LIABILITY FOR THE WRONGFUL ARREST OF SHIPS: WHERE WE STAND

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The question whether uniform rules on liability for the wrongful arrest of ships should be established has been debated since the origins of the unification of the law on the arrest of ships. In fact, conflicting views immediately emerged, and have continued to be expressed. This has not led to full regulation of the matter in an international convention. Recently, the question has been taken up again by the Comité Maritime International. A Working Group was formed, whose works are summarised together with what has been discussed from the outset, and a possible way ahead is suggested.

Keywords: *arrest; wrongful arrest; security; Arrest Convention 1952; Arrest Convention 1999; CMI Working Group.*

1. THE FIRST DRAFT CONVENTION AND THE 1930 CMI CONFERENCE

The initiative to seek uniformity on the arrest of ships dates back to 1930 when, in preparing the Conference of the Comité Maritime International (CMI), which took place that year in Antwerp, the National Maritime Law Associations who were members of the CMI were asked to suggest new subjects to be studied by the CMI.

The French, German and Italian Associations proposed the arrest of ships,[1] as this subject was closely linked with collision, maritime liens and hypothecs,

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[1] Conférence d'Anvers 1930, *CMI Bulletin n. 91*, 1931, p. 507.

which had already been given uniform regulation by the related Brussels Conventions of 1910 and 1926.

The proposal was accepted and at the CMI 1930 Antwerp Conference the arrest of ships was therefore considered, with issues immediately emerging relating to wrongful arrest.[2]

In compliance with the traditional manner of work of the CMI, a Questionnaire was subsequently prepared.

Replies were received from the National Associations of Belgium, France, Germany, Italy, the Netherlands, Norway, Portugal, Sweden, the United Kingdom, the United States of America and Yugoslavia.[3]

A preliminary text of the Convention was drafted,[4] which in its Art. 2 stated that the arrest of a ship was to be granted upon the Court simply checking that the claim was likely.

However, the Court could require the arrestor to supply security, as deemed reasonable, to cover damages in the event the arrest proved to be wrongful.

Art. 7 of the draft then provided that, in the case of the release of the ship from an arrest which was considered unjustified, the arresting party had to pay the costs of the security which was put up to release the ship. It also provided that if the unjustified arrest was performed in bad faith, the arresting party could be condemned to pay also the damages caused by the arrest.[5]

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[2] As reported in *CMI Bulletin n. 91*, p. 514 F. Berlingieri Sr. pointed out that *"There is an important difference in the consequences of arrest in various countries. In England and in America the arrest is only the subject of further investigation and complaint where a real culpable fault almost amounting to fraud has been committed in order to secure the arrest, but in Italy and in some Continental countries this question of demanding an arrest and obtaining bail for the arrest gives rise to the question of compensation in quite another way. Wherever the arrest has been demanded, lightly or frivolously, or an excess of bail has been insisted upon, that question is reserved for further examination and compensation can be claimed and obtained. That is an important difference which merits further examination"*. And A. Bagge of the Swedish MLA noted (p. 515) that among the points of interest there was the issue of security to be lodged by the arrestor for the eventual payment of damages awarded to the owner in the event of the arrest being found to be unjustifiable and vexatious.

[3] Conférence d'Oslo 1933, *CMI Bulletin n. 96*, 1934, respectively at pages 86, 127, 21, 39, 29, 60, 94, 54, 202, 68 and 49.

[4] *CMI Bulletin n. 96,* p. 157.

[5] From the report of M. Léopold Dor (*CMI Bulletin n. 96* at p. 155) it appears that the provision was strongly opposed by the British Association*: "L'article 7 soulève une question délicate, celle de la responsabilité encourue par le saisissant au cas de saisie injustifiée. Nous sommes convaincu que, si le projet de Convention prévoit des sanctions trop rigoureuses, il se heurtera à l'opposition irréductible des milieu britanniques, qui feront échouer la future Convention. Nous avons donc rédigé*

Art. 8 finally contemplated that the procedural rules relating to the arrest were those of the law of the place of the arrest.

The draft text was discussed among the National Associations, with amendments being made, to be considered at the 1933 CMI Conference in Oslo.

Whilst Art. 3 stated again that the Court was to release the ship from arrest if evidence was offered that it was unjustified, or if satisfactory security was furnished, the new Art. 5 repeated[6] what was provided for in Art. 7 of the previous text referred to above.

2. THE SUBSEQUENT DEBATE AND THE CMI CONFERENCES FROM 1933 TO 1949

At the Oslo Conference, this provision continued to be opposed by the British Association, which was against too severe sanctions, even if limited to the case of bad faith. It was therefore agreed to have the issue adjourned until the next Conference.[7]

During discussions,[8] it appeared that there were clear differences between common law and civil law systems: the first permitting arrest only when the claimant was entitled to enforce its claim by proceeding *in rem*, and contemplating claiming only the cost of the security on the ground that the arrest could be lifted by providing security; the second allowing the arrest as security for any claim, whether of a maritime nature or not, and giving the possibility to hold the arresting party liable for damages in the case of wrongful arrest.

l'article 7 de façon à limiter la responsabilité du saisissant de bonne foi au remboursement des frais de la caution fournie par le propriétaire pour obtenir mainlevée de la saisie. Par contre, il est tout naturel que, lorsque la saisie a été effectuée de mauvaise foi, le créancier soit entièrement responsable de toutes les conséquences dommageables de son acte illicite et qu'il répare le préjudice ainsi causé, non seulement aux intéressés sur corps, mais également à ceux sur cargaison".

[6] *CMI Bulletin n. 96*, p. 182.

[7] *CMI Bulletin n. 96*, p. 472: *"The President, summing up the debate, says that there are serious differences of opinion on various important matters in this draft Convention: further, a very important group of our members, the British members, are not in a position to consider it, nor to give their opinion as to the merits of the proposals made. Under these circumstances, the President suggests that it would not be wise to go into a reading of this draft as such, but that it is better to keep it before the Conference, leaving it to the Permanent Bureau to consult again the sub-Committee and bring the matter back before the next Conference when all these first ideas on a new subject, which had not been considered up to date, will have ripened, and we may probably arrive at a unanimous conclusion".*

[8] *CMI Bulletin n. 96*, p. 440.

In an effort to find a solution agreeable to as many National Associations as possible, the CMI restricted the scope of application of the Convention to certain claims secured by maritime lien under the 1926 Brussels Convention on maritime liens and hypothecs, i.e. to claims for salvage and collision.

At the 1937 CMI Conference in Paris, whilst the British and the U.S. Associations refrained from making comments, other National Associations, including the Italian one, regretted the restricted scope of application of the Convention.

However, upon the suggestion of the German Association, the scope was even more restricted to the case of collision.

The Conference finally approved a suggestion to leave the issue of damages for wrongful arrest to the Court of the arrest, and it was agreed that the arresting party was to refund the cost of the security to release the ship in the case of wrongful arrest.

At the 1947 CMI Conference in Antwerp, and at the following Conference of 1949 in Amsterdam, it was considered that the scope of the draft agreed at the 1937 Conference was too restricted. Another Questionnaire was circulated, to collect additional information on national laws. The answers outlined the differences between the English and the continental systems.[9]

3. THE COMPROMISE IN THE 1952 AND 1999 ARREST CONVENTIONS

A new draft was prepared, which was considered at the 1951 CMI Conference in Naples.[10] The wording was agreed, notwithstanding the different opinions that continued to be expressed by the National Associations regarding the provisions on wrongful arrest.[11]

[9] The history of discussions on the scope of a convention on the arrest of ships and on liability for wrongful arrest is summarised by Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. I, 6th ed., Informa Law from Routledge, 2017, p. 1.

[10] The Preparatory Works of the 1952 Arrest Convention are published in Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. I, 6th ed., *op. cit*, p. 490. The Preparatory Works are also published by the Comité Maritime International in a volume edited in 1997 by F. Berlingieri. Those relating to Art. 6 on wrongful arrest are uploaded on the CMI website → works → arrest/attachment of ships.

[11] The following was argued by Mr Kaj Pineus of the Swedish Association at the Plenary Session 25 September 1951 of the Naples Conference:
*"Mr President and gentlemen, I propose this amendment on behalf of Finland, Norway and Sweden. It was handed in yesterday. It contains four sentences, and I should like to read them to you just to make sure that we all know what we are talking about. The first is: "*Should an arrest be

found unjustified the claimant shall be liable to pay all costs and damages of whatsoever kind which have arisen on account of the arrest". *The second is:* "Before the arrest of a ship is authorized the claimant shall ordinarily be bound to furnish a guarantee sufficient to cover the damages and all costs for which the claimant may be liable if it appears that his claim is unjustified". *The third is*: "In exceptional cases the Court or other appropriate authority may permit arrest without such security provided that the claim is considered likely to succeed and if the condition of security will cause undue hardship". *The fourth is*: "The nature and the amount of such security shall be determined by the court or authority who permits the arrest to be made.".

However, M. J. de Grandmaison of the French Association objected:
"On the second point, which is the point of the compulsory furnishing of bail imposed by the judge upon the claimant, I should like to say this. It is an obligation, say the Scandinavian countries, upon the judge. We do not agree. The actual position is this. The judge is at liberty. He has full liberty to decide if he will impose such a bail upon the claimant. He takes into consideration all the facts put before him and decides if the claim is reasonable or feasible. He takes all those matters into consideration. But he must take into consideration, too, the personality of the claimant and his financial position and possibilities. I gave an example. Take a collision case. On the day following somebody in a foreign country might want to arrest a foreign ship which was ready to sail and which will never come back. Is the judge bound and tied to impose a guarantee to cover expenses and damages following an arrest if it is unjustified? It is impossible for anyone to know at the date of the arrest whether it will be justified or not. That cannot be a solution for such cases as where people have not money and no possibility of getting any, because they will not be able to arrest that ship. That seems to us undemocratic, and we think that our Parliament would not accept such a thing. We think that it is better to rely entirely upon the wisdom and experience of the judge, who will give, in certain exceptional cases, permission to arrest a ship without any bail, or who will, on the contrary, order the furnishing of bail or a bank guarantee if he thinks it advisable. That is why I suggest that we should heartily support the commission's text.".

This latter view was supported by Mr G. Berlingieri of the Italian Association:
"We heartily support what has been said by Maître de Grandmaison, and we really cannot see that a judge could be compelled to make the arrest of a vessel subject to the payment of a guarantee which in some cases the claimant could not supply. We find that in the Scandinavian text the mention of exceptional cases is too restricted as far as the freedom of the judge to act is concerned. Therefore, we cannot support the test of our Scandinavian colleagues, and we give all our support to the text submitted to us by the International Commission.".

The debate was concluded by President Albert Lilar who, after supporting the views of the delegates having expressed opinions against security being compulsory in order to be granted with an arrest, stated:
"It seems that after what Mr. Houston (also the U.S. delegate, Mr Oscar R. Houdson, supported the adoption of the language put forward by the International Commission), *Mr de Grandmaison and Mr. Berlingieri have said, I have nothing to add in order to show how right they all are; but on behalf of the Belgian delegation I should like to make a remark to our Norwegian, Finnish and Swedish friends. We will not deny that their opinion has a sound basis, but the only thing we ask is that they consider our feelings in the same way. We must come to a decision and bear in mind that our principal aim is to achieve unification in maritime law. We should like our colleague Mr. Pineus to recognize that the committee went as far as possible and has reached the point beyond which it is really impossible to achieve any agreement between all the countries concerned.*

The text was then submitted to a Diplomatic Conference held in Brussels from 2 to 10 May 1952. There, the more heavily debated issues were related to liability for wrongful arrest, to the requirement for the claimant to provide security, and also to the jurisdiction of the Court of the arrest to decide on the merits.

What was approved by the Diplomatic Conference[12] was a compromise to solve the differences relating to liability for wrongful arrest which existed between civil law and common law countries, these latter being even against the mention of the word *"security"* in the Convention. This was achieved with a rule of private international law, deleting the reference to security as approved at the CMI Conference in Naples and by simply referring to the law of the place of the arrest.[13]

The Scandinavian delegates objected to this, insisting that the arresting party provide security before the arrest,[14] whilst the delegates from a number

It seems to me that our commission went as far as possible and reached the maximum point after which no agreement will be achieved, and that the text of the commission is the utmost to which we can gain the approval of the countries and the ratification of the governments. Therefore, I must ask our Scandinavian friends to recognize that we are right in asserting what we do and that the text of the commission is the unique and sole basis on which the agreement of all countries can be achieved. Therefore, on behalf of the Belgian delegation, I give my full and hearty approval to the text submitted to us by the International Commission.".

The following text was therefore approved by the Naples Conference with the Norwegian, Finnish and Swedish Associations voting against:
"Article 6. 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, or whether he shall be required himself to furnish guarantee to secure the payment of such damages or costs, shall be determined by the law of the Contracting State in whose jurisdiction the arrest is made or applied for.".

12 The text of the Convention may be found at https://treaties.un.org.

13 Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. I, 6th ed., *op. cit*., 2017, p. 371.

14 This is what was stated by the Danish delegate at the tenth plenary session on 9 May 1952: *"M. Boeg (Denmark) estime l'article 6 particulièrement important. La question a déjà été discutée longuement lors de conférences antérieures, et lors des réunions du comité de rédaction. Pourtant, le texte actuel ne satisfait pas les pays scandinaves, Danemark, Finlande et Suède. Aussi ont-ils présenté un autre texte, qui a été distribué aux membres de l'assemblée. Ce texte permet d'obtenir, en principe, des dommages-intérêts pour toute saisie injustifiée qui a causé un dommage ou des frais, et oblige à fournir une caution pour assurer le paiement de ceux-ci. Il est toutefois possible que le demandeur se soit trouvé dans l'impossibilité de savoir que sa saisie était injustifiée; l'amendement admet que, dans ce cas, le demandeur n'est pas responsable. De même, le nouveau texte admet que, exceptionnellement, le dépôt d'une caution n'est pas nécessaire si la saisie est suffisamment justifiée ou si le demandeur a des difficultés très sérieuses pour fournir caution. Mais dans les cas normaux, M. Boeg considère le dépôt d'une caution comme une condition primordiale de la saisie, et le Danemark ne pourrait signer la convention s'il n'était pas donné suite, de l'une ou de l'autre manière, au vœu des pays scandinaves.".*

of continental States, including Italy and France, observed that this was too rigid.

To possibly obtain consensus over different views, it was suggested by the President of the Diplomatic Conference, Albert Lilar, and by the French delegate, Georges Ripert, to state that the Court of the arrest may require the claimant to provide security.[15] But strong opposition came from the British delegates, who insisted that all questions relating to liability for wrongful arrest and security were to be determined by the law of the State of the arrest.[16]

The opposition was accepted,[17] and this is why the Scandinavian countries ratified the Convention[18] only after ratification became necessary for the members of the European Union.

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[15] By adding a second paragraph to state as follows: *"The Court or other appropriate judicial authority of the country in which the arrest was made or applied for may require the claimant to furnish sufficient bail or other security for such liability as he may ultimately incur under the domestic law."*.

[16] *"Sir Gonne St. Clair Pilcher (United Kingdom) remercie M. le Président Lilar et M. Ripert de leurs remarques et suggestions. Mais la délégation britannique doit soumettre à l'assemblée un amendement qui devrait être discuté au préalable. Comme M. Miller l'a dit ce matin, le projet de la conférence du Comité Maritime International de Naples était acceptable. Le texte actuel ne l'est plus. Les instructions du gouvernement de Sa Majesté ne permettent pas d'accepter le paragraphe 2 qui laisse à l'appréciation du juge le soin de décider s'il faut fournir une caution. La délégation britannique propose donc la suppression pure et simple du paragraphe 2. Le Royaume-Uni possède une des plus grandes flottes du monde, et les pays scandinaves ont également de très grandes flottes. En Grande-Bretagne, il n'y a jamais eu de plaintes à ce sujet et si les pays scandinaves insistent tellement sur la question de la caution à fournir, c'est surtout à cause d'expériences que ces pays ont faites aux Etats-Unis. Cette question pourrait, semble-t-il, se régler plutôt aux Etats-Unis qu'ici. Le Royaume-Uni a fait de concessions, notamment en admettant la saisie d'un sister-ship et en acceptant la limitation des créances maritimes selon l'article 1er. Les pays continentaux ont fait également des concessions. Il serait dommage que cette convention très importante échoue par la volonté des pays scandinaves de conformer cette convention à leurs législations nationales. Ne pourrait-on plutôt essayer de faire adopter par les Etats-Unis la ligne de conduite que nous indiquons dans cette convention?"*.

[17] Put to the vote, the amendment of the Scandinavian countries to make security compulsory was rejected by fifteen votes: Germany, Austria, Belgium, Brazil, Egypt, Spain, France, Greece, Italy, Lebanon, Monaco, the Netherlands, the United Kingdom, the Holy See, Thailand. There were five votes in favour: Denmark, Finland, Norway, Sweden, Yugoslavia, and the abstention of Japan. As to the amendment by the United Kingdom, it was adopted by thirteen votes: Germany, Austria, Belgium, Brazil, Egypt, Spain, France, Greece, Lebanon, Monaco, the Netherlands, the United Kingdom, the Holy See, with six votes against: Denmark, Finland, Norway, Sweden, Thailand, Yugoslavia, and two abstention: Italy and Japan.

[18] Denmark: 2 May 1989, Sweden: 30 April 1993, Norway: 1 November 1994, Finland: 21 December 1995.

The question whether uniform rules were to be provided in respect of the obligation of the arrestor to provide security and of his liability in the event of wrongful arrest continued to be studied by the CMI, together with other issues pertaining to the arrest of ships.

The draft of a new Convention was thus approved by the CMI at the 1985 CMI Conference in Lisbon.[19] However, as to liability for wrongful arrest, the differences which prevented the incorporation in the 1952 Convention of any rule regarding wrongful arrest continued to exist.

It was therefore agreed to continue to avoid dictating specific rules and to simply say that the Court, as a condition of the arrest, may impose upon the claimant the obligation to provide security for any losses incurred by the arrested party as a consequence of the arrest, including but not restricted to damages for wrongful or unjustified arrest, or for excessive security having been demanded and provided.[20] This is the gist of what is stated in Art. 6 of the 1999 Arrest Convention, which was approved by a Diplomatic Conference convened in Geneva from 1 to 12 March 1999.[21]

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[19] CMI 1985 – Lisbon II, p. 118; *CMI Newsletter*, Summer 1985.

[20] Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. II, 6th ed., Informa Law from Routledge, 2017, p. 120.

[21] The Convention entered into force on 14 September 2011 after the tenth accession of Albania. The State parties total 11. In addition to Albania: Algeria, Congo, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. However, other States have enacted many of its provisions in their national law, or have adopted the list of the maritime claims provided therein. For relating details, see Berlingieri, F., I*nternational Maritime Conventions*, Vol. 2, Informa Law by Routledge, 2015, p. 278. Subsequently, also Turkey incorporated the enlarged list of maritime claims: Art. 1363 of the 2012 Turkish Commercial Code. Turkey then became the 12th State party by way of accession on 11 December 2019.
The Preparatory Works of the 1999 Arrest Convention are published in Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. II, 6th ed., *op. cit.*, p. 175.
The Preparatory Works relating to Art. 6 on wrongful arrest, titled "Protection of owners and demise charterers of arrested ships" are also uploaded on the CMI website→works→arrest/attachment of ships.

4. 2014 – 2016: NEW ATTEMPTS TO PROVIDE UNIFORM RULES – THE CMI QUESTIONNAIRE AND THE PLEA FOR A REFORM OF ENGLISH LAW

The idea to review again wrongful arrest issues was considered by the CMI after a presentation on the subject made at the CMI Conference of 2014 Hamburg titled "Wrongful arrest of ships: a case for reform".[22]

There, the position on wrongful arrest in English law was outlined and compared with that in other common law and in some civil law jurisdictions.

The presentation concluded with a plea for a reform of English law[23] or, more importantly, for a reform of the law on liability for wrongful arrest at the international level.

A campaign to proceed with such a reform has existed in England for quite some time.[24]

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[22] By Mandaraka Sheppard, A. in *CMI Yearbook 2014*, p. 283, and published also in the *Journal of International Maritime Law*, 2013, p. 41.

[23] The test for wrongful arrest in English law is based on the decision of the Privy Council of 1858 in the "Evangelismos". This related to a casualty at night on the Thames, when a ship navigating in the river collided with a ship at anchor but continued her course. Boats from the ship at anchor, the "Hind", made searches for the other ship and the following day found a ship in a dock, the "Evangelismos", which was believed to be the ship which had collided with the "Hind" as she had damages to her bow. The "Evangelismos" was arrested but it was discovered that she was not the ship which collided with the "Hind". Thereafter, the owners of the "Evangelismos" claimed damages for wrongful arrest over a period of nearly three months. However, the claim for wrongful arrest was dismissed on the basis that the arrest was made in the *bona fide* belief that the "Evangelismos" was the colliding ship. This was confirmed on appeal by the Privy Council, which held that the identity of the colliding ship was not proven but there were grounds to believe that the "Evangelismos" was the one which collided with the "Hind". In order to be entitled to damages, the owners of the "Evangelismos" had the burden of proving that the arresting party acted with *mala fides* or *crassa negligentia*. For a discussion of the requirements for wrongful arrest in English law, see Mandaraka Sheppard, A., *Modern Maritime Law*, Vol. 1, Informa Law from Routledge, 2013, p. 158.

[24] The promotor of this campaign, Sir Bernard Eder, in explaining why English law needs reform, being considered too favourable to the arresting party, lists quite a number of reasons in his article "Liability for wrongful arrest – Introductory remarks", *CMI Yearbook 2016*, New York II, p. 328. See also by the same author: "Wrongful arrest of ships: A time for change", *Tulane Maritime Law Journal*, 2013, p. 115. A contrasting view was expressed by Martin Davis, Director of the Tulane Maritime Law Center, in his article "A reply to Sir Bernard Eder", who in turn made a reply in his subsequent article "Rejoinder by the Honourable M. Justice Eder". Both articles are also published in *Tulane Maritime Law Journal*, 2013, p. 137 and 143.

Much of the criticism stems from the fact that the claimant is not required to give security to cover damages if the arrest is to be found wrongful.[25] The idea brought forward is that the position with regard to the granting of an injunction should be followed. In fact, in English law it is a standard requirement, when issuing a freezing order, that the claimant is to give a cross-undertaking in damages, which should be fortified with appropriate security.[26]

The suggestion for a revision of English law on liability for the wrongful arrest of ships, and the fact that there is in any event no unified approach to wrongful arrest among other jurisdictions, presented the opportunity to reconsider the issue and in 2015 the CMI constituted a Working Group[27] to study the subject. The mandate was to find out how the legal issues regarding liability for wrongful arrest are dealt with by the national laws of the CMI Member States, aiming at obtaining suggestions or recommendations for a viable amendment of the provisions contained in the International Conventions. A further step was possible, consisting of drafting a uniform set of rules.[28] A Questionnaire was therefore circulated among the NMLAs, whose broad questions were:

- what is the applicable law in respect of ship arrest and liability for wrongful arrest?
- is countersecurity required?
- what is the legal test and the required proof to succeed in a wrongful ship arrest claim?

From a review of the answers,[29] it appears that Croatia, Italy and the United Kingdom are party to the 1952 Arrest Convention but not to the 1999 one, and that Croatia and Italy add domestic legislation.

As far as countersecurity is concerned, the United Kingdom does not require it, whilst Croatia contemplates the possibility of granting the arrest even if the probable existence of the claim has not been proven, provided countersecurity is put up. However, countersecurity may be ordered by the Court at its discretion

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25 However, history shows that this is what has always been asked by the British Maritime Law Association since the CMI 1930 Antwerp Conference: see footnotes 5, 7, 16.

26 Eder, B., Arresting ships. The need for change, Institute of International Shipping and Trade Law, Swansea University, 15th Annual Colloquium – September 2019.

27 Made up of Giorgio Berlingieri, chair, Aleka Mandaraka Sheppard, rapporteur, Christopher O. Davis, Ann Fenech, Karl Johan Gombrii.

28 Berlingieri, G., Liability for wrongful arrest, a report on this study and on the activities of the IWG, *CMI Yearbook 2015*, p. 296.

29 On the CMI website, under "work" → *"Liability for wrongful arrest"*.

even if the claimant has offered proof of the probable existence of the claim. In Italian law, countersecurity is at the discretion of the Court.

With regard to damages for wrongful arrest, in the United Kingdom proof of gross negligence or bad faith by the claimant is required, whilst in Croatia liability for damages is strict. Therefore, proof of negligence, gross negligence or bad faith is not required, and the claimant is liable for damages if the arrest is unfounded. In Italy, proof that the claimant acted without normal prudence must be offered.[30]

5. THE 2018 CMI CONFERENCE AND THE FOLLOW-UP QUESTIONNAIRE

The issue of liability for wrongful arrest was debated again in 2018 at a meeting in London,[31] on the occasion of the CMI Assembly, which was also attended by representatives of the P&I Clubs and of the Industry.[32]

It was decided to circulate a follow-up Questionnaire[33] containing specific questions regarding wrongful arrest precedents and the test for wrongful arrest. The Questionnaire also attempts to discover if there is support for the provision of countersecurity, to seek information on remedy in the event of a finding of wrongful arrest, and to inquire if higher uniformity is desired.

The answers are being received by the Working Group[34] and a report will be made to the CMI which will then assess whether the study is worth continuing.

If so, the Working Group is likely to be turned into an International Sub-Committee, open to all National Association and Consultative Members, to consider the way ahead, possibly consisting of the drafting of uniform rules that are more complete than those already existing.

Although it is certainly good that liability for the wrongful arrest of ships continues be in the spotlight, history shows that it will not be easy to agree on provisions more ample than those contained in Art. 6 of the 1999 Arrest Convention.

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[30] The answers are summarised in *CMI Yearbook 2015*, p. 300.

[31] On 9 November, at Thomas Miller & Co. Reference is made to the related Discussion Paper, proposed by Aleka Sheppard, who substituted the author of this article in chairing the International Working Group of the CMI. The Discussion Paper, which was circulated among National Associations together with the follow-up Questionnaire, contains a useful abstract of the answers of the National Associations to the first Questionnaire.

[32] The transcript of the debate is published in *CMI Yearbook 2017-2018*, p. 449.

[33] It was sent by the CMI to the National Associations on 7 July 2019.

[34] The deadline for responding was extended to 15 February 2020.

There is in any event the question of the acceptance of an international instrument incorporating such provisions. Clearly, such an instrument would be of no use if it were not widely accepted.[35]

6. PROSPECTS OF HIGHER UNIFORMITY

It is likely that the matter of whether the posting of security should be a requirement for obtaining an arrest[36] will continue to be debated.

The purpose of the security is one of the issues to be considered.

If security may be imposed for any losses caused by the arrest, the problem would arise regarding the circumstances under which the arrestor may be liable for damages.

Art. 6 of the 1999 Arrest Convention prescribes that the basis of liability is:

a) the arrest having been wrongful or unjustified; or

b) excessive security having been demanded and provided.

The situations in which an arrest may be considered *"wrongful"* differ from country to country.[37] However, if the test is not indicated but is left to the law of the place of the arrest, an international instrument does not really provide uniformity.

As for the word *"unjustified"*, discussions took place regarding its meaning. An explanatory example was given, making reference to the case where the party against whom the arrest is brought owns many ships.[38]

However, besides the possibility of composition proceedings being sought also by companies owning relevant assets, or the difficulty in arresting ships which trade far away from the jurisdiction of the claimant, the issue should be considered with regard to claims secured by a maritime lien.

35 Berlingieri, G., Towards uniform rules on wrongful arrest or still with the law of the jurisdiction where the arrest is made, *CMI Yearbook 2016*, New York II, Documents of the Conference, p. 338.

36 This is the case in Spanish law: Art. 472 of Law 14/2014 on Navegación Marítima provides that security of an amount of at least 15% of the alleged maritime claim is to be provided. The same applies in Turkish law: Art. 1363 of the Turkish Commercial Code of 2012 provides for security to be posted of 10.000 S.D.R.

37 *CMI Yearbook 2015*, p. 300.

38 For a review of what was debated regarding such terms, their concept and whether the two words were to be kept or deleted, see: 1999 Arrest Convention, Preparatory Works, in Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. II, 6th ed., *op. cit.*, p. 319, and on the CMI website: http://comitemaritime.org/liability-for-wrongful-arrest/.

In fact, maritime liens entitle a party to secure claims by arresting the ship in order to avoid the extinction of the lien, and it does not seem easy to oppose the claimant with the argument that the owner of the ship owns many ships or that his financial responsibility is undisputable.

History shows that it is difficult to lay down uniform rules on liability for wrongful arrest; however, it is good that the CMI continues to look into the matter, which means that what is provided for by the Arrest Conventions is not entirely satisfactory.

BIBLIOGRAPHY

1. Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. I, 6th ed., Informa Law by Routledge, 2017.
2. Berlingieri, F., *International Maritime Conventions*, Vol. II, Informa Law by Routledge, 2015.
3. Berlingieri, G., Liability for wrongful arrest, a report on this study and on the activities of the IWG, *Comité Maritime International, Yearbook 2015*, New York I, p. 296-299.
4. Berlingieri, G., Towards uniform rules on wrongful arrest or still with the law of the jurisdiction where the arrest is made, *Comité Maritime International, Yearbook 2016*, New York II, p. 338-339.
5. *Comité Maritime International*, *Bulletin n. 91*, 1931, Antwerp Conference, Imprimerie J. E. Buschmann, Antwerp.
6. *Comité Maritime International*, *Bulletin n. 96*, 1933, Oslo Conference, Imprimerie J. E. Buschmann, Antwerp.
7. Davies, M., A reply to Sir Bernard Eder, *Tulane Maritime Law Journal*, 2013, p. 137-142.
8. Eder, B., Wrongful arrest of ships: A time for change, *Tulane Maritime Law Journal*, 2013, p. 115-136.
9. Eder, B., Rejoinder by the Honourable Mr. Justice Eder, *Tulane Maritime Law Journal*, 2013, p. 143-145.
10. Eder, B., Liability for wrongful arrest – Introductory remarks, *Comité Maritime International, Yearbook 2016*, New York II, p. 328-329.
11. Eder, B., Arresting ships. The need for change, Institute of International Shipping and Trade Law, Swansea University, 15th Annual Colloquium, 2019.
12. Liability for wrongful arrest of ships – Summary of answers of 38 countries to the main CMI Questions – CMI Conference New York: https://comitemaritime.org/liability-for-wrongful-arrest.
13. Mandaraka Sheppard, A., *Modern Maritime Law*, Vol. I, Informa Law by Routledge, 2013.

14. Mandaraka Sheppard, A., Wrongful arrest of ships: A case for reform, *Comité Maritime International, Yearbook 2014*, p. 282-307 and *Journal of International Maritime Law*, 2013, p. 41-59.
15. Sheppard, A., Study relating to liability for wrongful arrest – Summary of NMLAs answers to the CMI Questionnaire by the Rapporteur to the CMI IWG, *Comité Maritime International, Yearbook 2015*, New York I, p. 300-352.
16. Sheppard, A., IWG liability on wrongful arrest: Transcript of the debate, *Comité Maritime International, Yearbook 2017-2018*, p. 449-478.
17. Spanish Law 14/2014 on Navegación Marítima, Comentarios, Civitas – Thomson Reuters, Pamplona 2016.
18. The 1999 Convention on Arrest of Ships, Preparatory works in Berlingieri, F., *Berlingieri on Arrest of Ships*, Vol. II, 6th ed., Informa Law by Routledge, 2017 and https://comitemaritime.org/liability-for-wrongful-arrest.
19. Turkish Commercial Code, Vedat Kitapcilik, Istanbul 2017.

Sažetak:

ODGOVORNOST ZA NEDOPUŠTENO ILI NEOPRAVDANO PRIVREMENO ZAUSTAVLJANJE BRODA: GDJE STOJIMO

U radu se razmatra pitanje postoji li potreba za jedinstvenim međunarodnim pravilima o odgovornosti za nedopušteno ili neopravdano privremeno zaustavljanje broda radi osiguranja pomorske tražbine. Ovo pitanje otvoreno je još od početaka unifikacije pravila o zaustavljanju brodova i kontinuirano predstavlja predmet suprotstavljenih stavova, uslijed čega ono i nije potpuno uređeno relevantnim međunarodnim konvencijama. U novije vrijeme ova je tema ponovo otvorena u okviru Međunarodnog pomorskog odbora (CMI) te je osnovana nova radna skupina koja razmatra predmetnu pomorskopravnu problematiku. U ovom radu iznose se dosadašnji rezultati djelovanja Radne skupine CMI-a o odgovornosti za nedopušteno ili neopravdano privremeno zaustavljanje broda, uzimajući u obzir glavne točke rasprava koje su se na međunarodnoj razini vodile od početka unifikacije pravila o zaustavljanju brodova, te se govori o mogućem budućem razvoju na ovom planu.

Ključne riječi: *privremena mjera zaustavljanja broda; nedopušteno ili neopravdano privremeno zaustavljanje broda; mjere osiguranja; Međunarodna konvencija o zaustavljanu brodova iz 1952.; Međunarodna konvencija o zaustavljanu brodova iz 1999.; Radna skupina CMI-a.*