

LIABILITY FOR WRONGFUL ARREST OF SHIPS

Table I¹: Answers to the CMI questionnaire per question and country -

Rapporteur's report

Dr Aleka Sheppard

¹ With thanks to my assistant Agapi Terzi for her invaluable support during the compilation of the tables

	<p>I. a) Please advise which, if any, of the following Conventions your jurisdiction is a party to and has given effect to in its legislation:</p> <p>i) Arrest Convention 1952 ii) Arrest Convention 1999 iii) Maritime Liens and Mortgages Convention 1926 iv) Maritime Liens and Mortgages Convention 1993</p> <p>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?</p>	<p>II. 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?</p> <p><i>[This question means counter – security in the event of wrongful arrest]</i></p>	<p>II. 2) Under your national law, if the claim for which 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:</p> <p>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?</p>
<u>Australia</u>	<p>a) None of the listed Conventions b) Australian Admiralty Act 1988</p>	<p>No legal requirement</p>	<p>a) No b) The claimant must have acted “unreasonably” and without a good cause</p>
<u>Brazil</u>	<p>a) Maritime Liens and Mortgages Convention 1926 b) Brazil Commercial Code and Brazilian Civil Procedure Code</p>	<p>No security – Discretion of the Court</p>	<p>a) Liable only for the legal costs b) Separate claim for damages under tort rules requires proof of ii or iii. There is no specific provision in respect of wrongful arrest but general principles of negligence apply</p>

	Question I.	Question II.1	Question II.2
<u>Canada</u>	a) None b) Maritime Law - Federal Courts Act, R.S.C. 1985, c. F-7 as amended. (sections 2, 22, 42)	No security but optional at any stage	a) No b) Proof of iii is required
<u>Chile</u>	a) None b) Code of Commerce	Security depends on judge's discretion	a) No b) Liability if the test under ii or iii is satisfied
<u>Colombia</u>	a) None b) Decision 487, 2000 as amended by Decision 532,2002 which are based on the text of the Arrest Convention 1999 and Maritime Liens and Mortgages Convention 1993	Discretion of the Tribunal to request counter security	a) Potentially b) Bad faith or recklessness
<u>Croatia</u>	a) Arrest Convention 1952 b) Maritime Code 2004 and Enforcement Act 2012	Yes, if the claimant does not show a prima facie case of his claim and of a risk of no other means of enforcement	a) Yes, it would be unjustified or unfounded arrest b) Strict liability
<u>Ecuador</u>	a) None b) Decision 487 CAN 2001	No security is required but the Tribunal has discretion	a)No b)Illicit or unjustified arrest is the test
<u>Finland</u>	a) Arrest Convention 1952 b) Maritime Code (Ch. 4)	Bank guarantee for costs and losses and supplemental guarantee	a)Yes b) Strict liability if the arrest is proved to be unnecessary

	Question I.	Question II.1	Question II.2
<u>France</u>	a) Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1926 b) Code of Enforcement of Civil Proceedings (L 511-1)	No legal requirement	a) No b) Only if abuse of rights is proved (i.e. vexatious arrest, excessive security, arrest of wrong vessel, misuse of proceedings)
<u>Greece</u>	a) Arrest Convention 1952 b) Greek Code on Civil Procedure (art. 682 seq. and 707 seq.)	No legal requirement for security – Discretion of the Court	a) No b) There may be liability only under i or iii but since the judge hears the parties on the application for arrest, it would be difficult to prove i unless the claimant produced false evidence
<u>Hong Kong</u>	a) The Arrest Convention 1952	No counter- security is required	a)No b)Bad faith, gross negligence or malicious intent is required
<u>Ireland</u>	a)Arrest Convention 1952	An undertaking is required to indemnify the Admiralty Marshal in respect of charges and expenses [but this is not related to security for wrongful arrest]	a)No b)Proof of iii is required
<u>Israel</u>	a)None b)British Admiralty Court Act 1861, the Admiralty Rules 1883, and Israeli Maritime Court Law 1952	No counter- security is required	a) No b) The test is bad faith or gross negligence or malice
<u>Italy</u>	a) Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1926	Discretion of the Court	a) No b) Liability if the arrestor acted without ‘‘ordinary prudence’’

	Question I.	Question II.1	Question II.2
<u>Japan</u>	a) No b) Domestic Law: Civil Reservation Act, Civil Execution Act, Civil Code (Art.321), Commercial Code(Art. 842), Act on Limitation of Shipowner Liability (Art.95), Act on Liability for Oil Pollution Damage (Art.40)	Security is required	a) No b) Liability under tort rules. Rejection functions as a presumption of bad faith which must be rebutted
<u>Malta</u>	a) No b) Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta (Art. 742B – 742D)	No legal requirement for security – Discretion of the Court for penalties, damages, expenses if arrest is proved unlawful	a) No b) Separate claim for damages requires proof of i, ii or iii
<u>Mexico</u>	a) No b) Domestic Legislation	Security is required	a) Yes
<u>Netherlands</u>	Arrest Convention 1952	Ordinarily, counter- security must be provided by the claimant	Two conflicting Court of Cassation decisions: in 1965 wrongful arrest compensation was ordered even when arrest was made on reasonable grounds; in 2003 the court required proof of abuse of rights or a vexatious/ unlawful arrest
<u>Nigeria</u>	a) Arrest Convention 1952 incorporated into AJA 2004	Only security for costs	Only if arrest “unreasonable and without good cause”

	Question I.	Question II.1	Question II.2
<u>New Zealand</u>	a) None of the listed Conventions b) New Zealand Admiralty Act 1973	No security but security for fees, expenses and harbour dues of the Registrar	a) No b) Proof of bad faith or gross negligence is required
<u>Norway</u>	Arrest Convention 1952 Arrest Convention 1999 Maritime Liens and Mortgages Convention 1993	Court decides if counter security is necessary for potential liability claims	a) Yes, if the arrestor did not have a maritime claim b) Strict liability
<u>Panama</u>	a) None b) Code of Maritime Procedure	No counter security but security for Marshall's expenses	a) No b) Proof of negligence is required
<u>Poland</u>	a) Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1926 b) Polish Civil Procedure Code, Part II, Security Procedure (Art. 730-757)	Security is upon the discretion of the Court – In practice never happens	a) Yes b) Strict liability
<u>Romania</u>	a) Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1993 b) Romanian Civil Procedural Code (Art.959-968)	Security in cash, fixed by the Court	a) No b) Liability only if the arrestor acted in an abusive manner
<u>Russia</u>	a) Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1993 b) Code of Civil Procedure and Arbitration Procedural Code of the Russian Federation	Security to cover damages is required	a) Yes b) defendant must show his interests were infringed by the arrest and prove his damages - (proof of i) or ii) or iii))

	Question I.	Question II.1	Question II.2
<u>Senegal</u>	a) Arrest Convention 1952	Security is required a) when vessel in question flies Senegalese flag and b) the claimant/arrestor is a foreign national.	a)No b) Arrestor would be liable if evidence of i or ii or iii
<u>Spain</u>	a) Arrest Convention 1999 and Maritime Liens and Mortgages Convention 1993 b) Spanish Shipping Act (Art.470 seq.) and Civil Procedure Act	Security or bond is required	Strict liability for wrongful arrest once claim is rejected, proof of i, ii or iii is not required
<u>Turkey</u>	a)Maritime Liens and Mortgages Convention 1926 b) Turkish Commercial Code (5 th Book)	Yes, up to 10,000.00 SDR	The arrestor will be liable in damages for unjustified arrest but Turkish law has a gap regarding the circumstances in which the arrest would be unjustified
<u>Ukraine</u>	a) Arrest Convention 1952 and Maritime Liens and Mortgages Convention 1993	Security for potential damages may be required	a) No b) Proof of wrongful behaviour unless the arrestor proves no fault
<u>United Kingdom</u>	a) Arrest Convention 1952 (as reflected in ss. 20-21 of SCA 1981)	No counter security in the event of wrongful arrest	a)No b) Proof of iii is required
<u>U.S</u>	a) No b) Supplemental Admiralty Rule (B and C) the Federal Rules of Civil Procedure	No security except "Security for costs"	a) No b) Proof of iii is required

	<p>II. 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):</p> <p>a) Would the arrestor be liable in damages for the consequences of the arrest, and, if Yes, in what circumstances?</p> <p>b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?</p>	<p>II.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:</p> <p>a) Would, under your national law, the arrestor be liable in damages?</p> <p>b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?</p>	<p>II.5) If the amount of the arrest claim was grossly exaggerated:</p> <p>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:</p> <p>i) for the extra cost of the security required,</p> <p>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</p> <p>iii) for losses incurred as a result of the owner being unable to provide the excessive security?</p> <p>b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?</p>
<u>Australia</u>	The claimant must have acted “unreasonably” or without a good cause	The claimant must have acted “unreasonably” and without a good cause	Liable for “direct” losses, if the claimant acted “unreasonably” and without a good cause
<u>Brazil</u>	Yes, under tort rules	a) Yes. Separate Claim is required b) Yes, bad faith is required	Yes
<u>Canada</u>	a) Yes b) Proof of gross negligence or malicious intention is required	a) Yes b) Proof of gross negligence or malicious intention is required	a) Yes b) Proof of gross negligence or malicious intention is required
<u>Chile</u>	No	a) Yes b) Tort rules	a) Yes b) Tort rules

	Question II.3	Question II.4	Question II.5
<u>Colombia</u>	a) If the arrest was illegal or unjustified b) Proof of bad faith or recklessness is required	a) Probably b) Proof of bad faith or recklessness is required	a) Yes, if the test is satisfied b) See II.2 above
<u>Croatia</u>	See as per answer II.2 (a) (b) above	a) Yes, the arrest would be unfounded b) Strict liability	No specific rules or court decisions
<u>Ecuador</u>	a) Yes b) Illicit or unjustified arrest	a) Yes b) Illicit or unjustified arrest	a) Yes b) Illicit or unjustified arrest
<u>Finland</u>	a) Yes b) Strict liability	No answer to this question is given but is presumed from previous answers that a wrongful arrest in these circumstances entails strict liability	Yes. Strict liability or even tort rules will apply for exaggerated security
<u>France</u>	Maybe if there is proof of abuse of rights	No	Yes, on the grounds of abuse of rights
<u>Greece</u>	a) No b) Validity of claim is judged on application for arrest	As per answer under II.3	Validity of claim is judged on application for arrest
<u>Hong Kong</u>	a) No b) As per answer II.2(b)	Only as per answer II.2(b)	Issue does not arise in HK

	Question II.3	Question II.4	Question II.5
<u>Ireland</u>	a)No b) Proof of bad faith, gross negligence or malice	a) No, unless proof of bad faith, gross negligence or malice b)As above	a) No b)[Not applicable]
<u>Israel</u>	a)Not usually b)Yes but very seldom	a)Not usually b)Yes on the basis of bad faith	a)Theoretically yes b)Yes
<u>Italy</u>	a)No b) If acted without ‘‘ordinary prudence’’	a) Yes b) Proof of negligence at least is required	Yes, if he acted without ordinary prudence
<u>Japan</u>	No	a)Yes b)Presumption of bad faith	a) Yes b) See II.2
<u>Malta</u>	No automatic liability in damages in the event of rejection of the claim	a) Yes b) Proof of malicious, frivolous or vexatious act is required	a) Yes b) Proof of malicious, frivolous or vexatious act is required
<u>Mexico</u>	The Court upon rejection of the claim will decide if there is liability	a) Yes b) Proof of negligence or gross negligence or bad faith	a) Yes b) Proof of negligence or gross negligence or bad faith
<u>Netherlands</u>	Conflicting principles as mentioned under II.2	Principles as mentioned under II.2	Principles as mentioned under II.2

	Question II.3	Question II.4	Question II.5
<u>New Zealand</u>	Proof of bad faith or gross negligence is required	Proof of bad faith or gross negligence is required	a) No relevant case law but potential liability under tort rules
<u>Nigeria</u>	See II.2 above	a) Yes, if arrest in Nigeria and b) arrest “unreasonable and without good cause”	Yes, please see II.2
<u>Norway</u>	See II.2 above	In such a case no arrest would be granted, unless arrestor mislead the court	Yes, potentially
<u>Panama</u>	See II.2 above	Yes, if there is proof of negligence	Evidence of error, fault, negligence or bad faith is required
<u>Poland</u>	No	No jurisprudence	No
<u>Romania</u>	No	No jurisprudence	Yes, as per under II.2
<u>Russia</u>	Liability only according to final decision on the merits	Yes	Yes, subject to proof of negligence and losses
<u>Senegal</u>	Answer as per II.2 above	a)Yes b) If the affected party provides evidence of any damage suffered due to negligence, bad faith, or gross negligence of arrestor	a)Yes b) Any of these grounds could be the basis for a claim for damages

	Question II.3	Question II.4	Question II.5
<u>Spain</u>	a) Yes b) Strict liability	a) Yes b) Strict liability	a) Yes b) Strict liability
<u>Turkey</u>	TCC is not clear	a) Yes, if arrest unjustified b) Strict Liability	a) Yes b) Strict liability
<u>Ukraine</u>	No difference between rejection of arrest by a court of first or by a C.A	a) Yes b) Proof of negligence	a) Yes b) Proof of negligence
<u>United Kingdom</u>	a) No b) N/A	a) Proof of malice or gross negligence would be required b) See II.2(b) above	a) It may be that the cost of providing excessive security could be recovered as costs incidental to the proceedings (there is some case law support) b) See II.2(b) above
<u>U.S</u>	No	a) Yes b) See answer under II.2	a) Yes b) See under II.2

	II.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?	II.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?	II.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?
<u>Australia</u>	No	No	No
<u>Brazil</u>	a) Yes in the instance of arrest in personam b) Yes, proof of awareness of assets	No	No specific penalties, unless there is a bad faith litigation
<u>Canada</u>	No	No	No
<u>Chile</u>	No	No	No
<u>Colombia</u>	No	No	No

	Question II.6	Question II.7	Question II.8
<u>Croatia</u>	No general answer to this question – matter of facts	No	No
<u>Ecuador</u>	No	No	No
<u>Finland</u>	No	No	No, unless there is criminal conduct by the arrestor
<u>France</u>	No	No	No
<u>Greece</u>	No	No	No, but maybe criminal penalty if there is false evidence
<u>Hong Kong</u>	No	No	No
<u>Ireland</u>	a)No b) Not applicable	Yes, under s. 47 of ACA 1867	No
<u>Israel</u>	a)Yes b) Presumably proof of bad faith is required	Rarely	No
<u>Italy</u>	No precedents	No	Maybe

	Question II.6	Question II.7	Question II.8
<u>Japan</u>	No	No	No
<u>Malta</u>	a) Yes b) Proof of debtor's healthy financial state is required of which the claimant ought to have known	- Where the applicant does not pursue the claim with 20 days after the issue of the arrest - Where the claimant fails to show why the arrest should continue - If 15 days prior to the application for the arrest there is no proof that the claimant demanded payments from the debtor	Yes, there may be upon request by the defendant
<u>Mexico</u>	No	No	No
<u>Netherlands</u>	Principles as mentioned on II.2	No	No
<u>New Zealand</u>	No	No	No
<u>Nigeria</u>	Solvency or not is not relevant	No	No
<u>Norway</u>	No	No	No
<u>Panama</u>	No	No	[Not relevant answer]

	Question II.6	Question II.7	Question II.8
<u>Poland</u>	No	No	No
<u>Romania</u>	Yes, if he acted in an abusive manner	No	No
<u>Russia</u>	No	No	No
<u>Senegal</u>	a)Regardless of the solvency of the party allegedly liable for the claim, the question is whether the arrest has caused damage to the affected party b)Evidence of i or ii or iii required	No	No
<u>Spain</u>	No	Where the defendant failed to bring proceedings on the merits within the period given by the Court or within 20 days when Spanish Courts have jurisdiction on merits	No
<u>Turkey</u>	No	No	No
<u>Ukraine</u>	No	No	No

	Question II.6	Question II.7	Question II.8
<u>United Kingdom</u>	No	If arrest amounts to breach of a valid English arbitration agreement or jurisdiction clause and the arrest proceedings aim to have the claim determined on the merits in another jurisdiction	No
<u>U.S</u>	No	No	No

	II.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?
<u>Australia</u>	International Private Law
<u>Brazil</u>	Lex fori: Brazilian law. Discretion of the court to examine lex forum arresti in order to analyse the merits of the claim

	Question II.9
<u>Canada</u>	Law which has the closest connection to the tort of arrest provided that this does not conflict with the Canadian public policy
<u>Chile</u>	Depends on the rules upon which the action for damages will be based
<u>Colombia</u>	Lex forum arresti if the arrest is within the Andean Community countries. If outside probably lex fori would be applied by the judge
<u>Croatia</u>	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.
<u>Ecuador</u>	Lex forum arresti
<u>Finland</u>	Lex loci damni (i.e. lex forum arresti)
<u>France</u>	Lex fori

	Question II.9
<u>Greece</u>	- 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: substantive law applicable pursuant to Rome II Regulation (lex forum arresti or damni)
<u>Hong Kong</u>	Lex forum arresti
<u>Italy</u>	Lex forum arresti (Rome II Regulation)
<u>Ireland</u>	If arrest in a Contracting State art. 6 of the Arrest Convention 1952 applies (i.e. law of the arrest). If not, International Law Rules apply
<u>Israel</u>	Lex fori
<u>Japan</u>	Not answered
<u>Malta</u>	Lex Loci damni (i.e. lex forum arresti)
<u>Mexico</u>	Lex fori

	Question II.9
<u>Netherlands</u>	-Netherlands outside EU: lex loci delicti [the same as lex loci damni] -Netherlands in Europe: lex loci damni (i.e. the Rome II Regulation)
<u>New Zealand</u>	International Private Law
<u>Nigeria</u>	No jurisdiction
<u>Norway</u>	Lex forum arresti pursuant to Norwegian International Private Law.
<u>Panama</u>	No jurisdiction for such claims
<u>Poland</u>	[Assumed Rome II Regulation applies]
<u>Romania</u>	[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]

	Question II.9
<u>Russia</u>	Russian International Private Law (applies Lex loci delicti)
<u>Senegal</u>	Lex fori, i.e. its own substantive law
<u>Spain</u>	[The Court would not have jurisdiction to examine such a claim] ²
<u>Turkey</u>	If International Conventions which may determine the applicable law do not apply, it would apply the substantive law applicable pursuant to its International Private Law Rules
<u>Ukraine</u>	Lex loci arresti unless there is no wrongful arrest under Ukraine law
<u>United Kingdom</u>	Lex forum arresti or damni (Rome II Regulation) assuming English court has jurisdiction
<u>U.S</u>	Different views of Courts. Some (subject to having jurisdiction) apply U.S law, others apply conflict of laws rules

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