

REPLY BY THE NEDERLANDSE VERENIGING VOOR ZEE- EN VERVOERSRECHT (NVZV) (DUTCH MARITIME AND TRANSPORT LAW ASSOCIATION) TO THE CMI QUESTIONNAIRE OF 27 MAY 2015 ON THE 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

The Netherlands: The Kingdom of the Netherlands is (only) party to the [Arrest Convention 1952](#). The convention was ratified on 20 January 1983 and it entered into force on 20 July 1983 (*Stb. 1982, 609*). At the ratification the Netherlands made reservations under article 10 of the Convention regarding the maritime claims of article 1 chapeau and sub (o), (p), and (q).

The convention originally applied to (the independent countries within the Kingdom) the Netherlands and the Netherlands Antilles (then consisting of Aruba, Bonaire, Curaçao, Saba, St. Eustatius, St. Maarten).

It continues to apply to the Netherlands in Europe, to Aruba (which seceded from the Netherlands Antilles on 1 January 1986 to become an independent country within the Kingdom of the Netherlands), to Curaçao and to St. Maarten (becoming independent countries within the Kingdom after dissolution of the Netherlands Antilles on 10 October 2010) and to the Caribbean Netherlands (the so called BES islands: Bonaire, St. Eustatius, Saba) (joined the Netherlands (in Europe) after dissolution of the Netherlands Antilles on 10 October 2010).

The Arrest Convention 1952 was not incorporated into the legislation as such. As the convention is considered to be self-executing, the convention text itself has the force of law and is applied as part of Dutch law.

(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?

The Netherlands: The Kingdom of the Netherlands has a civil law tradition so the (in rem) arrest is not known. We will use the term attachment here to underline that distinction.

Attachment of a vessel is possible for any (monetary) claim which is enforceable (*verhaalsrecht*) against the ship, for any claim for which a proprietary security interest (e.g. hypothec, pledge) was vested in the ship, or for claims to hand over

the vessel (e.g. as *rei vindicatio* or for delivery of the ship under a contract of sale).

Special conflict of law rules exist to determine whether foreign rights against the ship will be recognized in the Netherlands.

Where article 2 of the Arrest Convention 1952 applies (depending on the circumstances set out in articles 2 and 8 of the Convention), the attachment of vessels *ante litem* or *pendente lite* (*saisie conservatoire*) is limited to the maritime claims enumerated in article 1 (not subject to the reservation under article 10 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?

The Netherlands: Under article 701 of the Dutch Code of Civil Procedure the judge may give leave for attachment under to the condition that security is to be provided for the loss that may be caused by the attachment, up to an amount to be determined by the judge. A similar provision is incorporated in the Code of Civil Procedure of the Caribbean Netherlands/BES islands and in the Codes of Civil Procedure of Aruba, Curaçao and St. Maarten.

The provision is, however, not applied very often, at least not at the moment *ex parte* leave is given for the attachment. There are some reported cases (two in the last fourty years) where the shipowner does not succeed in his application to have an attachment lifted, but does succeed in obtaining an order for some counter security.

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?*

The Netherlands: In a judgment of 15 April 1965 (in Dutch, [ECLI:NL:HR:1965:AC4076](#); NJ 1965, 331) the Hoge Raad (the Dutch Court of Cassation for the entire Kingdom of the Netherlands) ruled that 'the person who effects a conservatory attachment acts at his own risk, meaning that the loss caused by the attachment – apart from special circumstances – must be compensated by him if it appears the attachment was effected wrongfully, and that the liability for this loss is not changed by the fact that the he – convinced on reasonable grounds of the existence of his right of action – did not act light-heartedly'. Similar wording has been used by the Hoge Raad in subsequent judgments, as recent as 2008.

In a judgment of 5 December 2003 (in Dutch, [ECLI:NL:HR:2003:AL7059](#); NJ 2004, 150) the Hoge Raad ruled that 'On the person effecting an attachment rests a strict liability for the consequences of the attachment effected by him if the claim for which the attachment was effected was wholly unfounded. If the claim or claims for which the attachments were effected to obtain security was or were only partially awarded, this does not mean the attachment was effected wrongfully. The question whether the person effecting an attachment is liable for the consequences of an attachment because it was effected for too large a sum, or light-heartedly or maintained unnecessarily, must be

answered on the basis of the criteria that apply for abuse of rights. Depending on the circumstances of the case the question may arise whether the attachment was vexatious and therefore unlawful.

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?

The Netherlands: We believe the principles of the Hoge Raad judgments cited in our reply to question 2 would equally be applied in the circumstances suggested here.

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?

The Netherlands: We presume that 'under the law of the state where the vessel was arrested' includes the law of another state that would have to be applied on the basis of the conflict of law rules of the state where the vessel was arrested.

We believe the principles of the Hoge Raad judgments cited in our reply to question 2 would equally be applied in the circumstances suggested here.

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?

The Netherlands: We believe the principles of the Hoge Raad judgments cited in our reply to question 2 would equally be applied in the circumstances suggested here.

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?

The Netherlands: We believe the principles of the Hoge Raad judgments cited in our reply to question 2 would equally be applied in the circumstances suggested here.

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 Netherlands: 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?*

The Netherlands: 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?*

The Netherlands: The Netherlands (in Europe) is part of the European Union. It is our view that the obligations arising out of wrongful attachment generally would fall under the scope of the [EC Regulation No 864/2007](#) of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Unless otherwise provided for in the Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict is the law of the country in which the damage occurs (*lex loci damni*) irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. Recital 11 of the Preamble to Regulation 864/2007 (Rome II) states: 'The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability'.

The Caribbean Netherlands/BES islands and Aruba, Curaçao and St. Maarten are not part of the European Union. Therefore the EC Regulation 864/2007 (Rome II) does not apply in those parts of the Kingdom, and the courts of these separate jurisdictions will apply their local conflict of law rules. In the absence of statute law dealing with the conflict of laws it is our view that the courts will generally resort to an unwritten (judge made) conflict of law rule and apply the *lex loci delicti* (which would generally be the same as the *lex forum arresti*).

However, article 6 of the Arrest Convention 1952 gives a specific provision dealing with the wrongful arrest/attachment of ships.

The name of the convention (... Sea-Going Ships) and other inferences in the convention text ('flying the flag') seem to suggest that the scope of the Arrest Convention 1952 is limited to sea-going ships, so that attachments of ships other than sea-going ships would be covered by the general conflict of law rules mentioned above. We are not aware of any Dutch case law on this particular issue.

Article 6 of the Arrest Convention 1952 states that '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, shall

be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.’ Applying the reasoning given by the Rotterdam District on 14 March 2012 in the matter ‘Kaliakra/UK 143 Andries de Vries’ (in Dutch, [ECLI:NL:RBROT:2012:BV9334](#); *Schip en Schade* 2012/86) with which the The Hague Court of Appeal concurred on 19 November 2013 in the matter ‘Hero’ (in Dutch [ECLI:NL:GHDHA:2013:4912](#); *Schip en Schade* 2014/20), it would seem article 6 can be applied irrespective of whether the ship attached is a ship flying the flag of a Contracting State. However, the text of article 6 does seem to limit itself to arrests/attachments taking place in Contracting States. This would suggest that attachments taking place in a non-Contracting State would be covered by the general conflict of law rules mentioned above.

Another question may be whether article 6 of the Arrest Convention 1952, by referring to ‘the law of the Contracting State...’ refers to the substantive law of that Contracting State or also to the conflict of law rules of that Contracting State (i.e. *renvoi*). In the absence of clear indications in text of article 6 of the Arrest Convention 1952 or the travaux préparatoires that *renvoi* was intended and in view of the general hesitancy in conflict of law matters to include *renvoi*, we believe article 6 of the Arrest Convention 1952 refers to the substantive *lex loci/forum arresti* only.

As article 6 of the Arrest Convention refers to the jurisdiction in which the arrest was made and the jurisdiction in which the arrest was applied for, this raises the question what law to apply in a case where (under the application of the new Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) one may apply to, for instance, a court in the Netherlands for an attachment to be effected in Germany or Austria (a recent Dutch example in an inland (non sea-going) shipping matter: District Court of Rotterdam 12 March 2015, (in Dutch:) [ECLI:NL:RBROT:2015:3395](#), the correctness of which is debated). But it may be that the wording ‘in whose jurisdiction the arrest was ... applied for’ merely aims to include situations where the attachment was never effected due to bail or other security having been furnished ‘to prevent the arrest of a ship’. The final phrase of the provision should then perhaps be read as meaning ‘... shall be determined by the law of the Contracting State in whose jurisdiction the arrest was (to be) made.’ This reasoning is supported by F. Berlingieri’s comments about article 4 of the Arrest Convention 1952 in his fifth edition of *Arrest of Ship* (Informa 2011) where he states (par. 13.31, p. 322) ‘... such an arrest would be clearly in conflict with the structure of the Convention. The recognition and enforcement of a foreign order or arrest by the court of a State party to the 1952 Convention would in fact be in conflict with article 4, pursuant to which only a court in the jurisdiction of which the arrest is made is competent.’

It is noted that Article 4 of the Arrest Convention 1952 (as interpreted by Professor Berlingieri) - for matters of jurisdiction, recognition and enforcement - may be set aside - in an EU setting - by provisions of EU law (see particularly the judgment of the Court of Justice of the European Union of 19 December 2013, C-542/12 ([Nipponkoa v Interzuid](#)) on the interpretation of the former Council Regulation No 44/2001 (now replaced by the Regulation (EU) No 1215/2012): ‘must be interpreted as meaning that it precludes an international convention from being interpreted in a manner which fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of that regulation are observed.’ But this does not affect the separate conflict of law issue of the interpretation of article 6 of the Arrest Convention. It should perhaps be mentioned that article 28 sub (1) of the EC Regulation No 864/2007 (Rome II) provides that the application of international

conventions (such as (Article 6 of) the Arrest Convention) is not prejudiced by the Regulation.

We conclude therefore that where the Arrest Convention 1952 is applicable, and article 6 of the Arrest Convention 1952 can be applied on the basis of its own text, the courts of all parts of the Kingdom of the Netherlands would apply the *lex loci/forum arresti* of the Contracting State in whose jurisdiction the arrest was (to be) effected. In all other circumstances the courts of the Netherlands in Europe will in principle apply the *lex loci damni* on the basis of EC Regulation No 864/2007 (Rome II) (unless otherwise provided for in the Regulation). The courts of the Caribbean Netherlands/BES islands and Aruba, Curaçao and St. Maarten will in all likelihood apply the *lex loci delicti*.

The distinction may seem a bit theoretical. In practice it would seem that all three criteria would point towards the place of the (intended) attachment.

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