

Feedback from Japanese Maritime Law Association
(CMI – IWG on Wrongful Arrest of Ships)

1. The legal systems and procedures in respect of arrest and release of the vessel in Japan are described in our answers to the questionnaire dated December 4, 2015 to CMI's questionnaire dated May 27, 2015. Japan is a Civil law state and therefore, its system is basically similar to the system of the other Civil law states such as Germany and France.
2. We have no legal conception of action "in rem". A ship arrest must be commenced by an action "in personam" in any case. Therefore, it is important to name the correct debtor whose liabilities are secured by the vessel when you arrest the ship.
3. We have three types of the ship arrest. The first is an arrest by virtue of a maritime lien (or a registered mortgage). The second is an arrest or, more accurately speaking, a provisional attachment of the vessel to obtain a security in preparation for enforcing the final judgment in ordinary civil proceedings. The third is an arrest of the ship for her enforced sale based upon the ordinary judgment. We may probably exclude this third type of arrest in considering the issue of wrongful arrest, since in this case, there would be no possibility of the arrest being revoked or cancelled for the reason of no proof of merits.
4. We think that the issue of wrongful arrest may arise in case where the arrest of the ship is revoked or cancelled or withdrawn on the basis that the merits or causes of action for arrest are found not to be proved or established at a later stage. We may say that the arrest of the vessel at this stage is a "defective arrest". A "defective arrest" means the arrest which was repealed or cancelled at a later stage because causes or merits were not found to be proved or established.
5. In these circumstances we can think about the issue of wrongful arrest on that basis. The shipowner whose ship was arrested can claim losses sustained by the shipowner arising from such "defective arrest". At this stage, Common law states require bad faith or gross negligence. Some Civil law states provide for strict liability, that is, if the arrest is found to be a "defective arrest", then that should be deemed to be a wrongful arrest and the arresting party has an absolute responsibility to compensate losses sustained by the shipowner.
6. The gap or difference between the two systems seem to be so great as not to be overcome or filled easily. In this respect, we would suggest going between the two systems. Australian law shows a good example, whereby if an arrest is made "unreasonably or without a good cause", then the arresting party shall be liable in damages to the shipowner.

7. In Japan, liability for damages arising from the wrongful arrest has been reviewed and considered as a result of the negligence. Negligence should be judged when the negligence is committed. Therefore, even if the arrest is repealed or cancelled by lack of proof of merits, that is, the arrest is regarded as a “defective arrest” and that would not be automatically taken to be a “wrongful arrest”. If an arrest was made “reasonably or with good causes” based upon the circumstances existing at the time of the arrest of the ship, the arresting party would not be found to be responsible for any losses for a reason of wrongful arrest. Any change of the circumstances which happened after the arrest of the ship cannot affect the position of the arresting party in respect of its liability for wrongful arrest.

8. In view of the above, our feedback is as follows:

8-1. Definition of the Test

We would suggest separation of the definition of “defective arrest” and “wrongful arrest” as mentioned above.

8-2. Counter-Security Provision

We would suggest that in case of arrest by virtue of a maritime lien which is usually given where there are claims of personal injury of crew, salvage, GA contribution, collision or allision claims or supply claims in some countries, no counter-security is required. However, in case of the arrest of a sister ship or to protect non-lien claims, provision of counter-security should be at the discretion of the court where the arrest is made.

8-3. Type and Extent of Damages

We would suggest that damages for claims for the reason of wrongful arrest should be limited to the detention loss and release bond related costs. No claims for economic loss should be allowed unless the arresting party is found to have arrested the ship with bad faith or gross negligence.

8-4. Method of Unification

We would suggest that unification of the wrongful arrest system be accomplished by a soft law such as a guideline or model provision where there are big differences between the civil law states and common law states.

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