

HRVATSKO DRUŠTVO ZA POMORSKO PRAVO



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THE CROATIAN MARITIME LAW ASSOCIATION RESPONSE TO THE DRAFT QUESTIONNAIRE STUDY RELATING TO LIABILITY FOR WRONGFUL ARREST (March 9, 2016)

Introduction

The CMI Executive Council has decided to set up an International Working Group to study certain areas of the law concerning the arrest of ships with particular emphasis on the law in relation to wrongful arrest.

The possibility and extent of greater uniformity in this area of maritime law may be worth of being identified.

The issues which the study intends to investigate are covered by the following questions:

I. INTERNATIONAL CONVENTIONS:

- (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
 - (iv) Maritime Liens and Mortgages Convention 1993

Answer: *Croatia has succeeded to Yugoslavia as a party to the Arrest Convention 1952 as from 8 October 1991 and, therefore, the Arrest Convention 1952 has the force of law in Croatia. The notification of succession has been published in the Official Gazette of the Republic of Croatia (NN-MU No. 1/92 of 14 November 1992). In accordance with Art. 10 of the 1952 Arrest Convention, Yugoslavia made a reservation, which is now applicable to Croatia, and according to which the Croatia reserves the right not to allow the arrest in respect of claims provided in art. 1 (1) (o) – disputes as to the title to or ownership of any ship.*

Croatia is not a party to any of the other above-mentioned Conventions.

(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?

Answer: *There are two different regimes in force in Croatia which may be applied in respect of the arrest of ships: that of the 1952 Arrest Convention which is applicable to ships flying the flag of a Contracting State; and the domestic regime, which is applicable in all situations outside the scope of application of the 1952 Arrest Convention. Domestic regime is based upon the provisions of the 2004 Maritime Code (as amended). Some of the provisions contained in the 2004 Maritime Code are very similar to the respective provisions of the 1952 Arrest Convention. In addition, some procedural issues are governed not only by the 2004 Maritime Code but also by the 2012 Enforcement Act (as amended).*

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?

Answer: *According to Croatian law, arrest of a ship may be proposed and ordered as a type of the provisional measure (in the proceedings of the securing the claim) or as an operation which is a part of the enforcement proceedings. In the context of the ship arrest as a type of the provisional measure and according to Art. 344 of the 2012 Enforcement Act, the claimant, in order to apply successfully for the arrest, has the burden of providing prima facie evidence of his claim. Therefore, he has to prove that the claim in respect of which the arrest is applied probably exists. Furthermore, he has to prove the probability of the danger that without such a measure the debtor shall prevent or make significantly more difficult the collection of the claim. It is presumed that such danger exists if the claim has to be executed abroad. However, according to Art. 349 of the 2012 Enforcement Act, the court may order an arrest at the claimant's proposal even when he has not shown probable the existence of a claim and danger if he has previously, within a time limit set by the court, provided security for damage that the debtor might incur by the ordering and implementation of the arrest. 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 proposal, require deposit to be provided by the claimant even when the claimant has shown probable the existence of the claim and the danger. If the claimant does not provide the security within the set time limit, the court shall suspend the proceedings and set aside the actions related to the arrest that have been undertaken. The circumstance that the debtor has asked for the provision of security does not postpone the implementation of the arrest until the court reaches a decision on his proposal. Finally, the claimant always has to pay an advance related to the costs of the arrest procedure.*

2. Under your national law, if the claim for which a vessel has been arrested has subsequently been rejected by the court hearing the case on its merits, would the arrestor be liable in damages by reason of:

- (a) The mere rejection of the claim?
- (b) Or would proof be required about the arrestor's:
 - (i) awareness/knowledge that his claim had no foundation, or
 - (ii) negligence in bringing such a claim, or
 - (iii) bad faith or gross negligence or, otherwise, malicious bringing of such a claim?

Answer: *According to Art. 354 of the 2012 Enforcement Act, the debtor has the right to claim from the claimant damages he incurred by an arrest which has been determined as unfounded or which the claimant failed to justify. Unfounded or unjustified arrest is wrongful. Arrest is unjustified if the claimant has not, in the prescribed time, commenced appropriate action in order merits of the case to be solved as well as in case when his claim has been rejected by the court dealing with the merits of the case. Claimant's liability for damages is the strict one. Therefore, the existence of claimant's negligence, gross negligence, bad faith or other malicious bringing of a claim is irrelevant in respect of establishing his liability for damages.*

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?

Answer: *According to Art. 354 of the 2012 Enforcement Act, the debtor has the right to claim from the claimant damages he incurred by an arrest which has been determined as unfounded or which the claimant failed to justify. The arrest is unfounded if the decision of a court of the first instance granting the arrest has been repealed by an appeal court (without deciding on the merits of the case). Claimant's liability for damages is the strict one. Therefore, the existence of claimant's negligence, gross negligence or bad faith is irrelevant in respect of establishing his liability for damages.*

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?

Answer: *According to 2004 Maritime Code (Art. 954), ship may be arrested only if it is owned by the personal debtor (i.e. the person which is, according to the rules of the applicable law, liable for the claim and which was, at the moment of the raising of the claim, the owner, operator or the charterer of the ship). The exception is related only to the claims secured by the mortgage or maritime lien attached to the arrested ship. If the claim could not be enforced against the arrested ship because the claim was not against the owner and the owner is not liable for the claim in any way, than the arrest was not founded. Therefore, the debtor has the right to claim damages against the claimant on the grounds of wrongful arrest. The liability of the claimant is the strict one.*

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 required 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?

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

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 him under your national law?
- (b) For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?

Answer: *There is no general answer to this question. It is the matter of the facts of each separate case. As described in answer to question No. 1, the claimant, in order to apply successfully for the arrest, has to prove (inter alia) the probability of the danger that without such a measure the debtor shall prevent or make significantly more difficult the collection of the claim. It is presumed that such danger exists if the claim has to be executed abroad. The circumstances mentioned in this question may be taken into considerations by the court of the first instance dealing with the application for the arrest (as well as by the appeal court), especially in order to establish the existence of the described probable danger. Although there is no court practice in Croatia relevant for this issue, theoretically it is possible that the first instance court grants the arrest and the appeal court subsequently repeals such arrest due to circumstances described in this question. In such a case the debtor could be entitled to claim damages from the claimant. In this context it is important to put emphasis on the fact that the arrest is permissible only if without such a measure the debtor shall prevent or make significantly more difficult the collection of the claim. If the judgment or arbitration award may be enforceable with no significant difficulties even without arrest being ordered, than the application for the arrest should be rejected.*

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?

Answer: *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?

Answer: *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?

Answer: *According to 2012 Enforcement Act, the debtor may claim for damages caused by wrongful arrest in a special adhesion process which is a part of the security proceedings related to the arrest of ships. The debtor must commence this adhesion process within thirty days from the date on which the competent court established that the arrest was unfounded or unjustified (i.e. unlawful). After the expiring of this deadline, the debtor may claim for damages only in civil proceedings which has never been used in practice. Since this special adhesion process is a part of the security proceedings related to the ship arrest, i.e. it is the matter of procedure, and having in mind that the arrest in general is governed by the Croatian procedural law, it is obvious that the court would apply Croatian law in respect of damages for wrongful arrest.*