

Reply by the German Maritime Law Association
to the CMI Questionnaire of 27 May 2015
“Study relating to Liability for Wrongful Arrest”

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**

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?**

Germany has ratified the 1952 Arrest Convention by statute dated 21 June 1972¹. When making this ratification, Germany used the option to make reservations in accordance with Article 10 (a) and (b) of the said Convention.

Together with this ratification, the German legislator made small adaptations to the German law in order to implement the 1952 Arrest Convention², but decided against fully incorporating the provisions of the Convention in the relevant German codifications. Therefore, the 1952 Arrest Convention – within its scope of

¹ *Gesetz zu dem Übereinkommen vom 10. Oktober 1957 über die Beschränkung der Haftung der Eigentümer von Seeschiffen und zu den auf der IX. Diplomatischen Seerechtskonferenz in Brüssel am 10. Mai 1952 geschlossenen Übereinkommen*, BGBl. 1972 II 653, Article 1 No. 1.

² *Gesetz zur Änderung des Handelsgesetzbuchs und anderer Gesetze (Seerechtsänderungsgesetz)*, BGBl. 1972 I 966, Articles 1 No. 3 (new section 482 of the Commercial Code) and 2 No. 4 (a) (new section 904 No. 3 of the Civil Procedure Code); see also the explanatory notes (*Gesetzesbegründung*) under the government bill for this statute, BT-Drs. VI/2225, page 14.

application³ – is of direct application in Germany and will supersede the general provisions⁴ on the arrest of a debtor's assets as a preliminary and protective measure⁵.

Germany has not ratified the Conventions addressed under (ii), (iii) and (iv). However, the 1972 statute on a reform of certain aspects of the maritime law⁶ implemented to a large extent the contents of the 1967 Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages⁷. Hence, national German law largely reflects the content of the 1967 Convention, despite the fact that this Convention has not entered into force.

General provisions on the arrest of a debtor's assets as a preliminary and protective measure are to be found in the German Civil Procedure Code (*Zivilprozessordnung ZPO*), mainly in sections 916 to 934 and 943 to 945, and are also applicable to the arrest of vessels. Those rules are completed by a provision governing the service of court documents to the master of the vessel in section 619 of the German Commercial Code. Under those general rules, German courts have jurisdiction to order the arrest of a vessel as a preliminary and protective measure, if the vessel has called a German port (sections 930 (4) and 931 (7) of the Civil Procedure Code) or when the German courts have jurisdiction over the case on the merits. These provisions are not only complementary to the 1952 Arrest Convention unless derogated by a specific provision of the Convention; they are also governing the arrest of vessels outside the scope of the Convention.

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?

Under sections 921, 108 of the German Civil Procedure Code, the judge has a discretionary power to decide on whether the applicant is required to provide security, and if so, for which amount⁸.

³ Also considering the reservations in accordance with Article 10.

⁴ See answer to question 2.

⁵ See page 37 of the explanatory notes (*Denkschrift*) under the government bill for the statute of ratification, BT-Drs. VI/2224.

⁶ *Seerechtsänderungsgesetz*, see Fn. 2.

⁷ See in particular Article 1 No. 43 (new sections 754 – 764 of the Commercial Code) of the *Seerechtsänderungsgesetz*, see Fn. 2, providing a new statutory regime on maritime liens. This legal regime is – to a large extent – still in force (today: 596 – 604 of the Commercial Code).

⁸ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 921 no. 1; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 921 nos. 6 and 12.

Where judges have a discretionary power, decisions are less predictable. However, a general rule of thumb could be described as follows: The more solid the claim documentation in the arrest application (*Grad der Glaubhaftmachung*), the greater the chance to obtain an arrest without having to provide security⁹.

Furthermore, there are cases where the applicant may have an interest in developing and sharing (with the court) thoughts on the likely loss which could be caused to the defendant as a result of the enforcement of the arrest, because this potential exposure should determine the security amount¹⁰.

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?

Section 945 of the German Civil Procedure Code provides that the applicant is liable for loss sustained by the defendant (i.e. usually the legal owner of the vessel) in cases where the arrest was not justified at the time the arrest warrant was issued. The provision only applies to loss suffered as a result of the enforcement (*Vollziehung*) of an arrest order¹¹.

Under German law, obtaining an arrest warrant requires the applicant to put forward a specific claim for which security is sought. In order to obtain the arrest, there is no need to fully prove such claim. Therefore, if it later turns out that there was no justified claim to be secured, that would mean that the arrest was – from the

⁹ Cf. *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 921 no. 2.

¹⁰ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 921 no. 8; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 921 no. 5.

¹¹ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 20 with further references; *Grunsky*, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 6; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 25.

beginning – not justified. That would be a typical case for liability under section 945 of the Civil Procedure Code¹².

In proceedings for compensation under section 945 of the Civil Procedure Code, the court would have to follow the decision on the merits in the main action, if that decision (of a court or arbitral tribunal) is considered to be binding on the defendant/arrestor. That is determined under the general rules on the binding effect of German court judgements or the recognition of foreign judgements or arbitral awards¹³.

Thus, in the typical case that the judgment or arbitral award rendered in the action on the merits (and rejecting the claim on the merits) will be considered as binding on the defendant/arrestor, the court deciding on a liability claim will find that the defendant/arrestor is liable under section 945 of the Civil Procedure Code without having to review the case on its own¹⁴.

Liability under section 945 of the Civil Procedure Code is strict¹⁵. There is no additional requirement of awareness, (gross) negligence or bad faith of the applicant when applying for the arrest. The mere rejection of the claim will suffice.

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?

As mentioned under question 2 above, Section 945 of the German Civil Procedure Code provides that the applicant is liable for loss sustained by the defendant in cases where the arrest was not justified at the time the arrest warrant was issued, or where the arrest is lifted because main proceedings for payment are not commenced within the time limit set by the court. Under those circumstances, the arrestor would be liable:

For instance, without rendering a binding decision on the merits, the arrest court ruling after an objection against the ex parte arrest order, or an appeal court ruling

¹² See *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 9; *Grunsky*, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 19.

¹³ BGH, NJW-RR 1992, 998, 999 with further references; *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 16 with further references; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 15 with further references.

¹⁴ Cf. BGH, NJW 1989, 106, 107.

¹⁵ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 2; *Grunsky*, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 19.

thereafter on an appeal against the decision of the arrest court, may come to the conclusion that the arrestor has not showed – on a prima facie basis and under the specific rules for evidence in arrest proceedings – that the arrest claim is justified. In that case, the arrest would be repealed and it would follow therefrom that the arrest was not justified at the time the arrest warrant was issued. That engages the liability of the arrestor under Section 945 of the Civil Procedure Code.

The provision only applies to loss suffered as a result of the enforcement (*Vollziehung*) of an arrest order¹⁶. This liability does not depend on whether the applicant acted negligently or in bad faith, it is a strict liability¹⁷. The liability is unlimited. However, a general rule is that the defendant in the arrest proceedings being entitled to claim under section 945 of the Civil Procedure Code may only ask for compensation of its own loss, but normally not for loss sustained by third parties (for instance charterers)¹⁸. This general rule has been confirmed by the German Federal Court of Justice¹⁹; however, this decision leaves some room to argue that there might be specific circumstances in cases under which the owners should be entitled to claim for third party damage as well.

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

The answer to sub-question b) is "no" (see details given under sub-question (a) and also question 2 above).

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?

We understand that this question relates to one specific example of the situation contemplated in question 2 above, i.e. the case on the merits against the legal owners being rejected (and potentially a third party, such as a charterer, being held liable):

¹⁶ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 20 with further references; *Grunsky*, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 6; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 25.

¹⁷ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 2; *Grunsky*, in: *Stein/Jonas*, ZPO, 22nd ed. 2002, § 945 no. 19.

¹⁸ Thümmel, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 24 with further references; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 29.

¹⁹ BGH, NJW 1994, 1413, 1416.

Under German law, that would be a case governed by the principles outlined under question 2 above; as there was no claim against the legal owners justifying the arrest (from the beginning), the enforcement of the arrest will give rise to strict liability under section 945 of the German Civil Procedure Code.

If the claimant, knowing that there is no case against the legal owners named as defendant in the arrest proceedings, commences the case on the merits against a third party only, the defendant in the arrest proceedings would request the court to fix a time limit for commencing proceedings on the merits against such defendant and after expiry of this time limit (usually between two weeks and one month), the arrest would be lifted by the court, section 926 of the Civil Procedure Code. That immediately engages the applicant's liability under section 945 of the Civil Procedure Code, the main proceedings against a third party not being relevant²⁰.

In another similar case, where the applicant has named a third party (instead of the legal owner) as defendant in the arrest proceedings because it intends to commence the case on the merits against such third party, the court – if properly reviewing the application – should not grant an arrest warrant, and if it did grant the warrant in *ex parte* proceedings not noticing the issue, it will set aside the arrest after the defendant has raised the issue. Again, that would engage strict liability without regard to the outcome of the case on the merits²¹.

Accordingly, in Germany, an applicant should only seek the arrest of a vessel if there is a claim against the current owner, or security title (maritime lien, mortgage, other foreign security title recognized in Germany) on the vessel for a third party claim. Otherwise, the applicant will be facing strict liability.

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?**

²⁰ See also the comments under question 3 above.

²¹ See also the comments under question 3 above.

If only a part of the claim was justified, the arrest for securing a claim beyond that amount was unjustified. Accordingly, to that extent, there will be a liability for an arrest having been (partly) unjustified from the beginning²², see also answer to question No. 3 above, without the requirement of a "grossly exaggerated" claim.

However, the element of causation will limit liability under section 945 of the Civil Procedure Code:

(i)

Extra cost incurred for putting up security for the unjustified part of the claim was caused by the unlawful part of the arrest claim and would therefore be recoverable under section 945 of the Civil Procedure Code, for example loss of interest on the part of the (unnecessary) security amount²³.

(ii) and (iii)

If a part of the arrest claim was justified, the seizure of the ship was resulting from a justified arrest, and therefore also the according delays and loss resulting therefrom.

Accordingly, it may be very difficult for the owner to prove that he suffered specific delay and associated loss only because of the unjustified part of the arrest claim. Thus, the risk for the applicant regarding this type of claim can be considered as rather limited.

However, in case of a grossly exaggerated claim where the owner was unable to provide the security because of the gross exaggeration, but would have been able to provide it for the justified claim, such proof of causation might be possible; hence, the applicant would then be liable for that particular loss. Generally, loss of use is a type of loss recoverable under section 945 of the Civil Procedure Code²⁴.

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

The answer to sub-question (b) is "no" (see answer to questions No. 2 and 3 above).

²² *Drescher*, in *Münchener Kommentar zur ZPO*, 4th ed. 2012, § 945 no. 9; *Haertlein*, in: *Kindl/Meller-Hannich/Wolf*, *Gesamtes Recht der Zwangsvollstreckung*, 3rd. ed. 2015, § 945 no. 10; for an excessive interlocutory injunction also: BGH, NJW 1981, 2579, 2580.

²³ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 22.

²⁴ *Thümmel*, in: *Wieczorek/Schütze*, ZPO, 4th ed. 2014, § 945 no. 22; *Walker*, in: *Schuschke/Walker*, *Vollstreckung und vorläufiger Rechtsschutz*, 5th ed. 2011, § 945 no. 26.

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?

Under German law, the arrest of a ship does no longer require the applicant to put forward that there is a material risk that he or she will not be able to enforce a future judgement or arbitral award on the merits without obtaining security via arresting (referred to as "cause for arrest", "*Arrestgrund*"), see section 917 (2) of the German Civil Procedure Code ("No grounds for a writ of seizure need be given if the seizure is being implemented solely by way of securing the compulsory enforcement against a ship.").

As there is no requirement for a "cause of arrest", a missing "cause of arrest" is not (no longer) a suitable case to present a claim under section 945 of the Civil Procedure Code.

That is different for any other arrest under German law, i.e. arresting any other asset of an alleged debtor but a ship: Here, the applicant would have to plead a "cause for arrest", and missing cause would justify a compensation claim. The allegation of a missing cause would be reviewed and resolved by the court in the proceedings on the liability action under section 945 of the Civil Procedure Code.

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

The answer to sub-question (b) is "no" (see answer to questions No. 2 and 3 above).

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?

The circumstances for holding an arrestor liable under German law are explained under questions No. 2 and 3 above.

In theory, an arrestor could also be liable in tort, subject to the claimant proving that the arrestor willfully caused damage to the claimant in a manner which is considered to be *contra bonos mores* (Section 826 of the German Civil Code). This provision is applicable to action taken in court with the knowledge that the request for relief is

not justified²⁵; there is also case law suggesting that – in addition to proving such knowledge – the claimant needs to prove additional elements of fact relating to the manner in which the court proceedings were conducted by the defendant which are considered to be *contra bonos mores*²⁶.

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?

No, except where obtaining the arrest involved fraud or other criminal acts (for instance a false affidavit), which may obviously give rise to criminal proceedings / prosecution.

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?

Under German law, determining the law applicable is always a matter governed by the international private law rules. Article 6 of the 1952 Arrest Convention, applicable in Germany, is a specific rule of international private law providing a specific connecting factor for unlawful arrest claims regarding arrests in other contracting states (*lex forum arresti*).

Where the 1952 Arrest Convention does not apply, a claim based on the allegation that the arrestor breached a statutory duty or acted *contra bonos mores* would probably be qualified as a claim in tort, so that the law applicable would have to be determined in accordance with Article 4 of the Rome-II-Regulation²⁷. A wrongful arrest claim based on a legislation requiring "bad faith" or similar requirements might potentially be considered as a claim based on a non-contractual obligation under the Rome-II-Regulation.

Section 945 of the German Civil Procedure Code governing strict liability for wrongful arrest under German law is part of the German procedural law on arrest proceedings. Hence, German courts will not apply this rule to foreign arrest proceedings²⁸.

²⁵ Wagner, in: Münchener Kommentar zum BGB, 6th ed. 2013, sec. 826 no. 191.

²⁶ BGH, judgement of 25 March 2003, VI ZR 175/02, NJW 2003, 1934.

²⁷ Cf. Junker, in: Münchener Kommentar zum BGB, 6th ed. 2015, art. 4 no. 84.

²⁸ Mayer, in: Vorwerk/Wolf, Beck'scher Online-Kommentar ZPO, 19th ed. 2015, sec. 945 no. 3; Drescher, in: Münchener Kommentar zur ZPO, 4th ed. 2012, sec. 945 no. 5.

III. FINAL REMARKS

In the questionnaire of 25 May 2015 (first version of the CMI-Questionnaire), the CMI asked the National Maritime Law Associations whether they think that it would be helpful for CMI to prepare a set of Model Rules.

The working group of the German MLA has considered the question as to whether it would be helpful for the CMI to prepare a set of Model Rules dealing with procedural aspects of ship arrests, and if so, which aspects should reasonably be addressed.

The working group has come to the conclusion that Model Rules aiming at an international harmonization of the following subjects should be considered and supported:

- Harmonized rules stipulating the type of security (other than a cash deposit) being acceptable to achieve the release from arrest:

The working group of the German Maritime Law Association takes the view that a club letter of undertaking (LOU) should be accepted as suitable security. A Model Rule to that end may have better chances to meet acceptance if accompanied by a template defining the minimum standards for the wording of such LOU – although an adaptation to the law applicable may be required. Defining which organizations should be acceptable issuers of such LOU may amount to a sensitive task: One conceivable approach might be a rule stating that the courts of the State of arrest are to accept a LOU from an organization which – in this State – would also be an accepted insurer (issuer of blue card) for purposes of insurance certification, for instance under Article 12 of the Nairobi Convention, 2007, or Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

- Protective writ to be considered in ex parte proceedings

The working group is of the opinion that the procedural provisions in some jurisdictions are not sufficiently ensuring the principle of equality of arms. One approach in Model Rules may be the proposal of provisions for a "protective writ" instrument, allowing a sort of caveat in cases where a ship owner has reason to fear an abusive arrest and aims to ensure that his position will be considered by the court when deciding in ex parte proceedings. As an example, reference can be made to the German concept of "*Schutzschrift*" which satisfies that purpose.

- Strict liability for unlawful arrest

Furthermore, model rules on the liability for unlawful arrest could also lead to a strengthening of the principle of equality of arms. The working group is of the opinion that the strict liability system is a rather effective bar against abusive arrests and does on the other hand not hinder a claimant from seeking and obtaining security for a justified claim.