

Discussion Paper on Liability for Wrongful Arrest of Ships

Proposed by Dr Aleka Sheppard, the Chairman of the IWG of CMI, for debate at the CMI meeting to be held on:

9 November 2018 at 14.30 – venue: Thomas Miller & Co., 90 Fenchurch Street, London, EC3M 4ST

Introduction

1. By way of background for the representatives of the NMLAs and for newcomers to the CMI meeting, it is fitting to explain briefly what has been done about this project and where we are at present. In 2014, the International Working Group (“IWG”) on the Liability for Wrongful Arrest was established after the CMI meeting in Hamburg when the issue of the need for review and/or reform of this area of the law, at international level, was raised by the author of this Discussion Paper in her presentation on the subject. The first Chairman of the IWG was Giorgio Berlingieri whose report can be found at the CMI website.
2. The mandate of the IWG has been (i) to find out how the legal issues surrounding liability for wrongful arrest are dealt with by the national laws of the CMI member States, (ii) to obtain the views of the CMI member States on recommendations of the IWG for possible reform and (iii) if there is, in principle, consensus for reform, to carry out the drafting of a uniform set of rules dealing with issues arising thereof.
3. In the execution of its mandate, the IWG composed and circulated to the National Maritime Law Associations (“NMLAs”) a detailed questionnaire on the subject matter (see the CMI website) and received detailed answers to it by a relatively large number of NMLAs (38). The then Rapporteur (currently the Chairman of the IWG) analysed and set out the answers to the questionnaire in the Rapporteur’s Tables and in her Synopsis; a short summary of the results and her presentation of the results at the New York CMI Conference in 2016 can be found in the CMI website.
4. The results as analysed form the basis of this Discussion Paper, the purpose of which is twofold:

- (i) to inform the NMLAs and representatives of the shipping industry attending the CMI meeting in London about the work pursued by the IWG on the subject matter;
 - (ii) to seek feedback and views from representatives of the NMLAs and of the industry, particularly P & I clubs, on the proposals of this paper at the meeting scheduled for 9 November 2018.
5. For this purpose, the gist of the questionnaire sent to the NMLS is broadly clustered into 3 fundamental questions (para 6 below) and the answers are summarised (paras 7,8,9,10 below) in a comparative way with a view to highlighting the issue of disparity of the laws between the various Civil Law jurisdictions as well as between Civil and Common Law.
6. The broad questions are:
- A. What is the applicable law by the various States in respect of ship arrest and liability for wrongful arrest at national level;
 - B. Whether counter-security is required to be provided by the arrestor when the application for the ship arrest is made, or thereafter, in the event of a potential wrongful arrest;
 - C. What is the legal test and the standard of proof for a defendant-arrestee to succeed in a wrongful ship arrest claim.

Summary of the answers to each of the above broad questions:

7. Question A – Applicable law

- 17 out of the 38 countries apply the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (“Arrest Convention 1952”), which are:
 - Belgium, Croatia, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Russia, Senegal, Ukraine, and United Kingdom.
- 2 out of the 38 countries apply the International Convention on the Arrest of Ships, 1999 (“Arrest Convention 1999”), which are:

- Spain and Norway
- 9 out of the 38 countries apply one of the above international instruments in conjunction with national legislation, which are:
 - Croatia, Finland, France, Germany, Greece, Poland, Romania, Russia, Spain and Turkey
- 18 out of the 38 countries apply purely domestic legislation, which are:
 - Australia, Brazil, Canada, Chile, Colombia, DPRK, Ecuador, Japan, Israel, Korea, Malta, Mexico, New Zealand, Nigeria, Panama, Peru, South Africa, and USA

8. Question B – Counter security

- 10 out of the 38 countries require the applicant-arrestor to provide counter security, which are:
 - Croatia, Finland, Japan, Korea, Mexico, Romania, Russia, Senegal, Spain and Turkey
- 12 out of the 38 countries do not require security, which are:
 - Australia, Canada, Ecuador, France, Greece, Hong Kong, Ireland, Israel, New Zealand, Panama, United Kingdom and USA
- 15 out of the 38 countries empower the court with discretionary power in respect of ordering counter security, which are:
 - Belgium, Brazil, Chile, Colombia, Germany, Italy, Malta, Netherlands, Nigeria, Norway, Peru, Poland, Portugal, South Africa, and Ukraine

9. Question C – Test/standard of liability

- 10 out of the 38 countries apply strict liability, which are:
 - Brazil, Croatia, Finland, Germany, Mexico, Netherlands, Norway, Poland, Russia, Spain
- 9 out of the 38 countries require proof of negligence as applied in tort rules, which are:
 - Belgium, Chile, DPRK, Japan, Korea, Panama, Portugal, Senegal, Ukraine

- 14 out of the 38 countries require proof of other culpable behaviour (see Note below), which are:
 - Canada, Chile (negligence whether gross or not), Colombia, HK, Ireland, Israel, Korea, Malta, NZ, Panama, Senegal, South Africa, UK, USA

10. **Note:** The following countries adopt different terminology in the degree of culpable behaviour of the applicant-arrestor. Here are the terms that were found in the replies:

- Illicit or unjustified arrest (Ecuador and Turkey)
- Unreasonable or without good cause arrest (Australia and Nigeria)
- Without reasonable and probable cause (South Africa)
- Frivolous or vexatious arrest (Malta), which may be tantamount to gross negligence, or bad faith
- Abuse of rights, such as vexatious arrest (Romania and France)
- Without ordinary prudence (Italy)
- Wrongful behaviour (Ukraine)
- Wrongful or unjustified (DPRK)
- Positive knowledge of no substantive right entitling arrest, or gross negligence in respect of its non-existence (Greece).
- “Crassa negligentia” or “mala fides” (England and countries following English law)

11. However, there is no specific explanation given in the replies of the above States, except in Malta’s reply, about the required components of the culpable behaviour, nor is there a definition of the terminology used for the claim of wrongful arrest to succeed. Some of these expressions indicate that the defendant-arrestee has to prove negligence on the part of the arrestor. Others may mean that gross negligence, malice or bad faith, has to be proved; therefore, in the latter case, there is a two-stage test: objective and subjective.

Commentary

On establishing liability

12. It is evident from the above that there is significant non-uniformity between the laws of the various States regarding the legal test and the standard of proof to be applied for a shipowner to establish liability for wrongful ship arrest. Apart from the Common versus Civil Law divide, there exist significant differences in the terminology of the test to be applied between the Civil Law jurisdictions. But there is also a certain degree of uniformity, which is encouraging.

13. The standard of proof required may be based either on the rules of tort law (as they apply in individual States), or on rules of evidence requiring a higher threshold of proof, such as proof of malicious, or vexatious conduct on the part of the arrestor.

On the Remedy

14. It should also be noted that the issue of the remedy for "wrongful" ship arrest is approached differently by the various States. While some States consider the issue of damages as a procedural law matter, other States consider it to be a substantive law matter. This has further consequences:
 - a. Under the procedural law approach, favoured by some Civil Law States, the remedy is invariably viewed as a *quid pro quo* procedural remedy for the damage caused by the act of arrest (i.e. how much did the defendant pay for legal fees to defend himself at the hearing, cost of putting up bail etc.)

 - b. Under the substantive law approach, the remedy sought is substantial damages suffered by the shipowner (applicant) by reason of the arrest, encompassing damages such as those arising by an inevitable interference with, or delay in, the performance of contractual obligations, or by any other breach of a charter party. In some jurisdictions, however, substantive damages may be limited to losses arising from the time a shipowner might reasonably require to post the security for the discharge to the ship.

A hypothetical scenario

15. To exemplify the difficulties that may arise from the above conflicting approaches, one may consider the following scenario:

Suppose that a bunker provider has sold bunkers to a large LNG carrier (i.e. carrying capacity of 180.000 m³) in Singapore. The vessel is under a time charter followed by a voyage charter for consecutive voyages and is fully laden heading for a Japanese port. The value of the cargo is roughly around 100 million USD. The value of the bunkers is about 100.000 USD. Credit period of 30 days is granted but the shipowner does not pay because he alleges that the bunkers were of poor quality resulting in substantial damage to the ship's engine and consequential losses, i.e. delay in prosecuting the voyage due to the need of repairs, plus the costs of repairs. In the meantime, the bunker provider manages to arrest the ship at Curacao, Dutch Antilles, where the ship called to have the engine repaired. Due to delay in putting up security for the claim, the ship is detained at the Caribbean port for 5 days (the days it took also to have the repairs done), resulting in delay in reaching its destination. As a result, the time charterer claims that the vessel is off hire for that period; he also claims damages for his liability incurred under the voyage charter.

The bunker provider commences arbitration proceedings in London according to the bunkering contract claiming payment. The shipowner counterclaims damages caused due to defective bunkers. The counterclaim succeeds and the bunker provider's claim is dismissed.

Subsequently, the shipowner files an action for wrongful arrest in the court of the arrest (Curacao) although he could probably claim damages for wrongful arrest in the arbitration (provided the arbitrators had jurisdiction under the arbitration agreement) but he was advised about the difficulties involved under English law to discharge the burden of proof. So he claims at the Curacao court substantial damages arising from the interference with and delay in performance of the charter party due to the arrest and consequently his liability incurred to the time charterer, plus legal costs and the costs to put up the security. If the court of Curacao follows Dutch law, and provided the shipowner proves that the arrest was totally unfounded, (see reply of Dutch NMLA to question 2 of the Questionnaire), then the bunker provider will have to pay full damages to the shipowner.

That would be straightforward; but what would have happened had the arrest taken place in England, or in Singapore, and the court there would have to consider the issue of wrongful arrest on the basis of the stringer test under the current English law (which is basically followed in Singapore).

In the recent decision of Mr Justice Teare in *NatWest Markets plc v. Stallion Eight Shipping Co SA (The MV Alkyon)* [2018] EWHC 2033 at [52], the judge summarises the law in depth and explains the issues surrounding wrongful arrest of ships under English law (the decision of the CA is expected).

[Briefly, the shipowner applied for the release of his ship from arrest (by the mortgagee) unless counter security was provided by the mortgagee in the event the arrest proved to be wrongful. Teare J. decided against the shipowner and commented that the introduction of counter security may have the effect of a deterrent for claimants to arrest in England]. Some commentators say: 'so the jurisdiction of England and Wales remains an attractive jurisdiction for ship arrests'. Such a belief is held by many, but I question whether it may be illusory.

Consequences of the procedural versus substantive law approaches

16. The above distinction entails further complexities. As is shown in some detailed answers to the questionnaire, if the wrongful arrest claim is simply a procedural remedy, then it should be governed exclusively by the *lex fori*. Conversely, if it is a substantive law action, then the applicable law may differ according to the applicable conflict rule of the *lex fori*. So, it could either be the *lex causae/lex contractus*, if the action for damages were to be considered as part of the main claim which provided the ground for the provisional arrest of the ship, or the *lex loci delicti commissi*, if the legal ground of the action was based on tort¹.

17. Based on the wording of art. 6 of the Arrest Conventions 1952/1999 dealing with questions of possible claims in damages for wrongful arrest, the matter is left to be decided by the law of the *forum arresti*. Whether that court applies *lex fori*, if it is considered to be a procedural matter, or applies directly its substantive law, if it is considered to be a substantive law matter, the provision works equally for both.

¹ Regarding the EU States which consider the matter as having substantive nature, they would not be able to apply Rome II in order to ascertain the applicable law, as it would be displaced due to the fact that the two Arrest Conventions deal with particular matters and they would prevail. Therefore domestic conflict rules would apply to ascertain the applicable law for the wrongful arrest..

18. As it transpires from the *travaux préparatoires* of the conventions these issues were raised during the deliberations of the representatives of the State Members and the legislator left the matter intentionally open to be decided by the court of the *lex forum arresti*.

Counter-Security

19. Article 6 of the Arrest Convention 1999 provides for “security” –“counter security” would be the more appropriate term - so as to make the States aware about the possibility that there might be cases which could amount to wrongful arrest. In such a case, the requirement for “counter security” would act as a deterrent for the applicant-arrestor before applying for the arrest of the ship².

Conclusion/proposals

20. The data as derived from the replies to the CMI questionnaire, show a sharp disparity between the national laws on both the liability for “wrongful arrest” and the remedy. The contrast is not only between the Common law and the Civil Law jurisdictions but also between the Civil Law countries, which causes more confusion. It seems, therefore, to be necessary, at least, to attempt to agree upon a unified term or a definition of what constitutes wrongful arrest.

21. Assuming that the NMLAs have properly reflected on national provisions, especially the terminology in respect of the expression “wrongful arrest”, or similar phrases, it would appear to be a major challenge to reach a definition of what constitutes “wrongful” and insert it in a future³ international instrument, so that it would be acceptable by all States. It would, of course, be easier to implement a Protocol to the present conventions dealing just with the issue of wrongful arrest seeking to obtain consensus through the tacit acceptance procedure of the IMO.

² See the “implications” from such approach expressed by Teare J. in the case *NatWest Markets plc v. Stallion Eight Shipping Co SA (The MV Alkyon)* [2018] EWHC 2033 at [52]

³ Just a reminder at this point that the Arrest Convention 1999, which makes mention of the terms “wrongful or unjustified”, has not gained sufficient support by States. No one can speculate that the lack of wide acceptance may be attributed to that reason, or probably to the expansion of the maritime claims for which arrest can be made, but it is a fact that could not go unnoticed.

22. Depending on whether the issue of damages is considered to be procedural or substantive in its nature, different prerequisites would need to be adopted. For example, if substantive damages were to be allowed, it may be considered appropriate to impose a limit upon their extent. Otherwise, the potential applicants-arrestors might be discouraged from making use of the provisional arrest of the ship (as is sometimes argued) to secure the satisfaction of their claims.
23. It is the role of the CMI to propose draft instruments for reform or the unification of laws. As is shown by the results of this study so far and the reflection upon them, this is an area that undoubtedly requires further work to be done. Provided there is strong support for this project from the NMLAs and the industry, the goals of the IWG should be to make concrete proposals about (i) a definition of the test, (ii) counter-security provision, (iii) the type and extent of damages that may be claimed, and (iv) the method of unification, if any, whether by a Protocol or soft law, such as Guidelines, or Model provision(s).
24. It is therefore proposed that the current IWG engages into a further exploration of the views of representatives of the NMLAs and of various stakeholders on the above items (i to iv) and generally on the issues set out above. It is hoped that some feedback will be received during the session set for a debate about the subject matter on 9 November 2018.
25. This Discussion Paper would not be complete if reference was not made to the comment of Oscar Houston (New York) made during the deliberations concerning agreement of the draft of the 1952 Arrest Convention (Travaux Préparatoires, Part II – Art 6 – wrongful arrest and rules of procedure, at 385):

“...I think we must recognise human nature and appreciate that no matter how much we may want to unify and harmonise law we can only do it up to the point where we run into stubbornness, if you will, but at any rate views that are so far apart that they cannot be harmonised. We can, in a convention of this kind, accommodate, as far as the different peoples are willing to agree. If we attempt to go beyond that point, I think we defeat the purpose of unification.”

The debate was then, so many years ago, again about the test to be applied for wrongful arrest, the provision of counter-security and the type of damages that could be claimed, all of which were left to the *lex forum arresti*.

26. As the Chairman of this IWG, on behalf of the CMI, I would like to stress the importance of attendance by representatives of the NMLAs and of the shipping industry at the session on 9 November 2018, so that there is an opportunity for a debate, particularly on whether the diversity of the laws can be narrowed, if not unified, by adopting one acceptable to all test, simpler than wilful misconduct, or gross negligence, or any similar term; a test that would strike the right balance for the benefit of the industry and the free movement of shipping which is important to international trade.

Thank you

Dr Aleka Sheppard

Chairman of the IWG

PS I would like to express my thanks to Dr George Theocharidis for his thoughts and contribution to this Discussion Paper.