solvent debtor and had other assets (fixed or moveable — e.g. ships) to make a future enforcement viable.

b) It will be necessary to prove that the arrestor was aware that the defendant had other assets to respond to the claim, without the need of obtaining security/arresting a vessel before the enforcement.

C. Canada:

a) No, since the election to arrest a ship is not restricted by how easy or how difficult it may be to obtain enforcement. However, there may be liability if it is shown that the arrestor used the legal process for an abusive purpose to maliciously cause damage to the defendant owner.

b) In the event of liability under (a), proof of gross negligence or malicious intent to cause damage is required.

D. Chile:

Under the Chilean law there is no such prerequisite. The arrest is available to the privileged creditor regardless of the solvency of the arrested party.

E. Colombia:

No provisions exist with regard to solvency of the defendant.

F. Croatia:

No general answer to this question. It is a matter of facts in each case.

G. Ecuador:

No.

H. Finland:

It is in the discretion of the first instance court to allow the arrest of vessels. The arrestor must show both probable cause (the level is set low by the Finnish Supreme Court) for his maritime claim (listed in the FMC), and that there is a risk that the defendant will take away the vessel or otherwise jeopardise the right of the arrestor (the movability of vessels usually constitutes such a risk). Consequently, if the court accepts an application for the arrest of a vessel, there is no liability for the arrestor.

I. France:

According to the French understanding of the Arrest Convention 1952, recovery through arrest is available regardless of the solvency of the other party. The arrestor in such a case will not be held liable for damages unless an abuse of rights can be established.

J. Germany:

No.

K. Greece:

The matter of solvency or insolvency of the owner of the vessel to be arrested is not a condition for the arrest (or at least this is not expressly provided in the Arrest Convention 1952, which seems to assume a risk exist by the mere fact that the vessel is moving around the world). Therefore, the arrest of a vessel in such circumstances would not in itself render the arrest wrongful.

However, if the arrest is under the GCCP where the Arrest Convention 1952 does not apply, the defendant owner has the chance to appear before the court, at the hearing for the arrest, and present defences relating to his solvency. Any liability for wrongful arrest would in principle be decided according to art. 703 of the GCCP (see question II.2b above).

L. Hong Kong:

a) No.

b) N/A.

M. Ireland:

a) No.

b) Not applicable.

N. Israel:

a) Yes.

b) Yes.

O. Italy:

a) There are no precedents.

b) Art. 96, para. 2 C. C. P. provides specific liability of the arrestor who acted without ordinary prudence.

P. **Japan:**

(a) Japanese Law provides that neither in the application of Provisional Attachments nor in cases of Security Rights or Compulsory Executions will the debtor's solvency operate, *per se*, as a bar to a claimant seeking arrest of a ship.

(b) Not applicable

Q. **Korea:**

No.

R. **Malta:**

a) Maltese Law provides that if a creditor inter alia arrests a vessel, if there is no reasonable doubt as to the solvency of the debtor and he is considered to be capable of meeting his dues, the arrestor will be found liable to pay a penalty.

b) Proof of negligence or bad faith is not required. What is required is proof of the debtor's healthy financial state, which the arrestor ought to have known, if it was a well-known fact.

S. **Mexico:**

If any of the causes for arrest mentioned in the 1952 Arrest Convention (incorporated in Mexican Law) exist, it is sufficient for a vessel to be arrested. If a claim is successful, no wrongful arrest can be claimed on the basis of the solvency of the defendant.

T. **Netherlands:**

The principles stated in II.2 would equally be applicable in those circumstances.

U. **Nigeria:**

Irrelevant, see the test under II.2.

V. **Norway:**

No. However, in such cases an arrest would not be granted because the arrestor will fail to substantiate the grounds for arrest according to Norwegian Dispute Act s.33.2 (1).

W. **Panama:**

No.

X. **Poland:**

The arrestor would not be liable.

Y. **Romania:**

Same principle as mentioned in III.2, the arrestor would be liable if he exercised his rights in an abusive manner.

Z. Russia:

The arrest would not be considered as wrongful in this situation.

AA. Senegal:

a) Regardless of the solvency of the party allegedly liable for the claim,⁴ the question is whether the arrest has caused damage to the affected party.

b) Negligence, bad faith and/or gross negligence could support a claim for wrongful arrest.

BB. Spain:

There is no limitation of the right to arrest a ship by reason of the solvency of the debtor. However, if the arrestor has previously seized other assets of the debtor to secure the same claim, the further arrest of the ship could be contested by the owners and, if successful, the arrestor would be obliged to pay damages (strict liability).

CC. Turkey:

The arrestor would not be liable in such a case.

DD. Ukraine:

The arrest will not be considered as wrongful in this case.

EE. United Kingdom:

a) See II.5 (a).

b) N/A.

FF. United States:

a) In connection with an arrest under [Supplemental Rule C](#), the vessel itself is liable for the maritime lien claim.

In connection with an attachment under Supplemental Rule B, as long as the requirements of [Supplemental Rule B](#) are met, an attachment would not be considered as wrongful. There is no liability for pursuing an attachment, if the person allegedly liable for the attachment claim is largely solvent and it is possible to enforce judgments or arbitration awards against him.

b) Not applicable.

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?

A. Australia and New Zealand:

⁴ [I think the reply meant to refer to the solvency of the person allegedly liable for the arrest claim (and not to the solvency of the arrestor)]

- Australia: No.

- New Zealand: No.

B. **Brazil:**

No.

C. **Canada:**

No.

D. **Chile:**

No.

E. **Colombia:**

No.

F. **Croatia:**

No.

G. **Ecuador:**

No.

H. **Finland:**

No.

I. **France:**

No.

J. **Germany:**

No. Theoretically, an arrestor could also be held liable in tort, if it is proved that he wilfully caused damage to the arrested party in a manner which is considered to be '*contra bonos mores*' (s. 826 GCC).

K. **Greece:**

Except for the circumstances described in III.2, or under tortious liability under certain circumstances, there are no other circumstances in which under Greek law, an arrestor can be held liable in damages for the arrest of a ship.

L. **Hong Kong:**

No.

M. **Ireland:**

Yes, under section 47 of the Admiralty Court Act 1867: the arrestor shall be liable to pay all costs and expenses occasioned by the arrest and damages for detention of the property unless he shows that without the arrest he could not obtain security.

N. **Israel:**

In rear cases an arrestor might have to provide a guarantee for damages.

O. **Italy:**

No.

P. **Japan:**

No.

Q. **Korea:**

The arrestor can be held liable in damages for the arrest of a ship in cases of misrepresentations of facts in the court.

R. **Malta:**

The instances where the arrestor may be found liable to pay damages or penalty are:

- Where the applicant does not pursue with the claim within 20 days after the issuance of the arrest;
- Where the defendant applies for the rescission of the precautionary act, yet the claimant (arrestor) fails to show why the arrest should maintained, or if 15 days prior to the application for the arrest, there is no proof that the creditor demanded payment from the debtor;
- If the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such fact about the debtor was notorious; and
- If the applicant's claim is malicious, frivolous or vexatious.

S. **Mexico:**

No.

T. **Netherlands:**

No.

U. **Nigeria:**

See the test under II.2.

V. **Norway:**

No.

W. **Panama:**

No.

X. **Poland:**

No.

Y. **Romania:**

No.

Z. **Russia:**

No.

AA. **Senegal:**

No.

BB. **Spain:**

The arrestor can also be held liable in damages for the arrest of a ship in case that he does not bring proceedings on the merits before the competent Court within the period of time given by the arresting Court.

CC. **Turkey:**

No.

DD. **Ukraine:**

No.

EE. **United Kingdom:**

Yes, in the event of breach of contract, i.e. breach of a valid arbitration agreement or exclusive jurisdiction clause, but only insofar as the arrest proceedings were instituted to pursue the claim on the merits rather than solely for the purpose of obtaining security.

FF. **United States:**

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?

A. **Australia and New Zealand:**

- Australia: No

- New Zealand: No.

B. **Brazil:**

There are no specific penalties under Brazilian Law for a wrongful arrest, unless there is a bad faith litigation.

C. **Canada:**

No, apart from an award of legal costs in favor of the defendant at the discretion of the court.

D. **Chile:**

Apart from the damages the arrestor bears the legal costs [strictly speaking this is not a penalty].

E. **Colombia:**

No.

F. **Croatia:**

No.

G. **Ecuador:**

No.

H. **Finland:**

No, unless there is criminal conduct of the arrestor.

I. **France:**

According to the Code of Civil Procedure, a party which brings proceedings in an abusive way could be penalized to pay a civil penalty to the state (up to 3000 euros). This provision is rarely used for the arrest of ships [in essence the answer to this is No].

J. **Germany:**

No, unless there is criminal conduct by the arrestor (fraud or other criminal acts).

K. **Greece:**

No, except that criminal penalties cannot be ruled out in case that the arrestor (knowingly) used false evidence.

L. **Hong Kong:**

No.

M. **Ireland:**

No.

N. **Israel:**

No.

O. **Italy:**

The Court, when issuing an order on costs, may also discretionarily request the arrestor to pay the other party a sum equitably determined.

P. **Japan:**

No.

Q. **Korea:**

No.

R. **Malta:**

Apart from damages, the defendant may also request the court to impose a penalty (which is no less than €1,164.69 and no more than €6,988.12) on the arrestor to be paid to the defendant.

Moreover, if the defendant successfully proves to the court that the warrant of arrest was requested by the arrestor maliciously (as opposed to just frivolously or vexatiously), the arrestor may be subject to a penalty of no more than €11,646.87.

S. **Mexico:**

No penalty. Only damages (direct damages, consequential damages, loss of profits, etc.).

T. **Netherlands:**

No.

U. **Nigeria:**

No.

V. **Norway:**

No.

W. **Panama:**

Irrelevant answer.

X. **Poland:**

No.

Y. **Romania:**

No.

Z. **Russia:**

No.

AA. **Senegal:**

No.

BB. **Spain:**

If the arrestor is held liable for the arrest, he shall have to bear the legal costs. This is the sole penalty or sanction to be levied upon the arrestor, distinct from any damages (which shall be assessed in a separate procedure).

CC. **Turkey:**

No.

DD. **Ukraine:**

No.

EE. **United Kingdom:**

No, unless there has been fraud in obtaining the arrest upon production of forged documents.

FF. **United States:**

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?**

A. **Australia and New Zealand:**

- Australia: Section 34 of the AAA 1988 appears on its face to be limited to claims for unjustified arrest where the vessel was arrested in Australia only. Despite this, if the section can apply in relation to arrests in another jurisdiction, Australian courts would apply Australian Law, consistently with the rules of International (Private) Law, whereupon it may be established that the law of another country should apply.

- New Zealand: The Court will apply New Zealand law, consistently with the rules of International (Private) Law. For example, in the case of Ocean Towing and Salvage (Vanuatu) Ltd v Custom Fleet (NZ) (2006), the ship was allegedly wrongfully arrested in Australia, but as the most significant issues that arose in the case took place in NZ, NZ law was applied (lex fori).

B. **Brazil:**

First, the Brazilian Courts must have jurisdiction to determine damages for a wrongful arrest which occurred in another jurisdiction (i.e. the defendant is domiciled in Brazil, or the obligation was to be performed in Brazil, or the claim derived from facts occurred in Brazil). If they have, Brazilian Law shall apply. However, it is possible that the judge would examine the arrest rules of the country where the wrongful arrest occurred, in order to analyse the merits of the claim.

C. **Canada:**

The Canadian court would determine which law has the closest connection to the tort of wrongful arrest, which is for example the law of the tort in the foreign locality where the wrongful arrest occurred, provided that this does not conflict with Canadian public policy. If there is no evidence that the foreign law differs from Canadian Law, it is presumed to be similar to it.

D. **Chile:**

It depends on the rules upon which the action for damages will be based.

E. **Colombia:**

Lex forum arresti would apply but only to the extent where the arrest took place in the countries being parties to the Andean Community (i.e. Colombia, Venezuela, Peru, and Bolivia). If not, it is likely that a Colombian judge will apply lex fori.

F. **Croatia:**

The arrest in general is governed by the Croatian Procedural Law and the court will apply lex fori in respect of damages for wrongful arrest.

G. **Ecuador:**

Lex forum arresti.

H. **Finland:**

Finnish courts would apply the *lex loci damni* as provided in [Article 4.1 of Rome II Regulation](#).

I. **France:**

According to French case law on the arrest of ships, the concept of liability for wrongful arrest is closely associated with enforcement procedures which are governed by *lex fori*.

J. **Germany:**

Determining the law applicable is always a matter governed by the international private law rules. Article 6 of the 1952 Arrest Convention, applicable in Germany, is a specific rule of international private law providing a specific connecting factor for unlawful arrest claims regarding arrests in other contracting states (*lex forum arresti*).

Where the 1952 Arrest Convention does not apply, a claim based on the allegation that the arrestor breached a statutory duty or acted *contra bonos mores* would probably be qualified as a claim in tort, so that the law applicable would have to be determined in accordance with Article 4 of the Rome-II-Regulation.

Section 945 of the German Civil Procedure Code governing strict liability for wrongful arrest under German law is part of the German procedural law on arrest proceedings. Hence, German courts will not apply this rule to foreign arrest proceedings.

K. **Greece:**

In case of arrest of a vessel within a member state of the 1952 Arrest Convention the Greek Court would apply the law of the member state pursuant to art. 6 of the Convention.

If not, Greek Courts would apply the substantive law applicable pursuant to [Rome II Regulation](#) (on the law applicable to non-contractual obligations).

L. **Hong Kong:**

As a general principle the conduct must be actionable under both HK tort law and the tort law of the place of the arrest. However, it is possible to argue that only the law of the country of arrest (lex forum arresti) should be applied.

M. **Ireland:**

Pursuant to article 6 of the arrest Convention 1952 the Irish Court would apply the law of the Contracting State in which the arrest was made. If the arrest was in a non-contracting state, the substantive law applicable would be determined pursuant to International Private Law rules as applied generally in Ireland.

N. **Israel:**

Lex fori would apply.

O. **Italy:**

Art. 6 of the Arrest Convention is interpreted by Italian law as a specific provision whose application is not barred by Rome II regulation and consequently in respect of damages caused by wrongful arrest, Italian courts apply lex forum arresti, i.e. the law of the contracting state in whose jurisdiction the arrest was made or applied for. [If it is not a contracting state the result would be the same under Rome II Regulation.]

P. **Japan:**

[The answer to this question is not related to the question but to conflict of laws rule with regard to Maritime Liens.]

Q. **Korea:**

The Court would apply the substantive law applicable pursuant to the International Private Law of the Republic of Korea.

R. **Malta:**

Today, [Rome II Regulation](#) applies, and the applicable law would be the lex loci damni. The scope of this regulation is universal and every European Court should apply the provisions of the said regulation wherever a cross border claim is brought before it.

S. **Mexico:**

Mexican Courts will apply Mexican legislation for the arrest and will enforce any decision of competent foreign courts/arbitration panels as issued by the competent courts/panels.

T. **Netherlands:**

Netherlands in Europe apply the Rome II Regulation ([lex loci damni](#)).

The Caribbean Netherlands are not part of the EU, so Rome II Regulation does not apply. However, in the absence of statute law the lex loci delicti, which is the same as lex forum arresti, will apply.

[There is an extremely interesting analysis in the text of the reply to this question, referring to some European cases, which deserves careful reading.]

U. **Nigeria:**

There is no jurisdiction to hear such a claim.

V. **Norway:**

The lex fori always applies for procedural issues. Lex forum arresti will apply for the substantive issue of damages according to Norwegian International Private Law.

W. **Panama:**

No jurisdiction to hear claims for wrongful arrest occurred in another state.

X. **Poland:**

[The Polish courts would not have jurisdiction to determine such a claim. Assuming they had and since Poland is an EU member, Rome II Regulation will apply.]

Y. **Romania:**

In accordance with [Rome II Regulation](#) (see the general rule in Art. 4), the law applicable to a non-contractual obligation arising out of a tort/delict shall be the loci damni.

Article 6 of the 1952 Arrest Convention expressly mentions that all questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

Therefore, a Romanian Court, seized with a claim for damages for the arrest of a ship in another country will apply the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

[Presumably, if the arrest was not in a 1952 Convention contracting state, the lex loci damni would apply pursuant to Rome II Regulation, which, in effect, is not in conflict with the 1952 Convention]

Z. **Russia:**

If Russian Court has to consider a claim for damages for the arrest of a ship in a foreign jurisdiction, the Court will follow Russian International Private Law rules and therefore apply the lex loci delicti.

AA. **Senegal:**

The Senegalese Court would apply lex fori, i.e. its own substantive law.

BB. **Spain:**

According to Spanish law, the arresting court is the competent court to hear any claim for damages arising from a ship arrest. Therefore, we understand that Spanish Courts would lack jurisdiction in a claim for damages for the arrest of a ship in another country.

CC. **Turkey:**

It follows the Code of Private International Law (CPIL) and International Civil Procedural Law. CPIL gives priority to International Conventions to which Turkey is a contracting state. Otherwise, the relevant conflict of laws rule will apply to find the substantive law governing in the particular case.

DD. Ukraine:

According to art. 49 of the Law of Ukraine “ On International Private Law” the applicable law is the Law of the State in which an action or other circumstance that gave rise to the claim for damages has taken place. However, the law of a foreign state cannot apply in Ukraine if the action is not considered wrongful under Ukrainian law.

EE. United Kingdom:

As the wrongful arrest claim is a claim based on tort, (and assuming the English courts would have jurisdiction to determine a claim in respect of a foreign arrest, which is said to be wrongful) the proper law of the tort rules would apply as established by International Private Law, Rome II Regulation applying *lex forum damni*.

FF. United States:

For a U.S. court to address a claim for wrongful arrest of a vessel in another jurisdiction, the U.S. court will first have to obtain jurisdiction over the defendant in personam or his property to establish quasi in rem jurisdiction. Assuming such jurisdiction exists, a U.S. court can address a claim that a vessel was wrongfully arrested in a foreign jurisdiction. In such cases,

- Some courts have applied U.S. law to the question of whether the arrest was wrongful, without engaging in conflict of laws analysis;
- Other courts have indicated that when the arrest occurs in a foreign jurisdiction and involves foreign parties, “it appears fairly certain that United States law” will not apply to the claim and that a conflict of laws analysis is necessary.