
Wrongful arrest of ships: a case for reform

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There should always be good reasons for reform in the law and such reasons, undoubtedly, include 'balance of justice' and 'uniformity'. The attraction of the common law is that, if the judges are unrestrained by International Convention rules or statutes, it is their prerogative to develop the law by adapting old principles or creating new ones, when changes in other spheres of the law, or society, or the commercial world, call for new law. Wrongful arrest of ships is an area in need of such reform.

I. Introduction¹

Under English law,² the test for wrongful arrest, as derived from the old authorities of the Privy Council, *The Evangelismos*³ and *The Strathnaver*,⁴ requires proof by the owner of the arrested ship of *mala fides* or *crassa negligentia* on the part of the arresting party. This is the phraseology most commonly used to represent the test derived from these decisions, although it has been elaborated by subsequent cases, as will be seen below. The question is, therefore: Is it necessary to disturb the law which has been settled for more than 150 years? Are there any compelling reasons for its re-examination? The fact that the test was formulated in very different conditions and has not been critically examined in the context of modern commercial litigation is itself a reason for its reassessment. Some other reasons are explored below.

The complacency with, or resistance to disturbing, this test can be explained by the reason that claimants should be protected by affording them the right to arrest a ship to obtain security for their legitimate claims against the defendant who is, in many, if not most, cases a one-ship

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¹ This is an extended version of the subject dealt with in the forthcoming 3rd edition of 'Modern Maritime Law' by this author, expected later in 2013.

² The Arrest Convention 1952 does not deal with wrongful arrest of a ship but leaves the matter to be decided by the law of the state in whose jurisdiction the ship is arrested. The issue of whether the Convention should contain a provision on the right of the owner to claim damages for wrongful arrest was hotly debated; the civil law countries were in favour of such a provision and the common law countries were against it: see Berlingieri *Arrest of Ships* (5th edn Informa 2011) ch 16. Thus, the situation in which such liability arises differs from country to country; the law of each country, State Party to the Convention, can be found in this chapter.

³ *The Evangelismos* (1858) 12 Moo PC 352; *Walter D Walle* [1893] P 202 (proof of actual damage is not necessary to sustain an action in a court of Admiralty for wrongful arrest, if the seizure of the vessel was the result of *mala fides* or *crassa negligentia*, implying malice).

⁴ (1875) 1 App Cas 58 ('*mala fides*' or 'malicious negligence').

company with one tangible asset moving from one jurisdiction to another; claimants are faced with the risk of that asset being either sold or lost at sea. In addition, there is a policy reason that English jurisdiction should be amenable to claimants and a lower threshold of the test for possible wrongful arrest might discourage them from bringing their claims to this jurisdiction. In some other common law jurisdictions that have applied this test, however, the attitude of courts is changing,⁵ as will be seen later, and an emphasis is placed on providing a balance between claimants and defendants and recognising that the interests of justice must be served.

The rigid English test, in effect, provides claimants with immunity from being sued for damages because they know that the defendant will be discouraged from seeking compensation for wrongful arrest. There have been cases where claimants have abused the 'right to arrest', again discussed further below, including: when an unreasonable demand for high security was made; when an undertaking from the owners' P&I club was not accepted and the arrest continued until the arrestor's demands were met; when the foundation of the claim had not been thoroughly examined; when the claimant did not have the requisite standing to arrest; and when the ship was not in the beneficial ownership of the alleged defendant. In such situations, the owner has not been able to discharge the burden of proof that the claimant acted out of malice, bad faith or *crassa negligentia*, except in exceptional cases. The present law does not help the owner to obtain justice for his losses incurred by reason of a wrongful arrest not only in terms of the costs to put up security, but also commercial losses and liabilities paid to third parties. Granting an owner his legal costs when he succeeds in litigation on the merits or in his application that the arrest was not justified is not sufficient compensation.

Would the reason of justice, alone, not be sufficient to justify revision of the test? The time is ripe to do so, particularly because of the developments in other common law jurisdictions.⁶ These show, however, that there are inconsistencies in the application of the test because of different phrases that have been used by the judges, and the need for uniformity is another important reason for reform of the law in this area.

This article sets out the problems arising from the current test, its history and the tort of malicious prosecution, examines some decisions which have applied the test, looks for modern trends and explores the available options as to whether reform, if at all possible, can be achieved.

2. The problem

2.1 The test of malice or *crassa negligentia*

When *The Evangelismos* was decided by the Privy Council in 1858, the arrest of the ship, rather than the issue of the writ, constituted the commencement of the action in order to found jurisdiction, so the claimants' right to proceed in rem needed to be protected. In addition, no precedent could be found in Admiralty law of an action for the wrongful arrest of a ship by means of Admiralty process, nor was such an action available in the common law courts.⁷

In *The Evangelismos*, a collision occurred on the Thames in darkness, and the vessel that had caused the damage escaped. On the morning of the next day, the owners of the damaged ship, the *Hind*, arrested the *Evangelismos* which was found in the docks. By reason of having damage to her bow, she was taken to be the missing colliding ship. She was kept under arrest for three months and could not perform her voyage to carry coal to the Levant, until bail was

⁵ For example see the Singaporean case of *The Vasily Golovnin* [2008] SGCA 39 (albeit obiter comments).

⁶ A most thorough and critical analysis of the law as developed in common law jurisdictions is provided by Michael Woodford 'Damages for wrongful arrest: section 34, Admiralty Act 1988' (2005) 19 *MLAANZ Journal* 115–47.

⁷ Procedures changed with the merger of the common law courts with the Admiralty Court by the Supreme Court of Judicature Act 1873.

found for her release. After examination of witnesses, Dr Lushington found that it had not been sufficiently proved that the *Evangelismos* was the guilty ship and dismissed the action with costs. Upon application for wrongful arrest and detention, damages were refused to her owner because the judge considered that the arrest had been made in the bona fide belief that she was the ship that had been in collision and that there had been no *mala fides* in the proceedings.

On appeal (the case reached the Privy Council), it was argued that the arrest was without probable cause, in that there was no shadow of reason for charging the *Evangelismos* as being the guilty ship. Reliance was placed on previous decisions, including: *The Orion*,⁸ in which damages were awarded for having been arrested by mistake for six days; *The Glasgow*,⁹ where the ship was arrested upon mistake of law and demurrage and costs were awarded; *The Nautilus*,¹⁰ which was arrested by the salvor, who had already been paid for its services and was condemned to pay damages in costs and expenses for groundless arrest.

The defendants argued that the arrest was bona fide and invoked the jurisdiction of the court. There being no authorities with regard to granting damages for wrongful arrest in Admiralty courts, they relied on common law authorities concerning false imprisonment and malicious prosecution of a person, as applied by the common law courts.¹¹ In cases of malicious prosecution, malice *and* the absence of reasonable and probable cause were, and still are, required to be proved by the person contesting the prosecution in order to succeed.¹²

Applying this principle by analogy, the Privy Council affirmed the decision of the court below and held there was nothing whatever to establish the appellant's proposition. Although it was true that the identity of the ship was not proved, there were circumstances which afforded ground for believing that this ship was the one that had been in collision with the *Hind*.¹³ The appeal was dismissed and the owner, whose vessel should not have been arrested and detained for three months, was not even compensated for the legal costs incurred to contest the wrongful arrest.¹⁴

⁸ (1852) 14 ER 946.

⁹ (1855) 166 ER 1065.

¹⁰ (1856) 14 ER 1044.

¹¹ For an explanation of this see *Walter D Wallet* (n 3) at 206 (Sir Francis H Jeune): 'No precedent, as far as I know, can be found in the books of an action at common law for the malicious arrest of a ship by means of Admiralty process. But it appears to me that the onus lies on those who dispute the right to bring such an action of producing authority against it. As Lord Campbell said in *Churchill v Siggers*: "To put into force the process of law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case". Why is the process of law in Admiralty proceedings to be excepted from this principle? It was long ago held that an action on the case would lie for malicious prosecution, ending in imprisonment under the writ de excommunicato capiendo in the spiritual court: *Hocking v Matthews*. It can, therefore, hardly be denied that it would have lain for malicious arrest of a person by Admiralty process in the days when Admiralty suits so commenced, just as for malicious arrest on mesne process at common law. But if for arrest of a person by Admiralty process, why not for arrest of a person's property? I can imagine no answer, and the language of the reasons of the Privy Council in the case of *The Evangelismos*, quoted with approval in the late case of *The Strathnaver* appears to me to treat the existence of such an action at common law as indisputable'. In *Walter D Wallet* (n 3) 205–206, where the action of the defendant was commenced clearly without reasonable or probable cause, or was the result of *crassa negligentia*, the court awarded nominal damages.

¹² See eg *Mitchell v Jenkins* (1833) 5 B and Ad 588. For malicious prosecution the plaintiff must prove that the prosecution or arrest was malicious and without reasonable and probable cause; 'malice is not in the sense of spite or hatred but of "*malus animus*" denoting that the party acted by improper motives'. See *Herniman v Smith* [1938] AC 305 (HL), where Lord Atkin held: it is for the judge to decide whether there was want of reasonable and probable cause; and for the jury to decide whether there was malice, eg motives other than a desire to bring to justice someone whom the prosecution honestly believed, on the facts before it, to be guilty [synopsis]. In *Glinski v Mclver* [1962] AC 726 (HL), Lord Devlin concurred with Lord Atkin in *Herniman* and added that if there is no proof of reasonable and probable cause, no questions are for the jury. The judge should keep questions of fact to himself.

¹³ *The Evangelismos* (n 3) 359, applied by the PC in *The Strathnaver* (n 4).

¹⁴ However, in the following cases costs were awarded: *The Active* (1862) 5 LT(NS) 773; *The Volant* (1864) Br & L 321; *The Eudora* (1879) 4 P 208; *The Keroula* (1886) 11 PD 92; and *The Village Belle* (1985–86) 12 TLR 630.

In particular, the Rt Hon T Pemberton Leigh stated the test:

Their Lordships think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either *mala fides*, or *crassa negligentia*, which implies malice, that would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. . . .

The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or gross negligence which is equivalent to it? . . .(emphasis added)

It should be noted at this point, however, that in malicious prosecution cases (see further below) malice is not to be inferred from a finding of groundless prosecution.

3. Is the *Evangelismos* test appropriate?

One commentator, Nossal,¹⁵ interprets this test as containing a narrow rule and a broader rule. He argues that the latter could be applied and damages for wrongful arrest may be awarded in, at least, three circumstances: (i) where the arrest is initiated ‘maliciously’; or (ii) ‘negligently’; or (iii) ‘unwarrantably’, or with ‘so little foundation’. The latter includes cases, the author submits, where the court has no jurisdiction to hear the matter. He contends that the Privy Council did not, perhaps, mean the narrow scope of the rule which has been attributed to it by subsequent cases, and were the House of Lords (now the Supreme Court) invited to re-examine the rule, it would decide that there are, in modern times, insufficient grounds for its stringency. There are some valid points in Nossal’s commentary but, as it appears from later interpretations of the decision, the test, even in its most liberal interpretation, does not warrant the inclusion of merely negligent,¹⁶ or even unwarranted, arrest without an assessment of the subjective state of mind of the arresting party.

Considering the background against which *The Evangelismos* was decided, the test is no longer appropriate at the present time. But judges, in subsequent cases, felt bound by this decision, known as the ‘Admiralty law test’¹⁷ or the ‘historic pedigree’, as opposed to the common law test, discussed below. The fact that the test derives from the test applicable to malicious prosecution cases has caused confusion.¹⁸ Even in malicious prosecution cases, in which a stringent test is required because public prosecutions are concerned with the interests of the public, the test has been, it seems (see below), adapted to present times.

4. Malicious prosecution cases: the common law test

The very early cases in this area had established that to support an action for the tort of malicious prosecution, there must be a want of reasonable and probable cause and malice.¹⁹ Hawkins J in *Hicks v Faulkner*²⁰ defined the two limbs of the test. With regard to reasonable and probable cause, the prosecution must have had:

¹⁵ S Nossal ‘Damages for the wrongful arrest of a vessel’ (1996) *LMCLQ* 368, at 377–78.

¹⁶ Although the Singaporean judge in *Ohm Mariana* [1992] 2 SLR 623 said at 636: ‘the expression “*crassa negligentia*” or “gross negligence” simply means negligence. The vituperative epithet adds nothing to its meaning’. (Reversed by the Singapore CA [1993] 2 SLR 698.)

¹⁷ Referred to by the Singaporean Court of Appeal in *The Kiku Pacific* [1992] 2 SLR 595.

¹⁸ See Woodford (n 6).

¹⁹ See *Reed v Taylor* (1812) 128 ER 472; *Gibson v Chaters* (1800) 126 ER 1196. There must be both a want of probable cause and malice proved to support the action. This was an action for maliciously and without any just or probable cause arresting the plaintiff and holding him on bail.

²⁰ *Hicks v Faulkner* (1878) 8 QBD 167, test approved by Lord Atkin in *Herniman v Smith* (n 12).

An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.²¹

With regard to malice, he said:

As a general proposition, want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one – of fact purely – and altogether for the consideration of the jury, and not at all for the judge. The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact – *malus animus* – indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody.²²

As private prosecutions and arrests of individuals were proliferating in the 17th and 18th centuries, this stringent test was not justified because it discouraged actions to be brought for holding someone on bail in a mere civil suit.²³ The test for malicious prosecution and which questions are for the jury were clarified by the House of Lords in *Herniman v Smith*.²⁴ The House of Lords had another opportunity to refine the test in *Glinski v McIver*,²⁵ where the judge had again put to the jury the wrong questions; *Herniman* was applied.

It was held that:

- (i) it is for the judge to determine whether there was want of reasonable and probable cause, and for the jury to determine any disputed facts relevant to that determination on which he needed their help;²⁶
- (ii) the question of want of honest belief is relevant to that of want of reasonable and probable cause, but that question may be put to the jury only if there is affirmative evidence of want of honest belief;²⁷
- (iii) in the present case there was no such evidence, nor other evidence of want of reasonable or²⁸ probable cause for the prosecution.

The following guidelines for the judges were put forward by their lordships as to the meaning of ‘no reasonable and probable cause’:

In deciding whether there was reasonable and probable cause for the prosecution, the judge cannot ignore the fact of the prosecutor’s belief, which is therefore relevant. Want of reasonable

²¹ *ibid* at 171. The House of Lords in *Herniman v Smith* (n 12) approved the judge’s definition of ‘no probable and reasonable cause’; their lordships only disapproved the judge’s statement at 172 that ‘the reasonableness of the accuser’s belief in the existence of the facts on which he acted is a question of fact for the jury’. The test was considered more recently by the Court of Appeal in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524, where it was held that the judge had directed himself correctly as to the meaning of ‘reasonable and probable cause’: he had set out the standard definition, which required a finding as to the subjective state of mind of the officer responsible and an objective consideration of the adequacy of the evidence.

²² *ibid* at 175; but see *Mitchell v Jenkins* (n 12) that ‘malice is not in a sense of spite’.

²³ *Gibson v Chaters* (1800) 126 ER 1196. In *Sinclair v Eldred* (1811) 128 ER 229 Mansfield CJ said: ‘With respect to the malicious arrest, there never was a period when this species of action ought more to be encouraged, for there is much abuse made of the power of arrest’.

²⁴ Note 12.

²⁵ [1962] AC 726 (HL).

²⁶ *ibid* 742, 768, 779.

²⁷ *ibid* 742, 744, 752, 753, 768.

²⁸ It is noted that the conjunctive ‘and’ is used interchangeably with the disjunctive ‘or’, which has caused confusion in subsequent cases.

and probable cause is not to be inferred from malice. When a police officer preferring a charge has, at every step, acted on competent advice, and has put all the relevant facts known to him before his advisers, it would be hard to say that he acted without reasonable and probable cause.²⁹

Reasonable and probable cause means that there are sufficient grounds for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction ... Objectively there must be reasonable and probable cause for the prosecution, and the prosecutor must not disbelieve in his case ... even though he relies on legal advice.³⁰

If the prosecutor can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge, he cannot be said to have acted upon reasonable and probable cause ... mere belief in the truth of the charge would not protect him, if the circumstances would not have led an ordinarily prudent and cautious man to conclude that the person charged was probably guilty.³¹

A prosecutor ... must have reasonable and probable cause in fact and not merely think that he has.³²

Although there are some slight discrepancies between the dicta cited above, their lordships were in agreement that reasonable and probable cause requires a finding as to the subjective state of mind of the officer responsible and an objective consideration of the adequacy of the evidence.³³ Malice is an independent question of fact and for the jury to decide provided there is a case of no reasonable and probable cause for the prosecution, as the judge may determine following the process explained above. One of the issues considered by the House of Lords was whether it was correct to put to the jury the question of the belief of the prosecutor and this was extensively analysed by Viscount Simonds. It was argued that although the belief of the prosecutor in the guilt of the accused may be relevant to malice, it is not relevant to the question of reasonable and probable cause as to which the test is purely objective. Viscount Simonds thought that this entailed a confusion of thought. The question of belief can only be left to the jury if there is affirmative evidence of the want of it, he firmly stated (at paras 743–44). The reasoning seems to be somewhat circular but the space here does not permit further elaboration on this point, nor is it necessary to do so for the present purposes.

It suffices to say on this issue that it is strikingly surprising that this complex test (involving questions for both the judge and the jury), which is undoubtedly suitable to criminal cases, should be the starting point for and be applicable, by analogy, to Admiralty cases of wrongful arrest of ships.

It has been suggested³⁴ that, in current times, having in mind the Human Rights Convention, the test of 'no reasonable and probable cause' should be based on the guidance applying to public prosecutors in making charging decisions. Current Guidance on 'Charging' to Police Officers and Crown Prosecutors requires both the police and CPS to apply the principles in the Code for Crown Prosecutors when determining charges. The 'Full Code' test requires the prosecutor to charge if there is enough evidence to provide a 'realistic prospect of conviction', and if it is in the public interest to proceed. The 'realistic prospect' is essentially a sufficient evidence test and involves determination of whether a fair minded tribunal properly applying the law would be more likely than not to convict. In some circumstances, a lower 'Threshold Test' is applied, where the police do not wish to release on bail for

²⁹ *ibid* (Viscount Simonds, Lord Reid concurring) at 742–45.

³⁰ *ibid* (Lord Devlin) at 766, 769–70 and 777.

³¹ *ibid* (Lord Radcliffe) at 753–54.

³² *ibid* (Lord Denning) at 758, 759.

³³ Applied in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524.

³⁴ *Clerk & Lindsell on Torts* 20th edn ch 16 section 3 – malicious prosecution.

prescribed reasons and where not all of the likely evidence is available as yet. This test requires there to be 'at least reasonable suspicion', being compatible with Article 5 of the ECHR.

4.1 The difficulty in applying this test to wrongful arrest of ships

There have been a few older decisions in which the court awarded damages for wrongful arrest of a ship without insisting on proof of malice. In these cases, the underlying claim was not justified and therefore failed.³⁵ In other decisions, the court awarded only costs to the shipowner and not damages because no *mala fides* or *crassa negligentia* was found.³⁶ In another strand of cases, where the test of *mala fides* or *crassa negligentia* was met,³⁷ damages were awarded.

In more recent years, in *The Saetta*,³⁸ Clarke J (having no further guidelines from higher courts) applied the *Evangelismos* test of *mala fides* or *crassa negligentia* and on the facts of the case he held that even if the owners were not liable to the claimants for conversion of the bunkers, it could not be said that the claimants or their solicitors acted with *crassa negligentia* in arresting the ship for payment of the bunkers.

Unfortunately, the test of 'malice or *crassa negligentia*' was not in issue before the Court of Appeal in *The Borag*³⁹ and an opportunity for its review was lost. The ship had been under arrest for 14 days at the action of her managers who colluded with the master to sail to Cape Town, a port which was always avoided upon the instructions of the owners considering the ease with which arrest of ships is obtained there. However, the court recognised that the

³⁵ See eg *The Victor* (1860) Lush 72 (where the cargo on board ship was arrested wrongfully after a collision because the value of the ship and freight was insufficient to meet the collision damage. The cargo was released with costs and damages for its improper detention); *The Cheshire Witch* (1864) Br & L 362 (substantive claim in rem dismissed); *The Cathcart* (1867) LR 1 A & E 333 (wrongful arrest by a mortgagee who ought to have been aware of the facts); *The Margaret Jane* (1869) LR 2 A & E 345 (salvors became aware, after the arrest, of the appraised value of the wreck, which was lower than the sum for which they arrested, therefore they dropped the proceedings. The court condemned them to pay damages although malice was not shown); cf *The Strathnaver* (n 4) where there was error of judgment and no damages were awarded.

³⁶ See eg *The Active* (n 14); *The Volant* (n 14); *The Eudora* (n 14); *The Keroula* (n 14); *The Village Belle* (n 14).

³⁷ In *The Eleonore* (1863) 167 ER 328 arrest of the vessel for salvage in excess amount was wrongful and *crassa negligentia* was shown. In *The Vindobala* (1888) 13 PD 42, (1889) 14 PD 50 (CA), the managers and part owners of the ship had no right to arrest her and were liable to the other owners for any damages resulting from their wrongful act. See also *Walter D Wallet* (n 3), where the concept of 'without reasonable or probable cause' from common law was equated to *crassa negligentia* and nominal damages were awarded.

³⁸ [1993] 2 Lloyd's Rep 268. Upon withdrawal of the ship from the charterers by the owners for non-payment of hire, there was a quantity of bunkers on board which was involuntarily transferred to the owners by the transfer of possession of the vessel back to the owners on termination of the charter. Unbeknownst to the owners, the bunkers, which were subject to a retention clause, had not been paid for by the charterers and so the ship was arrested for conversion. It is interesting, in this connection, to refer to *The Kos* [2010] 1 Lloyd's Rep 87, where the ship was withdrawn for unpaid hire and the charterers, challenging the right of withdrawal, threatened to arrest the ship unless security was put up for their counterclaim. The owners gave a bank guarantee without prejudice to their contention that the demand was unjustified and obtained a declaration from the court that their withdrawal was lawful and valid and the charterers' counterclaim for damages on basis of wrongful withdrawal had been dismissed with costs at a previous hearing. One of the issues before Smith J was whether the costs of providing the guarantee were recoverable. He held the cost of the guarantee was recoverable as costs incidental to the proceedings within the meaning of s 51 of the SCA 1981. It was also argued whether such costs could be recovered as damages on the basis of breach by charterers of an implied term of the contract not to bring invalid claims. Counsel for the owners submitted that an invalid claim is one which is brought without reasonable or probable cause justifying the threats of arrest the charterers made (in the sense of *Walter D Wallet*), but that argument was rejected in the circumstances of this case.

³⁹ [1981] 1 Lloyd's Rep 483. Another Court of Appeal decision was *Astro Vencedor Compania Naviera v Mabanafit GmbH* [1971] 1 Lloyd's Rep 502, in which Lord Denning MR had to decide only whether the umpire, Mr Barclay, had jurisdiction in the arbitration proceedings to decide the issue of wrongful arrest and he held that he had. The umpire, upon the dismissal of the claimants' claims, had awarded damages to the owners for wrongful arrest of the ship by the claimants but his reasons for doing so were not given in the judgment.

owners of a ship which was wrongfully arrested were entitled, at least, to all reasonable expenditure which they had incurred as a result of the wrongful arrest; it said further that, subject to proof, the owners would be entitled to recover loss of profit and expenses thrown away during the time of the ship's detention, but it did not have to decide these items of damages.

The decision of Colman J in *The Kommunar (No 3)*⁴⁰ shows how difficult it is for the owner to succeed in his claim for damages for wrongful arrest. Although the arresting party knew that the beneficial owners and the person in possession of the ship were, when the cause of action arose, a different entity from the owners of *The Kommunar* at the time of the arrest (owing to privatisation of the company which would be liable in personam), the owners did not succeed in their claim for damages. Contesting the arrest, they argued that the conduct of the arresting party amounted to *crassa negligentia* and on that basis they claimed damages. Colman J, referring to the Rt Hon T Pemberton Leigh of the Privy Council in *The Evangelismos*, understood the test to be as follows:

Two types of cases are thus envisaged. Firstly, there are cases of *mala fides*, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel [emphasis added]. It is, as I understand the judgment, in the latter sense that such phrases as '*crassa negligentia*' and 'gross negligence' are used and are described as implying malice or being equivalent to it ... Taking the judgment as a whole, it would not appear that the mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to CN [*crassa negligentia*] in the sense there used.⁴¹

For convenience, the test will be referred to below as the '*Evangelismos/Kommunar*' test, unless reference to the former case is only relevant contextually. On the evidence of the *Kommunar*, Colman J considered that whether or not the conduct amounted to *crassa negligentia* it was quite impossible to say that it should have been obvious to the arresting party, or their legal advisers, that the claim in England was bound to fail, given the relatively complicated privatisation process and the complex analysis of the Russian legislation. He further said that the difficulty in granting damages, including wasted costs or other expenses incurred during a wrongful arrest, is inherent in the procedural rules of arrest of ships under English law. This is so because the in rem jurisdiction of the Admiralty Court requires no undertaking in damages from a claimant who obtains the benefit of security for his claim by arresting a vessel, even if he has wrongfully invoked the jurisdiction. He continued:

... [h]e will not have to compensate the shipowner for the expenses and losses arising out of the arrest unless *mala fides* or *crassa negligentia* is proved. This is a rule of English law which can bear very harshly on shipowners who for some special reason may be unable to obtain release of their vessel by putting up security. It is not a rule which is found in the civil law systems. The more widely used procedure for obtaining security for a claim in *personam* in English law is the Mareva injunction, but there is an undertaking in damages required and the liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction.⁴²

The absence of a similar provision in the CPR (Admiralty proceedings in rem) leaves without remedy an innocent defendant shipowner who has suffered loss by an unjustified arrest but who is unable to establish malice or *crassa negligentia*. Recognising the injustice suffered by the shipowner, the judge did not exercise his discretion to allow a reduction of the

⁴⁰ [1997] 1 Lloyd's Rep 22.

⁴¹ *ibid* 30.

⁴² *ibid* 33.

shipowner's recoverable costs (incurred as a result of the wrongful arrest) in order to give credit for the benefit of the bunkers remaining on board.

At about the same time, the English court held in *The Peppy*⁴³ (arrested by the manager for alleged outstanding balance of account) that the arrest, which amounted to a repudiatory breach of the management agreement, was wrongful and the owners suffered recoverable loss by reason of the arrest. It was shown, however, in this case that the conduct of the director of the managing company was dishonest. On the facts, it was found that there was no outstanding balance of account at the time of the arrest because there was a variation of the agreement to defer payments until the vessel was sold.

4.2 The confusion

From the interpretation of the test by Colman J above, there seem to be two categories of cases which will fall within the current test of wrongful arrest:

- (i) '*mala fides* arrest', where it is shown from primary evidence that the arrestor did not have an honest belief in the reason for the arrest or
- (ii) 'obviously groundless arrest, objectively judged, from which it can be inferred that the arrestor did not believe in, or did not give serious regard to, its entitlement'. What this entails is that there should be an objective assessment of the subjective state of mind of the arresting party (i.e. assessing the reasonableness of his belief). Mere absence of reasonable care to ascertain entitlement to arrest the vessel would not necessarily amount to *crassa negligentia*.

This alternative test has been taken to be equivalent to the test of 'without reasonable and probable cause' (objectively judged). But it is important to note what Colman J said about this phrase in *The Kommunar*:

... To characterise their continued pursuit of the proceedings and maintenance of the arrest as without reasonable and probable cause would be putting the threshold of *crassa negligentia* far too low.⁴⁴

What Colman J meant is that without an assessment of the subjective state of mind of the arrestor, the threshold would be too low. The phrase probably stems from the interpretation given to the test in *Walter D Waller*,⁴⁵ in which the concept of 'without reasonable or⁴⁶ probable cause' was borrowed from the common law malicious prosecution cases and was equated to *crassa negligentia*. It seems to the author that, upon a literal construction, 'without reasonable and probable cause', in the context of wrongful arrest of ships, should mean that there are no reasonable grounds for the arrest and/or the cause for the arrest is 'more likely than not' to fail. It is submitted that this phrase, in civil cases, as opposed to the malicious prosecution cases, should require only an objective assessment of the situation without inquiring about the subjective belief of the arrestor. When courts use this phrase as being the test for wrongful arrest of ships, confusion arises because different meanings can be ascribed to it.

To compound the confusion, 'no reasonable and probable cause' has been regarded to be the common law test applicable to the malicious prosecution cases, as opposed to the Admiralty law test.⁴⁷ However, as seen in *Glinski v McIver*,⁴⁸ the 'common law' test requires also malice,

⁴³ [1997] 2 Lloyd's Rep 722.

⁴⁴ *The Kommunar (No 3)* (n 40) at 32.

⁴⁵ Note 3.

⁴⁶ As noted earlier (n 28), the conjunctive 'and' is used interchangeably with the disjunctive 'or'.

⁴⁷ It is interesting to note that the Singaporean court (1st instance) in *The Ohm Mariana* [1992] 2 SLR 623 endorsed the test of 'no reasonable and probable cause', while the Court of Appeal of Singapore rejected it in *The Kiku Pacific* (n 17), as it thought it was the common law test applicable to malicious prosecution cases and was different from the Admiralty law test of *The Evangelismos*, being the appropriate test to be applied to wrongful arrest of ships.

⁴⁸ Note 25.

which cannot be inferred from a finding of 'no reasonable and probable cause', although the latter was defined to include the subjective aspect of 'no honest belief' in the prosecution. By comparison, as discussed above, the Rt Hon T Pemberton Leigh suggested that the real question to be asked in cases of wrongful arrest of a ship is this: 'is the action so unwarrantably brought, or brought with so little foundation, that it rather implies malice, or gross negligence which is equivalent to it?' In a sense, he conflated the two limbs of the test applicable to malicious prosecution cases by using the word 'malice'. Thus, there has been confusion as to the application of the test as is apparent from the decisions analysed by Michael Woodford⁴⁹ in his scholarly article mentioned earlier.

5. Recent decisions – are new trends emerging?

In *Gulf Azov v Idisi*,⁵⁰ the Court of Appeal applied the test, namely: 'in the absence of any serious regard to whether there were adequate grounds for the arrest of the vessel', and damages were awarded. In this case, there was clear evidence of wrongful detention of both the ship and her crew in Nigeria by the owners of the cargo. They demanded US\$17 million (an extortionate amount) as security for the release of the ship. Although the P&I club offered security in an LOU for US\$1.5 million, it was rejected. After an impasse in negotiations, US\$3 million was accepted as security. The claimants in the English action (owners and P&I club) obtained a freezing order on the sum of US\$3 million pending execution of the agreement and instituted proceedings alleging that the agreement to pay US\$3 million was voidable for duress and that the vessel had been wrongly detained. They obtained a judgment in default and the defendants applied to set it aside. The judge decided in favour of the claimants and, on appeal, the Court of Appeal affirmed the judgment and held, on the point of wrongful detention, that there was no objective justification for the amount claimed and the question was whether the arresting party believed that there was. It appeared from the evidence that, in the absence of any serious regard as to whether there were adequate grounds for the arrest for which they demanded such a high amount of security, wrongful arrest was overwhelmingly established (ie the *Evangelismos/Kommunar* test was met).

In *The Kallang (No 2)*,⁵¹ Axa Senegal, the insurer of cargo receivers, knowing that the disputes between the owners and receivers were subject to London arbitration arrested the ship in Dakar (the discharge port) not just for obtaining security for the receivers' claim but for establishing jurisdiction. An offer of security from the owners' P&I club was rejected. Axa insisted that the ship would only be released against a bank guarantee answerable to Senegalese jurisdiction. As the court found, it was Axa's intention to use the arrest to force the owners to relinquish the London arbitration clause, which was a breach of the agreement between the owners and the receivers; therefore, they were liable in damages on the basis of the tort of procuring breach of contract (*OBG v Allan*⁵²). There was no need to apply the *Evangelismos/Kommunar* test of wrongful arrest, although the result, on the evidence, might have been the same. Damages were assessed for 10 days' unjustified period of the arrest during which the owners lost the use of the vessel, loss of hire from the next fixture (US\$120,000) and incurred consumption of gas oil and port charges, totalling US\$130,350.

The same tactics were used by the same insurers in *The Duden*⁵³ and the judge decided in the same way on the application of the principle. The only difference here was that the loss had been suffered by the subsidiary bareboat charterer and not by the shipowner. Unfortunately, it was too late to allow the shipowner to amend its case or to join the subsidiary as a party. He

⁴⁹ Note 6.

⁵⁰ [2001] 1 Lloyd's Rep 727.

⁵¹ [2009] 1 Lloyd's Rep 124.

⁵² [2008] 1 AC 1 and see further below.

⁵³ [2009] 1 Lloyd's Rep 145.

was entitled only to an injunction restraining the proceedings in breach of the arbitration clause but not to damages.

By analogy to a wrongful arrest of a ship, it is interesting to note *The Nicolas M*,⁵⁴ which shows the type of conduct of the arresting party that would be examined by the court. Flaux J decided that the charterers, who applied for a freezing order to obtain security against the owners for their counterclaim in London arbitration, had shown a good arguable case of wrongful attachment in New York⁵⁵ by the owners in support of an unsustainable cause. On the facts of this case, the owners of the ship 'had engaged in what, at its lowest, was a discreditable conduct involving perjury' on the part of the captain, in relation to the maintenance of the attachment obtained under Rule B. The judge commented that these owners were the sort of people who would stop at nothing to frustrate the charterers from making any substantial recovery by dissipating their assets, unless restrained by the freezing order.

Do these cases support a new trend? Other than the first and the last decisions referred to above in which there was no difficulty in applying the *Evangelismos/Kommunar* test, the bold tactics used by the claimants in *Kallang* and *Duden*, which are not novel, could be dealt with by applying the *OBG v Allan*⁵⁶ principle, as Lord Hoffmann delineated the tort for wrongfully inducing breach of contract from the tort of causing loss by unlawful means. Proceeding in a cavalier fashion to put pressure on the owner to accede to higher demands of security may not always be said to amount to bad faith, if legal advice had been obtained.⁵⁷

6. Other common law jurisdictions

The test of the *Evangelismos* is also applicable in other common law jurisdictions.⁵⁸ There is no need to refer to these decisions in this article other than to mention some of them briefly as a full account about such decisions has been given elsewhere.⁵⁹ It should be noted that in Australia the Admiralty Act 1988 included section 34,⁶⁰ which is headed 'Damages for unjustified arrest' and provides a different test from the *Evangelismos/Kommunar* test, namely that where a party 'unreasonably and without good cause' demands excessive security, or obtains the arrest of a ship, or fails to give consent for the release of the ship from arrest, that party will be liable in damages. Similarly, in Nigeria the same test is used in the Admiralty Jurisdiction Decree section 13:⁶¹ 'unreasonably and without good cause'.

South Africa also has a legislative provision in the Admiralty Jurisdiction Regulation Act 105 of 1983 (SAF), as amended in 1992.⁶² It includes claims for wrongful or malicious arrest, attachment or detention in the list of maritime claims. The provision is read with section 5(4), which was amended⁶³ in 1992 to mirror the South African common law requirements for damages for wrongful arrest of persons, and reads:

⁵⁴ [2008] 2 Lloyd's Rep 602. The substantive matter was within the jurisdiction of London arbitrators.

⁵⁵ US federal law recognises the tort of wrongful attachment only on showing bad faith, or malice or gross negligence.

⁵⁶ [2008] 1 AC 1.

⁵⁷ See similarly the judgment of the Court of Appeal of Hong Kong in *The Maule* [1995] 2 HKC 769.

⁵⁸ Canada: *Armada Lines Ltd* [1997] 2 SCR 617, although the court below had awarded damages on the basis that the arrest of the cargo was without legal justification, the Supreme Court held that there was no bad faith. Hong Kong: *The Maule* (n 57), mortgagee who arrested the ship without cause of action, as the judge found at first instance, was not held liable in damages by the Court of Appeal because it could not be said he acted in bad faith. Singapore: see nn 16 and 47. In both *The Eymar* [1989] 2 MLJ 460 (Sing HC) and *The Ohm Mariana* (n 16) the test was met and damages were awarded. USA: *Fruit Co Inc v Dowling* 91 F 2d 293 (5th Cir, 1937).

⁵⁹ Woodford (n 6).

⁶⁰ See analysis of this and comparisons with other jurisdictions in Woodford (n 6).

⁶¹ *ibid*.

⁶² The references to South African law and decided cases are available at <http://web.uct.ac.za/depts/shiplaw/booknew> (2011) by Professor John Hare who states, at para 2-1.3 on disclosure that 'claimants and attorneys who play their cards close to their chest run the risk, and rightly so, of being found to have proceeded without reasonable and probable cause'.

⁶³ Prior to the amendment, the test was that the arrest was without 'good cause'.

Any person who makes an excessive claim or requires excessive security *or without reasonable and probable cause* obtains the arrest of property or an order of the court, shall be liable to any person suffering loss or damages as a result thereof for that loss or damage.

It should be noted that the judge of Appeal, Scott JA, had no difficulty in awarding damages in *The Snow Crystal*⁶⁴ for loss of future charter hire as a foreseeable loss consequent upon delay of the vessel in breach of a dry-docking contract following the arrest.

The amended wording was dealt with in *The Cape Athos*,⁶⁵ in which both the arrestor and the local and foreign instructing attorneys were held jointly and severally liable to the owner of the arrested ship. 'Without reasonable and probable cause' was interpreted by the judge to bear a similar meaning to that given to it in the context of the tort of malicious prosecution, namely that a lack of honest belief negates the defence of reasonable and probable cause. Furthermore, the judge held that the value to be attached to the legal adviser's advice would depend upon whether or not the client had given the adviser all the relevant facts.

The Supreme Court of Appeal considered the notion of 'excessive claim' in *The H Capelo*⁶⁶ and adopted an objective standard to determine what the arrestor should reasonably have regarded as having been recoverable.

In so far as this article is concerned, it is important to refer to a couple of relatively recent decisions which show new trends, particularly with regard to Singapore and Hong Kong where judges, in recent years, have decided that the *Evangelismos* test is too harsh.

The Singaporean courts have recently taken a more liberal approach to this issue⁶⁷ and there has been a U-turn in the attitude of the courts since *The Kiku Pacific*.⁶⁸ This was shown in *The Vasily Golovnin*,⁶⁹ where the Court of Appeal set aside the second arrest effected in Singapore by the bank (lawful holder of the bill of lading) of the sister ship of the carrying ship (which had been arrested at Lomé, Togo, and released) on the grounds that (i) there was no arguable case shown by the bank for non-delivery of the cargo that had been discharged at Lomé, and (ii) the bank failed to disclose material facts that there had been an *inter partes* hearing at Lomé on the same issues which was resolved in favour of the owners.

In relation to the disclosure, it held that it was not only prudent but indeed necessary for a party intending to rely on the arrest of a vessel as security for a potential arbitration award to disclose in the body of the affidavit in support of the *ex parte* application for a warrant of arrest the material facts. Such facts included that the bills of lading had been switch bills by which the discharge port had been changed, and that the court of the port of discharge had set aside a previous arrest of the ship for the same claims. The disclosure of these facts would have alerted the court to the fact that the owner had delivered the cargo at the correct port.

On the cross-appeal by the owner of the ship for wrongful arrest, it was held that the arrest was wrongful. Although the higher threshold of the test of *crassa negligentia* was satisfied, it was further found that the bank could not in all honesty have believed in the validity of its claim, and the court discussed (obiter) the *Evangelismos* test. It questioned the continued validity of the test and conjectured that it might be out of step with modern practice stating (at para 26):

⁶⁴ Case 250/07 *The Snow Crystal* (judgment delivered 27 March 2008).

⁶⁵ *MV Cape Athos* 2000 (2) SA 327 (D).

⁶⁶ 1990 (4) SA 850 (SCA).

⁶⁷ *The Eymar* (n 58) (Singapore HC): the continuation of the arrest after a promise by the shipowner to give security under protest was regarded as wrongful.

⁶⁸ Note 17.

⁶⁹ [2008] 756 LMLN 3, [2008] SGCA 39; the court usefully reviews wrongful arrest decisions of various jurisdictions.

With the historical background in mind and in the light of the legislative reforms undertaken by some other Commonwealth countries, it may be rightly asked if the *Evangelismos* test, which appears conceptually anachronistic, should continue to be the governing rule for wrongful arrest in Singapore. Should not a lower threshold be adopted instead?⁷⁰

In Hong Kong, the court in *The Avon*⁷¹ thought that the test of malice is harsh and something less than that should be required for wrongful arrest, but generally, there is no consistent approach by the courts in adopting a less harsh test.

7. Civil law jurisdictions

In the civil law systems there is no unified approach to wrongful arrest among the civil law countries in Europe. According to Professor Frank Smeele,⁷² there is a north-south divide on the European Continent. In the northern countries, the applicant for arrest is faced with strict liability if his claim fails on the merits, irrespective of fault or good faith. In the south, the law is similar to English law, namely, it requires the various degrees of fault (abuse of rights, gross negligence or bad faith).

For example,⁷³ in Denmark, Finland, Norway, Poland and Germany, the arrestor will be liable in damages when his claim fails, or the arrest was unnecessary or unjustified, irrespective of fault. Similarly, in the Netherlands, the arrestor will make good any loss caused by the arrest if the claim is rejected, even if he reasonably believed that his claim was well grounded. It will be abuse of justice if he demands excessive security. In Italy and Greece, proof of bad faith or gross negligence is required.

Different tests apply in other civil law countries. In Belgium, the claim of wrongful arrest is in tort and the claimant has to prove fault of the arrestor, his damages and causation. Fault is presumed if the arrestor acted recklessly and with knowledge that his action would probably cause damage. In France, the arrestor will be liable in damages if it is subsequently established that he abused his right. Abuse can exist when the arrest was unjustified or the security requested was excessive. In Portugal, there must be proof of carelessness on the part of the arrestor and he will be liable if the arrest proves to be wrongful or the proceedings on the merits did not commence on time. In Spain, the arrestor will be liable if the arrest proves to be wrongful, in the sense that it does not meet the conditions for arrest, or the claim fails, or he does not commence proceedings within the prescribed time. It should be noted that Spain has acceded to the Arrest Convention 1999 (see below).

8. The Arrest Convention 1999

A major objective of this Convention is to achieve a balance between the interests of claimants and owners. For the owner to succeed in his application for wrongful arrest under Article 6(1)(a) of the Arrest Convention 1999,⁷⁴ he must show that 'the arrest is wrongful or unjustified' (emphasis added). Various views about the meaning of these terms were proposed by different delegations.⁷⁵ Although the words used are not defined, it is submitted that they could be interpreted to mean that there was no legal ground for the arrest and thus

⁷⁰ The 'reasonable or probable cause' test was endorsed in *The Ohm Mariana* (n 16).

⁷¹ HKHC (unreported) (27 January 1992).

⁷² Professor Frank Smeele 'Liability for wrongful arrest of ships from a civil law perspective' in *Liability Regimes in Contemporary Maritime Law* Rhidian Thomas (ed) (Informa London 2007) ch 14.

⁷³ See Berlingieri (n 2).

⁷⁴ It is interesting to note that Turkey has enacted a new Turkish Commercial Code (TCC) 2012, which contains rules for the arrest of ships. Although Turkey is not a party to any of the Arrest Conventions, it has adopted the Rules of the 1999 Arrest Convention.

⁷⁵ See Woodford (n 6) and Berlingieri (n 2) on the debate that took place regarding the word 'unjustified' before the passing of the Convention.

it was wrongful or unjustified, judged objectively without looking at the belief of the arrestor; in other words, the arrestor should have taken reasonable care to find out whether there were reasonable grounds for the arrest.

In the English dictionary,⁷⁶ 'unjustified' is defined as something 'wrong, indefensible, inexcusable, unacceptable, outrageous, unjust, unforgivable, unjustifiable, unpardonable, unwarrantable'. Such words would seem to indicate that the conduct is to be judged objectively, applying the standard of what a reasonable man would have done had he been in the position of the arrestor at the time of the arrest. Since the philosophy behind the Convention has been to balance the interests of the parties, the draftsman must have intended to make the test of a lower threshold than malice or *crassa negligentia*, unlike the contrary views expressed by Professor William Tetley.⁷⁷ The Convention also requires that an undertaking in damages is put in place by the arrestor, which is in line with the philosophy of the Convention to provide balance between the interests of the parties.

On 14 September 2011 the Convention came into force amongst its acceding states, following accession by the tenth state, Albania. The 10 states to which the 1999 Convention applies are: Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. In the remaining 77 countries, the 1952 Convention is still, in force.

9. Why the preceding analysis strengthens the case for reform

It is apparent from the decisions in which wrongful arrest has been upheld that the evidence was clear and there was no difficulty in meeting the higher standard test. However, such cases seem exceptional and the problem of discharging the burden of proof of the present harsh test lies with the run-of-the-mill cases.

The *Evangelismos* test, otherwise referred to as the 'Admiralty law' test, is confusing and deters deserving shipowners from pursuing wrongful arrest claims. Although costs may be awarded to an aggrieved shipowner against a frivolous litigant, that would not be enough to compensate him for serious financial losses that may result from the disruption of business. It is common knowledge in the shipping world that ships operate on tight schedules and to delay a ship or disrupt its schedule can, and usually does, have far reaching commercial consequences.⁷⁸ This test makes the law less than even-handed, so that there is no balance between the interests of the respective parties. Furthermore, the procedural background against which *The Evangelismos* was decided has changed and the law in other jurisdictions has been developing, or reformed, to fit present commercial realities.

Reasons of uniformity and justice require that this outdated test is abandoned.

The objective of uniformity has led to reform in many other areas of the law concerning international trade, shipowners' liabilities and limitation, so that there is consistency and certainty in the application of the law. Why not in this area? Changing the rule in English law may lead other countries, in the common law jurisdictions at least, to follow suit. However, it seems that some of these countries are taking, or have taken, the lead in the reform. Perhaps the easiest solution for broader uniformity would be if the Arrest Convention 1999 was adopted, provided the terms used were clearly defined.

The so called 'common law' test of 'no reasonable and probable cause' as derived from the tort of malicious prosecution has caused confusion. The civil law test is not just one uniform test but entails a diverse terminology and even when the word 'unjustified' arrest is used, it does not have a uniform definition.

⁷⁶ Collins Thesaurus of the English language.

⁷⁷ W Tetley 'Arrest, attachment and related maritime law procedures' (1999) 73(5-6) *Tulane Law Review*, cited in Woodford (n 6) at 128-29.

⁷⁸ As observed by Scott JA in *The Snow Crystal* (n 64).

The 1999 Convention test, as seen above, would require precise definition of the words 'wrongful' and 'unjustified' for uniformity purposes. It seems to the author that this test is intended to be of objective standards without requiring an examination of the subjective state of mind of the arrestor.

10. Suggestions for reform

10.1 (i) By judicial initiative

First, it is suggested that the English courts themselves should revise the test. It seems that English judges are not precluded by the doctrine of precedent. Although there are two Privy Council decisions, there is not yet a decision of the Supreme Court on the issue. The Court of Appeal in *The Borag*⁷⁹ or *Gulf Azov v Idisi*⁸⁰ did not have to consider whether or not the *Evangelismos* test was suitable. Therefore, a bold judge in a future case might feel able to say he is not bound by *The Evangelismos* or *The Strathnaver* because the Privy Council has an advisory role; or he or she may be able to distinguish them in the light of changes in the procedure of arrest of ships and the views held by other judges in England and in the other common law jurisdictions. Thus, a judge might say that the 'orthodox authority' is old, weak and unsuitable for present legal and commercial reality. Another judge might feel bound by the Privy Council authorities but might, nevertheless, express his or her view about what the modern test should be and give leave to appeal.

10.2 (ii) By requiring a cross-undertaking in damages to be provided

It was argued in 1996 by Bernard Eder⁸¹ that English law should be changed and an undertaking in damages should be ordered by the court as a condition of arrest in case of wrongful arrest, as in the case of interim injunctions. He strongly advocated that if it was possible to 'invent' the Mareva injunction, why is it not possible for the Admiralty Court to adopt a practice of extracting a cross-undertaking in damages from an arresting plaintiff? He stated:

There is nothing, so far as I am aware, in any statute prohibiting such practice. And, if necessary, the rules of court can always be changed to recognise the change in practice. It is because the law does not permit a claim for damages to lie absent *mala fides* or *crassa negligentia* that I would suggest that the Admiralty Court should, like the courts of Equity, insist upon such a cross-undertaking in damages.⁸²

This proposal, as a second solution, could be workable to compensate the defendant either for his loss caused by the arrest, if the claim fails, or for the expenses incurred to put up security, in the event the demand is excessive, or in the event the claimant is using abusive tactics to force the owner to accept his terms. Before considering the viability of this solution in the instance of arrest of ships, a brief account of cross-undertakings relating to interim injunctions is given below.

A cross-undertaking in damages is normally a condition for the grant of an interim injunction, whether *ex parte* or on notice. This principle developed in the area of applications for injunctions as early as the 1850s, and Mareva injunctions⁸³ (now freezing injunctions) are merely a particular example of this general rule. But an injunction, as opposed to the arrest of

⁷⁹ Note 39.

⁸⁰ Note 50.

⁸¹ See B Eder QC 'Wrongful arrest of ships: revisited', paper delivered at a seminar held by the London Shipping Law Centre in 1996 and at ICMA XV. It is interesting to note that German courts sometimes require counter-security before the bailiff is entitled to detain the vessel.

⁸² *ibid* 13.

⁸³ S Gee QC 'The undertaking in damages' (2006) *LMCLQ* 181, where he makes a case for reform of cross-undertakings for the protection of third parties affected by them who are not mentioned in the order.

a ship, is a discretionary remedy. There are two reasons why the undertaking in damages is required: first the court is not in a position at the time of the application to determine the rights of the parties but must decide whether there is a serious issue to be tried; if there is, then it considers whether, in all the circumstances, it is just and convenient to make the order sought.⁸⁴ Given the serious damage that can be done to the respondent (the person(s) actually enjoined under the order) its business and reputation by an interim injunction and, especially, by a freezing injunction which is served on third parties, a cross-undertaking became a condition to issuing an injunction (CPR 25, PD 25A para 5.1) and, although the court does not have power to compel the applicant to provide an undertaking, it can withhold the granting of the injunction. So the cross-undertaking is the 'price' and is given to the court (not to the respondent) in return for the court making an interim order without having determined the facts or the claimant's entitlement to it. Otherwise, if the claim fails, the court would not have power, without the undertaking, to award damages to the successful respondent for any loss he may have suffered.⁸⁵ If the claimant later fails to establish his right to the injunction, or if he had failed to make full disclosure and the injunction is set aside, the undertaking can be enforced, at the court's discretion when it examines all the circumstances, by an application of the respondent. If enforcement is granted, damages can be assessed (on normal principles applying to damages and there is no discretion),⁸⁶ or an enquiry can be ordered as to what loss the respondent has suffered, when there is a reasonably arguable case that the injunction has caused some loss or damage.⁸⁷

Similarly, with regard to applying the cross-undertaking solution to an arrest of a ship (which is a without notice application), the court is not in a position to determine the rights of the parties and a cross-undertaking could be the price in return for the issue of the warrant of arrest. However, under the present CPR, strangely, the issue of a warrant of arrest is no longer a discretionary remedy, as confirmed by the court in 1993⁸⁸ and it is accepted since *The Varna*⁸⁹ that there is no scope for full and frank disclosure. If the statutory requirements set out in PD 61 r 61.5.3 are complied with, the claimant is entitled to have the warrant issued. The only provision in the CPR which allows a warrant of arrest not to be issued as of right is in the event the ship was sold after the issue of the writ by any court in any jurisdiction exercising admiralty jurisdiction in rem as a result of which the beneficial ownership has changed (CPR Part 61 r 61.5(4)). It might be argued, therefore, that the court may not have the power, at present, to withhold the stamping of the warrant until a cross-undertaking is provided, unless the CPR are changed.

This has been considered to be the stumbling block unless the relevant rule in the CPR on the issue of a warrant of arrest is reconsidered and amended, so as to make the requirement of a cross-undertaking a condition of the arrest. If need be, the CPR could revert to the pre-1986 position when the court had discretion whether or not to issue the warrant of arrest.⁹⁰ With regard to discretion which is linked to disclosure, it should be noted that the Admiralty and Commercial Court Guidelines 2011 (at F2.5), provide expressly that on all applications without notice it is the duty of the applicant and those representing him to make full and frank disclosure of all matters relevant to the application. Such a duty goes back to *Castelli v Cook*⁹¹

⁸⁴ *Lichter v Rubin* [2008] EWHC 450 (Ch).

⁸⁵ According to Lewison J in *SKB v Apotex* [2005] EWHC 1655 (Ch); *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch): to compensate the innocent party for loss caused by the injunction which ought not to have been granted.

⁸⁶ *Hoffmann-La Roche v Secretary of State for Trade & Industry* [1975] AC 295, at 361; the legal principles as to damages are essentially contractual: *Triodos Bank v Dobbs* [2005] EWHC 108.

⁸⁷ White Book paras 15–33 to 15–36 (Interim remedies).

⁸⁸ *The Varna* [1993] 2 Lloyd's Rep 253. The procedure rules had changed in 1986 and they were interpreted in *The Varna* to mean that the arrest is as of right, unlike the position that existed previously where the court had discretion and the arrestor had to comply with the disclosure rule: *The Vasso* [1984] 1 Lloyd's Rep 235 (CA). It should be noted that in other common law jurisdictions, eg Hong Kong, Singapore and South Africa, the requirement of full and frank disclosure has not been abandoned, since the application is *ex parte*.

⁸⁹ *ibid*.

⁹⁰ See *The Vasso* (n 88); see also *Eder* (n 81).

⁹¹ (1849) 7 Hare 89.

and it has been regarded as a perfectly well settled principle. It is an essential part of the *quid pro quo* for the court entertaining a departure from the fundamental principle of fairness that an order should not be made without giving the person who is the subject of it a chance to be heard, except in some cases in which short or informal notice can be given unless the circumstances of the application require secrecy. Logically, one would expect the principle of full and frank disclosure to apply also to the arrest of a ship, being a without notice application, as it used to before 1993, or before the CPR changed in 1986. The next step would be to change, or clarify, the Admiralty rule on arrest of ships so that there is consistency with the above principle and guideline.

It would not be difficult for a claimant to provide an undertaking even in situations where the arrest has to take place in a very short time, as happens in the case of a freezing injunction. Claimants prepare long in advance when they know that the relevant ship is about to come within the jurisdiction and, by and large, obtain security for their claim from the owners' P&I club. Alternatively, the undertaking should be required to be provided at the hearing of an application made by the defendant to set aside the arrest.

It is for the Civil Procedure Rules Committee (CPRC) to undertake the amendment to the CPR⁹² and prescribe the conditions as to when a cross-undertaking should be required. The attraction of this solution is, it is submitted, threefold: (i) it will not delay the process of arrest (as the claimant will be well prepared to give the undertaking); (ii) it will balance the claimant's right of arrest with the owner's right to be able to claim damages should the case warrant it; and (iii) the procedure applicable to the enforcement of cross-undertakings given in the case of interim injunctions⁹³ should be followed, in which case, it is submitted, the judge will have discretion, when an application is made for the enforcement of a cross-undertaking given in the event of a wrongful arrest, as to how to proceed regarding the enforcement of that undertaking and what evidence will be required. In the view of the author, this would help the court to ascertain the position of both parties at that stage when it determines the issue of damages.

10.3 (iii) By the application of the tort of wrongful interference with goods

A third solution may be to equate wrongful arrest of a ship with the tort of wrongful interference with goods rather than applying the test which is suitable to malicious prosecution cases. Conversion under the Torts (Interference with Goods) Act 1977 exists now in three forms: (i) the first form requires a positive wrongful act of dealing with goods in a manner which is inconsistent with the owner's rights and an intention in so doing; the gist of the action is the element of inconsistency with the owner's rights; there need not be any knowledge on the part of the person sued that the goods belonged to someone else nor need there be any positive intention to challenge the true owner's rights; liability is strict and fraud or other dishonesty is not a necessary ingredient in the action; (ii) the second form of conversion is committed where goods are wrongfully detained by the defendant, being equivalent to the old action for detinue; to establish wrongful detention there must have been a refusal to a demand for the return of the goods within a reasonable time; (iii) the third form of conversion lies for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.⁹⁴ For example, if the arrest was without foundation, it would

⁹² The only situation under the CPR where payment of compensation to the shipowner is envisaged is under CPR rule 61.7(5), in the event of arrest notwithstanding the filing of a caution against arrest.

⁹³ Note 87.

⁹⁴ The Torts (Interference with Goods) Act 1977 applies in large part to proceedings for wrongful interference. 'Wrongful interference with goods' means conversion of goods, trespass to goods or negligence insofar as it results in damage to goods, or to an interest in goods, and any other tort insofar as it results in damage to goods, or to an interest in goods. The Act is confined to proceedings in tort. 'Goods' includes all personal chattels other than 'choses in action' and money. See *Halsbury's Laws* vol 45(2) paras 545–48; for new procedural rules see CPR rule 19.5A (added by SI 2001/256).

be inconsistent with the owner's rights. Applying the test of the first form of conversion to the facts of the *Evangelismos* case, there would be no need to examine the knowledge of the arrestor that the ship was not the right ship to arrest nor would there be a need to prove a positive intention to challenge the rights of the owner or to show no honest belief in the right to arrest. Another example in this connection would, perhaps, be fitting the second form of conversion, if the arrestor had not taken reasonable care to ascertain the foundation of his right to arrest the property of the owner which resulted in causing damage to the latter, damages could be awarded upon an action in tort.⁹⁵

To the knowledge of the author, there is one shipping case that points to the possibility of suing for damages for wrongful interference with goods in case of an unjustified or unlawful arrest. *The Van Gogh*⁹⁶ was concerned with a claim for an alleged invalid detention of the ship by the MCA under sections 94 and 95 of the MSA 1995 when it was alleged by the MCA that the ship was dangerously unsafe. The claimant's case against the DoT was that the detention was unlawful, or not justified, and he claimed compensation under the Act or damages on the basis of the tort of wrongful interference with goods, namely conversion. The court held that to justify a detention under sections 94 and 95, the inspector had to have reasonable grounds for his opinion that the ship was dangerously unsafe and the evidence did not support that. On the assumption that the detention was invalid the court held, however, that since the claimant did not commence arbitration proceedings, as provided by section 96 of the MSA 1995, he could not recover compensation. On the issue whether the defendant had committed the tort of conversion, the case advanced by the claimant's counsel was that the test should be 'assumption of control' of the ship by the detention. The judge, referring to previous authorities defining the test of conversion in broad terms, held that the detention notice was not inconsistent with the owners' rights over the ship. The intention of the notice was to prevent the owner from using the ship for a short period and did not involve a sufficiently extensive encroachment on the claimant's rights to constitute conversion; rather, it was a lesser act of interference.

This case may be limited to its own facts because of the special provisions of the detention notice applicable pursuant to the Merchant Shipping Act 1995 and, therefore, be distinguishable from a case of an actual wrongful arrest of a ship where there is interference with the ownership rights of possession and control.

10.4 (iv) A temporary solution

As a solution for owners, in the meantime and in an appropriate case, where an owner becomes liable to a third party by reason of the arrest because he cannot perform the contract with that party, a cause of action may lie in the tort of wrongful inducement of breach of contract, as was reformulated by Lord Hoffmann in *OBG v Allan*, provided the conditions of that tort are met as they were in the *Kallang* case (both cited above). The elements of this tort are: (i) knowledge by the inducer that he is inducing breach of contract; (ii) intention to do so in order to achieve a further end; and (iii) actual breach of contract by the third party.

II. Conclusion

From the foregoing analysis of the problems surrounding the present test applicable to wrongful arrest of ships, it is believed that a case for reform has been made. In the view of the

⁹⁵ *Jarl Tra AB & Ors v Convoys Ltd* [2003] EWHC 1488 (Comm) concerning a successful claim by shippers of timber against the defendant stevedores (sub-bailees of the carrier) for delivery up of certain timber cargoes and damages for wrongful interference; upon the insolvency of the carrier, the stevedores exercised lien over the claimants' goods in respect of handling charges due to them by the carrier, but it was held that the lien clause did not cover such charges. See further a novel theory about liability for the tort of wrongful interference with chattels developed by S Douglas *Liability for Wrongful Interferences with Chattels* (Hart Publishing Oxford 2011).

⁹⁶ [2009] 1 Lloyd's Rep 201.

present author, judges are free from precedent and they may consider adopting a test which is based on negligence on the part of the arrestor. Alternatively, it may be easier if the test 'no reasonable or probable cause' is defined to the effect that it should be simply an objective standard test, namely that it means there are no reasonable grounds of arrest, or that the case was more likely than not to fail, upon an objective assessment without examining what the arrestor believed his case to have been.

Endorsing an old test, on historical grounds, is less than satisfactory, less than just and obstructs uniformity. The reform should aim for a test which must facilitate the balance of justice and enable uniformity in its application.

To speed reform up, however, the solution of amending the rules in the CPR relating to the arrest of ships and/or providing a new rule for the provision of a cross-undertaking in damages, seems attractive.

If policy considerations were in issue, such as that a less stringent test would deter claimants from this jurisdiction, or that it would lead to satellite litigation, it is submitted that:

- (i) lowering the threshold of the test and providing a precise definition of the term used, or providing a new rule in the CPR for a cross-undertaking in damages, will provide balance between the interests of claimants and shipowners which will work for the benefit of this jurisdiction and, most importantly, will serve the interests of justice;
- (ii) in the majority of cases, as admiralty practitioners would be able to confirm, claimants do have a good cause for the arrest; the cases in which the owner needs the assistance of the law for wrongful arrest would not be great in number so as to lead to much satellite litigation, were the threshold of the test to be lowered.

If there is no English reform as suggested in this article or otherwise, it is hoped that, since it has been appreciated by judges in this and other jurisdictions and by commentators (as shown in this article) that the present test of wrongful arrest poses a real problem, it will be for the remaining 77 maritime nations to react collectively and accede to the Arrest Convention 1999 or adopt it wholly or partly into their national law.

CMI – IWG open meeting on Liability for Wrongful Arrest of Ships

**Transcript of the debate held on
Friday 9th November 2018, 14.30-16.30**

**at Thomas Miller & Co., 90 Fenchurch Street, London,
EC3M 4ST**

88 delegates in attendance.

The Agenda for the meeting and the questions set for this debate are also attached as a point of reference for the delegates and others who receive this report.

Executive Summary and Reflections

1. We had a very interactive 2-hour session.
2. Various representatives of NMLAs spoke (such as from Canada, USA, UK, Ireland, the Netherlands, France, Spain, Greece, Malta, Nigeria, Turkey, Ukraine, Japan, Hong Kong, China, and representatives of ICS, P & I Clubs, and cargo interests' insurers).
3. There was an illuminating and constructive debate among participants, who freely expressed their views as derived from their experience of practice in their own jurisdictions.
4. As it will be seen in the transcript, most of the participating lawyers and cargo insurers were concerned about any change of the law and were more or less happy with their national law regarding wrongful arrests.
5. It was said, that although many of them have had experience of 'so called wrongful arrests', actual wrongful arrest cases are rare and, in any event, there can be other remedies in place than a claim for general damages, which can be disproportionate. As to counter security or a cross undertaking, it was said that such a provision would deter the weaker claimants, such as crew members and others who are not protected by compulsory liability schemes, to have access to justice.
6. Many expressed the view that there is no real problem, first because wrongful arrests are rare, other than the occurrence of sharp practices to put pressure on the shipowner, and second because in most cases security is provided without much delay to the ship or even arrest. In the event of a failed claim there is a costs award.
7. However, P & I Clubs and the ICS (which represent owners) expressed the view that they are unhappy with the system because it is unsatisfactory and fragmented, and it will need to be looked at further.

8. Although the IWG project and the debate were welcomed and the participants would like to have more of such debates for the purpose of learning about the various national systems on arrest of ships, there was no appetite for change. The show of hands, however, was almost evenly balanced for and against change.
9. At the end of the debate, there was consensus that the CMI Project should continue to the next stage of a further questionnaire and further communication with the industry sectors.
10. However, I think that to attempt a reform of the system of arrest at an international level would not only be an almost impossible task, but it would also be prevented by national protectionism. On reflection, I do not think that any attempted uniformity would be achievable; (and even if it were, it might have the same fate as the 1999 Arrest Convention). Model law rules will only be serving the purpose of guidance.
11. The project, once the industry became aware of it by reason of the debate (and it was commended by the Court of Appeal in the *Alkyon*), has had the value of learning and it may provide a stimulus to law reformers of each national system to improve their respective laws on the subject.
12. Personally, I have come to the view that Sir Bernard Eder is right to pursue improvement of the procedural rules of arrest under English law, until such a day when the Supreme Court finds an opportunity to overrule its decision in the *Evangelismos*. Perhaps Sir Bernard's approach may be taken as an example for improvement of the national laws of the other jurisdictions.
13. Looking at the matter academically, of course, one can see that the laws should be somehow harmonised. But from what transpired broadly from the debate, which was attended by the very top legal practitioners and other professionals of the shipping industry, is that, in practice, the national legal systems work satisfactorily.

14. Be that as it may, the following points emerged from this debate:

- (a) there is an important distinction between technically defective arrest and wrongful arrest which causes confusion;
- (b) different legal systems have different procedures of arrest; many do not have the concept of an action in rem;
- (c) in some jurisdictions, the court gives only permission to arrest the ship and it does not issue the actual arrest order;
- (d) counter-security or a cross undertaking as a condition for arrest would raise the threshold of arrest as the judge would have discretion whether or not to grant the arrest order;
- (e) besides, (d) above would cause unfairness to economically weaker claimants – such as the crew and those who are not protected by compulsory insurance – because they would be prevented from access to justice;
- (f) a balance must be struck between the competing interests;
- (g) other remedies should be considered for the rare eventuality of wrongful arrest instead of change;
- (h) one should look at the context of wrongful arrest, i.e. which jurisdiction, how many arrests occur there, experience of lawyers, experience of judges etc;
- (i) if the arrestor loses on the merits, he/she will have to pay costs award, being the losing party;
- (j) a distinction should be drawn between a procedurally wrongful arrest and the strength or weakness of the underlying merits.

The questions that can be considered for the next questionnaire, as arising from this debate, may be around the following:

- (i) state: (a) your jurisdiction; (b) how many years you are practising; and (c) how many arrests of ships take place more or less in your jurisdiction?
- (ii) have you or your colleagues dealt with a wrongful arrest case, or one that was considered to be close to wrongful?
- (iii) was it in your jurisdiction – or in another one, and which?
- (iv) if yes, give details of the case;
- (v) was there a procedural mistake or defect?
- (vi) were any tactics used by the arrestor to put pressure on the shipowner?
- (vii) was the arrest aiming to challenge: (a) the inherent jurisdiction of another state; or (b) the jurisdiction agreed by the parties to the dispute in an arbitration agreement; or (c) was the arrest made for the sole purpose of obtaining security for the claim?
- (viii) was security for the claim readily available?
- (ix) what was the outcome in your example?
- (x) do you want CMI to make proposals for unification of the law on wrongful arrest of ships, or not?
- (xi) instead of unification, would you support the provision of (a) counter security or (b) cross undertraining to be provided as a condition of the arrest?
- (xii) what exemptions should there be in such a provision and for whose protection?
- (xiii) what should the test for wrongful arrest be (negligence, or other)?
- (xiv) in the event of a finding of wrongful arrest, what damages do you consider would be fair? (a) no damages; (b) just the legal costs; (c) all losses suffered by the shipowner if it is proved they were caused solely by reason of the wrongful arrest?
- (xv) would you like to propose alternatives to damages, other remedies?

IWG Chairman

Dr Aleka Sheppard

Date this report was finalised: 2nd March 2019

Edited Verbatim Transcript

Dr Aleka Sheppard, Chairman of the IWG (hereinunder “Aleka”):

Thank you very much for attending this Meeting which is very important.

By way of an introduction, the CMI instructed us to assemble as many people from the shipping industry together (i.e. representatives of P & I Clubs, cargo insurers, and the NMLAs, so that we can have an open debate about wrongful arrest of ships. I will explain in more detail in a minute.

I am Aleka Sheppard - for those of you who do not know me. I would like to introduce you to my colleagues, the team: to my right is Edmund Sweetman (a barrister in Ireland, who practises also in Spain, I understand). He is the new Rapporteur of the International Working Group (“IWG”). Previously, I was the Rapporteur and Giorgio Berlingieri was the Chairman. When he stepped down as Chairman, I was appointed in his place. So we have a young Rapporteur, who is energetic to do the work. We are honoured also to have Dr George Theocharidis (on my left) who is a Joint Rapporteur and was appointed yesterday by the Executive Committee of the CMI. He is both an academic and a practitioner and he offers his knowledge from the continental jurisdictions, mainly Greece.

To the very left of the panel we have Reinier van Campen from Holland, who is another member of the IWG from a civil law jurisdiction.

We have more members of the IWG but, because they have had CMI engagements elsewhere, they are unable to join us today. Giorgio Berlingieri had to fly to Italy because he was instructed in a number of arrests and I hope one of them is a wrongful arrest!

Ann Fenech from Malta is presently dealing with matters of the CMI executive committee at the IMO. Another member and a great contributor to the group is Karl Gombrii - a very distinguished lawyer in Norway.

Also, a valuable contributor to and a member of this group is Sir Bernard Eder who is involved in an arbitration today and it is a great pity that he is not here with us.

I aim to include in this IWG younger people but this will be determined after this meeting. This debate, in fact, will determine whether or not we continue with the

project, if there is enough appetite in the industry and the NMLAs for the furtherance of this project. In particular, if there is a need, or any reason, why the CMI should take steps to attempt uniformity of the law.

I assume you have read the discussion paper which is the basis for this debate so we can start.

You have read what is the mandate of the IWG, so I do not need to repeat that, Ok?

At this meeting, the purpose of this debate is to exchange views and it is, in fact, your opportunity to make your voices heard and we will pass your views on to the CMI, so that we can make a record of what the industry wants. It is your time to speak, it is not our time – we are going to have views from the floor.

As you can see in the Agenda, the main issues derive from the answers to the questionnaire; we sent a questionnaire out to the membership of the CMI and the analysis was fascinating, I did not expect that. We were complaining about English law being the tough one – that you cannot have a wrongful arrest case ever because of the very, very high threshold in the test. But in the civil law jurisdictions the law is really very diverse; there are some similarities between jurisdictions, but diversity is more prominent and you see that the law has got to become somehow uniform, if people want it.

Some people say they want our law to be as it is – diverse – because “ it is an attraction of claimants to our jurisdiction, because we get work” – that’s a lawyers’ argument – but it is not really a reality, is it? So, I am raising now the first question of the debate: do you see a need for a revision of the current fragmented regime at national level and adopt a uniform regime at international level?

John Kimball (USA)- not all of us have a lot of experience of this IWG; I was wondering whether you could take a couple of minutes to set the stage a little bit more. What is the starting point of the IWG?

Aleka: OK, the results of the questionnaire and the analysis of the answers were uploaded on the CMI website. The beginning of this working group was, in fact, in 2014 after Sir Bernard Eder gave a speech at the Tulane University in 2013 when he had a robust debate with Professor Davies who was against Bernard’s campaign to reform common law on the subject. Bernard has been fighting for reform of English

law for over 30 years. At the same time in 2013, due to Bernard's encouragement, I wrote an article, and in my book as well, about the wrongs of wrongful arrest under English law and I compared it with some civil systems. I suggested in that article that reform might be needed at international level. That was spotted by John Hare, who was then the Secretary General of the CMI and, I guess, he was looking for an international law reform project. He invited me to speak at the CMI Hamburg in 2014 and, following on this, the CMI EXCO, officially set up the IWG. The first Chairman of it was Giorgio Berlingieri and I was the Rapporteur. The mandate was primarily to find out how wrongful arrest is treated in various national regimes and jurisdictions and then to obtain the views of the CMI members on whether they wanted the CMI to attempt to unify or the law; assuming there was consensus for reform, the group would attempt to draft uniform rules. That was the beginning; we set up the questionnaire fairly quickly. Karl Gombrii, Giorgio Berlingieri and I drafted the questionnaire. We sent it out and Giorgio was the 'Chief Whip'; he really pushed the national maritime associations to respond and we got 38 responses as you heard at the CMI Assembly. We set the CMI record for the greatest number of responses. I had the onerous task of analysing them. It was very time consuming and I engaged 2 young assistants to summarise the results in tables

You will find the answers to the questionnaire at the CMI web-site and in this booklet at the back. Leaving aside the common law jurisdictions, the other jurisdictions are divided and some of them, to my surprise, apply strict liability as a test for wrongful arrest. Others apply the negligence test and some others use peculiar terms in their legislation which need to be defined. The diversity of these results – prompted the CMI to give us the go-ahead to explore the matter further and that is why they advised us to have this meeting to explore the industry's views, and here we are!

Aleka invites responses

So, does anybody wish to contribute to the first question – “do you see a need to revise the current fragmented regime and adopt a uniform regime at international level?” Or “do you want to just stay as we are with different legal systems and different legal tests for proving wrongful arrest?”

To warm you up, I will start with my co-panellists; Reinier are you happy with the system in Holland?

Reinier van Campen (Netherlands): In general, we have a good working system in the Netherlands, it is, in fact, and while I may not be entirely objective, I think we have a fairly balanced system – as follows: you apply to the court for permission to arrest the vessel. It is an *ex parte* application. The court then, having reviewed the application, grants permission to arrest a vessel. It is a big difference between common law jurisdictions and civil law jurisdictions. I think in the common law jurisdictions you get a court order and the court orders the arrest. In the Netherlands, we have a permission from the court and as the applicant, who has obtained permission – the applicant - the arrestor – instructs the bailiff to effectively arrest the vessel. That is a difference. Why did I say it is a fairly balanced system? Because in the Netherlands, you obtain permission from the court fairly easily, you submit your petition – it can be two or three pages – you set out the details of the case and why you think the ship owner is liable and you have to mention whether or not it is one of the 1952 arrest convention flag states, which vessel you want to arrest, and it is all done *ex parte* – so you get permission from the courts purely on the facts as you have presented them. The fact that you obtain permission from the courts doesn't give you a real justification to actually arrest; you have the permission but it is still your risk to do so, and if you do take that risk (you need good advice prior to arresting) and you lose your case on the merits entirely, then you are strictly liable for all damages you caused; so the balance is you obtain permission to arrest fairly easily but if you do arrest you also take a risk. I have been practising close to 22 years as a lawyer and I have never arrested a vessel which turned out to be wrongful, because you know what the liability is, and you are cautious when advising clients to arrest. On the whole (I speak on different occasions on ship arrest in the Netherlands) and I think people, not coming from the Netherlands, consider the Netherlands a sort of arrest paradise – it is so easy; it is just a perception, but yes, of course, Rotterdam is a fairly big port in Europe, so there are a lot of vessels calling in the Netherlands and overall we receive many instructions to arrest, and on each and every occasion I will say, ok yes, that we can obtain permission, if we present the case right, but please know what the risks are and the risks can be quite substantial if you arrest wrongfully, but the bottom line, I think, as I experience this as a Dutchman, and as my clients experience it, it is a fairly balanced system.

Aleka: Did you have any experience of wrongful arrest or handle a case of wrongful arrest?

Reinier van Campen: the most recent case of wrongful arrest was published a number of years ago and it had a strange turnout. Basically, it was a straightforward cargo claim – groundnuts or peanuts from China – and the vessel was arrested; security was obtained and then they started litigating over the merits – things did not develop quickly and 13 years later, there was a final judgement and in the final judgement, the entire claim was entirely dismissed, rejected; the arrestor did not have a claim and he should never have arrested the vessel; then the shipowner said: well that is interesting, now we know that the arrest was wrongful, and now we are going to pursue the cargo and cargo claimants for wrongful arrest; so it ended up in court and the court said: ‘well, 13 years later you are a little bit too late because you knew from day one who was the arrestor and how wrongful the arrest was’. Under Dutch law the claim for wrongful arrest or any wrongful act becomes time-barred after five years, and so you will have to take a close look at your time bars, as well, and that is the only published case I know of.

Aleka: Thank you – now, anybody from the audience with any experience of wrongful arrest? I should mention that this session is being recorded, so please state your name and jurisdiction.

Andrew Keates (UK): there is clearly, perhaps, a lack of international knowledge because Mr Reinier is clearly a very accomplished Dutch lawyer, but here in the UK we do not have to get any permission from any court to arrest. It is purely a procedural and administrative matter – I must take my instructions from my client. I must then decide if I can swear what used to be an affidavit, which is now a witness statement, using the appropriate admiralty forms to make the claim, describing the claim but more importantly describing the vessel etc, etc etc; then the Admiralty Marshall, who is not a judicial officer but what used to be known as a clerk of the court, but is now a ‘manager’ or something, and he will make the decision on procedural grounds more than anything else; so the whole thrust of making an arrest lies with the client and the lawyer and it has nothing to do with the court at that stage; so it is a rather different situation to the ones which we have heard Reinier describing; many civil lawyers with whom I deal (and I have dealt with many civil lawyers and other common law lawyers

over the years) have, perhaps, some sort of misunderstanding, which needs to be put right first, before we can do anything, or take any steps, because if we need comparative steps to be taken then that is something maybe we should make a priority.

Aleka: – OK, well we have done the preliminary steps – we know how the 38 jurisdictions deal with wrongful arrest – what is the country and what is the test and what damages might be allowed. This meeting will determine what we do next – we are going to do another questionnaire upon your guidance people – this is the industry’s forum and CMI needs your guidance – what do you suggest the next steps should be? I guess it will be another questionnaire to explore more about the subject.

Voice: The issue is dissemination of that knowledge.

Aleka: – Yes, we have disseminated it to the industry but just through the CMI website, which I presume is visited by reps of the NMLAs. However, not many people knew about this project until receiving our invitation to attend this forum.

Andrew Keates: I was incidentally involved in a wrongful arrest case, an English case back in the early 1980s, which was utterly fascinating, I am not going to go into the details now, but it can be discussed.

Aleka: Did you win in England?

Andrew Keates: We won on the fact that it was wrongful, but the court decided that it was not quite grossly negligent enough by the lawyer who had conducted the arrest!

Aleka: That is the problem with common law and all the other jurisdictions of common law. Of course, you know, as the English lawyers do, that *the Alkyon case*, which was decided by Teare J. at first instance, was recently heard by the Court of Appeal and the judgment is awaited.

Mitsuhiro Toda (Japan) I have one experience – I arrested a ship for the claim of paint supplies but unfortunately the arrest order was later cancelled, repealed, by the court; then the ship owner sued my clients for wrongful arrest damages but the court said, no, no, no, it is not wrongful arrest; of course it could be said to be defective in a situation like this. Well, my client supplied paints to A and A in fact owned the ship but the ship flies convenience flag registered by the name of B; so in such circumstances it is difficult to identify who are the real owners. But anyhow, later on, it was decided

by the court that you arrested the ship alleging the ship was owned by the other party whose name was not registered; anyhow, I would suggest that defective arrest and wrongful arrest, sometimes, under the civil law country is very difficult to specify who the real owner is; and in the case of, what shall I say, provisional attachment to obtain the security, then such things happen. You arrested a ship but later you failed to prove the merits, so it could be said to be defective but defective arrest cannot be said automatically to become wrongful arrest for which the ship owner is entitled to claim damages. That is my point.

Aleka – thanks. In England, I do not know about other jurisdictions, you do a search to find the real registered owner to arrest the ship and if you arrest the wrong ship it should be wrongful, but in England it would be difficult to pass the test of malicious intent. This was the case in *The Evangelismos* where the claimants arrested the wrong ship but it was held it was not out of malice or ‘crassa negligentia’, so the owners whose ship was mistakenly arrested failed in the claim for wrongful arrest. In your case, one aspect is the procedural and the other is the substantive; of course, if you arrested the wrong ship, you lose on the merits. How do you define wrongful arrest in your jurisdiction? What is the test?

Mitsuhiro Toda: Negligence

Aleka: Well, was it not easy to prove negligence in that case?

Mitsuhiro Toda: No, shipowner failed to prove negligence.

Aleka: Thank you very much for your contribution. Are you happy with the system in Japan?

Mitsuhiro Toda: Yes, happy

Aleka: it gives you work!

Mitsuhiro Toda: Because we do not have procedures in rem, it makes a difference.

Aleka – would you like uniformity then?

Mitsuhiro Toda ... Well, the gentleman said that under English law, you do not need to get the court’s permission or a court order to arrest a ship, so perhaps I would like such a system to change, so in such sense, unification would be good.

Aleka: Yes, English law has to change anyway! (I can see you are taking notes; it is all recorded, so you do not have to make notes). Anyone else?

John Kimball: Just to follow up with the first speaker - I did not feel like I got to the end of your story – if in fact there was a wrongful arrest, what would be the financial consequences to the party who initiated that arrest and was there a requirement for counter security to be put in place to pay for that mistake?

Reinier: to answer your last point first, in the papers that were distributed, the Netherlands are mentioned as being a party where counter security is mandatory – in fact it is not. We should be at the bottom of the list – there is a provision where the judge has the discretion to order counter security but, in practice, it never happens, really it never happens. As regards the first part of your question, to what extent are you liable: – you are liable for all the damages you have caused, not only the cost of security, (basically a bank guarantee that has been out there for a number of years and the interest accrued over the amount that was secured), but also if the vessel was detained for a number of days and if it lost hire over those days; you are liable to compensate that and, of course, all the damages must be proved to the court. If you do not agree to it, this may cause some difficulty but, in principle, you take a big risk if you have a flimsy case. I always advise my clients to arrest the vessel immediately when it enters the port because during the loading or discharging the vessel will not be delayed at all – other lawyers say we should arrest right before she starts sailing because the pressure is really high and we will get our security for the cargo claim much quicker because they want to leave the port; there are two ways of looking at this; yes it will create a lot of extra pressure but if you have a weaker case then you are also more likely to cause damages and the damages can be substantial.

Aleka: By the way, Reinier, the paper regarding your jurisdiction has been corrected to reflect the judge's discretion on counter security.

I think we should continue without following the order of the agenda items because John you have progressed the discussion to damages.

Would people go for strict liability like in the Netherlands and for general damages?

Nicola Cox (West of England) UK: I have one question, one observation. What is the policy reason behind why there should be such a high test under English law? It

seems strange that a local authority can have a loose paving stone and be liable and negligent for substantial damages and yet you intend to arrest a vessel, albeit for security, and you are not liable, unless the defendant can prove a much higher test I cannot see the logic looking at this from scratch – I cannot see the policy reason for why there is such a high test?

Aleka: You have to read my article, it is all there!

Nicola Cox: Why is it higher than say negligence to prove wrongful arrest?

Aleka: It is rather a historical matter, in 1800 the House of Lords, in the *Evangelismos* case, applied the test applicable to malicious prosecution of a person because there was no precedent at common law for wrongful arrest of a ship. That test required the party to prove malice or gross negligence of the prosecutor.

Nicola Cox: so, the reason was taken from an analogous case Rather than first principles as to why there is policy under English law.

Aleka: Then the courts were stuck with *The Evangelismos* which has been followed for over 200 years and is still not over-ruled and the case is so far followed by the common law systems, which follow English law.

Let us have the views of more participants.

Edmund Sweetman (Ireland & Spain): it does seem to give rise to a very distinct imbalance of circumstances where a claimant can obtain security against the shipowner and even if the claimant loses the case, he is not to be liable for the damages the shipowner has suffered. It might be interesting to hear from anyone in the audience who can speak up for the common law regime and the test of mala fides.

Beatrice Witvoet (France): just to contribute to the discussion we have in front of us; in France we have really similar system as the Dutch, so we need to go to the judge to have permission and then the claimant would carry out the arrest; but we have some cases regarding wrongful arrest and the consequences and some condemnations against the claimants – it is not very often but we have had some.

Aleka – ok but the test is very, very fluid – what do you have to prove for wrongful arrest?

Beatrice: it is quite subtle, I would say – it is not straightforward, but usually there is the idea of a fault from the claimant; it is not only that he should not have arrested the vessel that he knew he did not have grounds to arrest; so it is just a little bit in between, I would say.

Aleka: so, it is not just negligence. It is an objective and subjective test?

Beatrice: Yes.

I have an example: it is in relation to the *OW Bunkers'* bankruptcy and the consequent arrest of vessels. We had a Dutch client whose vessel was arrested once in the US for first time, and a deposit was placed into the hands of the judge as security; then when the vessel arrived in France, on the west coast, she was arrested second time, for the same claim by the same claimant. So, it can happen and we had to go back to the judge who authorised the arrest and he said OK the arrest was lawful and we had to go to the court of Appeal and, at the end of the day, and owner of the ship won – it happens with the condemnation of the claimant who decided to arrest the vessel; he is usually condemned to fully indemnify the shipowners.

William Sharpe - Canadian Maritime Law Association: so, I will say a word for the *Evangelismos* test:

Yes, the Supreme Court of Canada in the *Shiller Fertiliser* case, reviewed the test and came to the conclusion that it had been settled law for so long that any change should be a matter for the legislature. So I will now discuss the policy behind that test and, first of all, it is well to remember that compulsory insurance for marine liability is by no means universal for oil cargoes, yes but for many types of claims there is no international regime for compulsory insurance; there may not be a domestic regime for compulsory insurance and there are many sorts of claims such as charter hire where there may be FD&D cover, but in others the shipowner may not necessarily have such resources. For risk management, it is a common practice among shipowners to use single purpose vessel companies and ships are mobile assets; we are not dealing with a factory that is planted in the ground; so there are many classes of claimants such as seafarers who are owed wages and tort victims whose only effective recourse is to have a low threshold right of arrest. Now this is by no means one-sided based under Canadian practice because while a ship may be arrested readily, so may a motion be brought for the release of the vessel; such motions are

expedited; if the claimant is unsuccessful, then the claimant is faced with an adverse cost award so it is by no means a no risk proposition for a claimant to act imprudently in arresting a vessel - certainly among the Canadian admiralty bar the plaintiffs do take some care in trying to locate the owner to associate the owner with the claimant in rem – so certainly in the Canadian experience there has been very little abuse of the system and interim security is often negotiated beforehand and, if it cannot be negotiated beforehand, then certainly the shipowner and their insurers do have prompt recourse to the courts to sort things out and I should say that the position of the Canadian Maritime Law Association is that - while we are very appreciative of all the analysis and we appreciate that the debate should occur - we have not yet seen evidence of such severe abuse as to suggest that the CMI might accept the policy of demanding a higher threshold and that is CMLA position.

Aleka: thank you very much – that is a great contribution and, of course, Canada is a very civilised nation. But there are jurisdictions where there are cowboy claimants and they just arrest a vessel for the sake of establishing jurisdiction there to make life difficult for the defendant in breach of a contractual jurisdiction clause or for other reasons. I have another example from Ann Fenech which happened in Malta. She told me to contribute her example here because she is not able to attend this session. Recently she has been battling with an arrest of a ship which was arrested in Jamaica first by the mortgagees. The ship was judicially sold. The courts held three million dollars for security for the mortgagees. The claim was one million and the mortgagees, out of spite, went to Malta, arrested the ship again in Malta and blackmailed the owner by maintaining the arrest; and as we know there is no P & I club cover for that type of claim. Is that right Nicola?

Nicola Cox: not just for transactional or operational costs but if there is a value dispute under the terms of the contract it will fall under FD& D claim potentially like any other claim for any other cost.

Aleka: Anne's case is similar to the *Alkyon*, really, where the mortgagee did not have a legitimate claim. But with a civilised nation like Canada and others, the lawyers would have advised the claimant properly; that is the crux of the matter, good lawyers, moral lawyers, ethical lawyers, advise their clients properly. My question now is: should we

close our file on the CMI Project and report there is no desire for change or uniformity of the law?

William Sharpe: But there could be *in personam* remedies against the person who acted unreasonably in arresting. It is not that there are no other remedies; if the claimant is a financial institution they are not going to fold up their tents and steal away in the night and therefore certainly under Canadian law it would be possible to insert an *in personam* remedy against an unreasonable claimant and it would proceed to trial and a determination on the merits – the critical issue here is what should be the initial threshold and what procedures are appropriately associated with the initial threshold for arrest.

Aleka: Absolutely

Edmund Sweetman: William, just a question; given that you are standing up as a defender of the common law in that situation, what justification do you see for a situation where there is a bona fide arrest made and where ultimately the claim fails for some reason? for example, if the claim is for damage caused to a ship and it is found not to be the fault of the vessel arrested. So there is a bona fide arrest made and there is a dispute determined by the court and it is determined against the arrestor; but in those circumstances, certainly under Irish law there would be no liability for wrongful arrest; I assume that the same position would obtain in Canada [YES] - what justification can you see for allowing that situation – why shouldn't, in those circumstances, the bona fide arrestor be liable for the damage caused by the arrest?

William Sharpe: As I mentioned, ships are very mobile assets.

Edmund: so, are you worried about the chilling effect that might occur otherwise?

William Sharpe: yes, I do have an example of the chilling effect; some years ago the Canadian office in British Columbia introduced the *in rem* process and I am sure that the marine lawyers who pushed for it assumed that the *Evangelismos* test would be applied. A few months after the new procedure was introduced, an arrest came before a judge who was experienced but not in admiralty law who said, aha, this is like an interim injunction, so yes countersecurity undertaken for damages. It is not surprising that we see the *in rem* process is used very little; so it is the relevant power of the parties who are talking about a sea farer or a claimant who may not have access to

insurance – the issue becomes one of access to law and a balancing of interests and, of course, it is a policy decision but there is a rationale for the *Evangelismos* test, which is to say the remedy can be pursued by means other than raising the threshold to arrest.

Edmund Sweetman: yes, I can see. You might identify a difference between the requirement for counter security and liability for an arrest in circumstances where the action fails because in the same way, an unsuccessful litigant would be liable for the costs of the action if the costs follow the event, as they do in many jurisdictions – but I can see how countersecurity might be considered a barrier to access to justice, particularly where ships are mobile assets. That is probably a distinct issue in many ways.

Aleka: Yes, we can go to that later. You said it could be unjust to the crew if we change the test but the crew have maritime lien so there is no problem for the crew or anybody who has a maritime lien which follows the ship.

An un-named Delegate: well it is an issue where the crew has no financial resources to follow the ship from jurisdiction to jurisdiction in the hope that someday it might be arrested. The interests of the crew and tort victims in liability regimes where there is no compulsory insurance, they have to be considered in the mix.

George Theocharidis (Greece); Before I comment, I would first like to thank on behalf of the International Working Group, Thomas Miller for hosting this event here in the very heart of London next to this very iconic building, IMO was really a very good headquarters, but I think we are better here.

Now there seems to be a problem which is why we have this debate, we have clashing interests. On one side you have the claimant and the claim could be something like hundreds of dollars or something substantial like a bank claim for a million or even more and on the other hand we have the ship owner. At this very initial point we do not really know the substance of the case and therefore, as was correctly said, the claimant needs to find this asset which is moved around the world in order to obtain some kind of security and therefore to know that it will be able to satisfy its claim in a convenient way because, although the counter argument to that would be, “you can find the vessel anywhere after you have a judgement on the merits”; however, by that time, the vessel has probably changed flag or shipowner which is very, very easy, so

we need to find a balance on the one hand for that claimant; – how much he has to pay, how much he has to suffer in order to pursue the claim and, of course, the shipowner, on the other hand. We have given an example here of a vessel, an energy vessel, which carries 100 million value of cargo; now, if that ship stops for five or six days, somewhere, we can understand how much damage that would be for the shipowner; so in order to approach that issue we have to strike a balance and it is interesting from the reports by the different countries to see that, even in continental law jurisdictions, we still have some countries which have a hard test like the common law, not to that extent of course; Greece for example, in order to be able to get a claim for wrongful arrest, the shipowner will have to prove first of all that the right, the substantive right, which the claimant was pursuing was non-existent and either the claimant had knowledge of that or he was grossly negligent which is quite hard to prove. So even in continental law countries you can still find, like Greece, that there is quite a hard test and the rationale behind that is quite clear – you can have a good faith claimant, as Edmund said, who wants to pursue his claim; it could be for 5,000 dollars - a crew member, or a bunker provider, finds the vessel very close in the area; he does not want to change continent and does not want to pursue the claim somewhere very far; then if for any reason - even for any procedural or technical reason - his claim might fail before the court - perhaps it is time-barred - and he might find himself in a position where he might have to pay substantial damages – lots of thousands. So, I think, and this is why we want to hear these opinions, especially from the P & I Clubs, because they deal with security, they deal with the problems of shipowners and how they see the problem. Could there be some uniform law whereby they would know the limits of security; they would know when to put up the security in place and, if something does not go well they would know to what extent they would be able to recover that.

Aleka: Thank you George. I sense that, although I have not heard from many of you yet, there is a sort of uneasiness about disturbing their national systems and you would rather stay with a fragmented international system, is that correct? How many people prefer fragmentation? Raise hands please. (Some hands are raised, perhaps half of the audience).

How many would opt for doing something to improve the system as far as we can? Perhaps unification? Raise hands please. (A reasonable show of hands).

I would like to hear from more people with practical examples of wrongful arrest.

Has anybody had wrongful arrest, in your experience, either in your jurisdiction or know of in other jurisdictions?

Andrew Chamberlain, HFW (UK): – just a couple of comments which are along the line of what you are discussing. It is quite important to distinguish defective arrest from wrongful arrest – there is a problem of definition here and I agree with our Japanese colleague that an arrest might be defective, but it is a long way short of bad faith or wrongful. I am firmly a defender of the common law jurisdictions – our Canadian colleague made excellent points as well; it is about balance. I do agree, but my one experience of a wrongful arrest claim – and I preface that by saying that wrongful arrest is relatively rare – there are a number of reasons for that, one is the high professional standard required of maritime solicitors around the world – my experience of arresting ships around the world, many of our colleagues in Holland, Belgium and France are admirably even-handed about giving an honest appraisal of the prospects of successful arrest and getting the law right. You sometimes get more difficulties in jurisdictions where there is very little expertise of maritime law at all, particularly, where the judiciary has no background in maritime law; so, my one personal experience was in Spain and I have nothing against Spanish colleagues. But one of the dangers of uniformity where you always have to have security for wrongful arrest is that when wrongful arrest is alleged in a common law jurisdiction, the question of whether an arrest is maintainable is Question 1, but actually has nothing to do with the underlying merits, quite rightly – they are two different questions. You have a rightful arrest, a hopeless case that you then lose – that's fine. When you have an opportunity for a party to complain of wrongful arrest, what you will find (and this happened to me in Spain), is that inevitably the merits of the case then get argued in the context of whether it is a wrongful arrest or not and it was a disaster – years of litigation, huge amounts of money spent and nobody was very happy on any side; so I am firmly a defender of the status quo and I say that for a number of reasons, and I just throw out this question for perhaps Nicola and other P & I colleagues, I do wonder whether a significant liability for wrongful arrest is actually covered by P & I interests? I don't think it is. No, so that is something for the P & I community to think about carefully, I would suggest.

Aleka: So, I guess that is the feeling of common law jurisdictions – anyone else?

Kiran Khosla - ICS: ICS represents shipowners and I think, as a general principle, we would be interested in the ICS if the CMI work continued to try to improve the situation. The last attempt that was made for protecting shipowners from wrongful arrest was in 1999 at the Arrest Convention and at that point we did support Article 6 in the 1999 Arrest Convention, which provided protection for shipowners in the event that an arrest was wrongful, or unjustified or excessive and we would like to pursue that. Whether uniformity is achievable, and I think that is questionable, we certainly think it would be something to consider because there have been cases – and I think that the case you have referred to in your paper *The Alkyon*, highlights the problem of wrongful arrest where shipowners are left without any recourse and have had to incur quite considerable losses, which they are unable to recover; so some form of countersecurity is certainly what we would be looking at and we would hope that it is made mandatory as well.

Aleka – Thank you for that. May I comment on that first point. What Sir Bernard Eder is arguing is for a provision of a cross undertaking in damages like in freezing injunctions. Would that solve the problem? I personally do not think so. The problem will not be solved, unless we change the test for wrongful arrest. The 1999 Convention of course provides for a lower threshold of negligence

but you would still have to define what is unjustified arrest - so the two go together. You cannot have a cross-undertaking or counter security and not have a change to the test, because you would have to go through that loop of proving culpable conduct later on, when you try to prove your case of wrongful arrest.

Nicholas Wilson MFB (UK): If I could just answer that point about cross undertakings; I do think that there is a possibility that if you require cross undertakings that you are going to snuff out legitimate claims, that there is every possibility there; Just to go back to Mr Sweetman's point earlier, regarding say a collision action and the question of security; you often hear the phrase: "it is only security that we are after, we are not necessarily seeking to have the matter resolved there and then" and the easy answer is to put up security, if that is what somebody is seeking, and it is a very, very premature at the arrest stage, as has already been mentioned, to consider the merits. With an asset which is mobile and vulnerable, and it could change

ownership, this may not be a problem with a collision because there is a maritime lien on it, obviously, but it is premature to try to determine the merits of any matter, when it is only security which you are seeking, and it could take a year, two years, before a matter gets to trial and there is a final determination in relation to the issues; and I think it is arguable, from a common law perspective, that it is a bit much to expect of the lawyer who is undertaking the arrest, if you like, and their client to ascertain the liability at that stage – you are only seeking security for your reasonably arguable best case, as it were.

Aleka: Obviously there are very complex issues to consider before any change is made. Just to refer to the possibility of a provision for a cross-undertaking to be provided by the arrestor just as it is provided when a freezing injunction is applied for, (the argument pursued by Sir Bernard). This would require the arrestor, the client of the lawyer, to undertake to be liable to the shipowner in damages, if the arrest is proved to have been wrongful, and it would require the court to have discretion to grant it as a condition of the arrest. As English lawyers know, prior to the *Varna* case, the court had discretion to grant the arrest upon consideration of the evidence given in an affidavit in which the arrestor or on his behalf the lawyer was required to state on oath to the court that he had made full and frank disclosure of all relevant information known to him. That rule was displaced by new procedural rules on arrest and the arrest became **a right**, which meant that the court was deprived of that discretion.

Emeka Akaboglu – Nigeria MLA: One of the things that I am going home with today is the distinction between wrongful arrest and defective arrest – I like that distinction and while I sympathise with the position of the ship owners, as relating to loss suffered, I think it should largely be taken care of by the need to immediately offer security and I emphasise the importance of this distinction because there are many times where a strict liability regime against the arrestor will be unfair, to say the least, particularly within the Nigerian jurisdiction, where you often find that an arrest may be vacated on technical grounds, which have nothing to do with whether the arrestor has a legitimate claim. So there is a typical scenario where we have ship arrest being vacated for an alleged reason ie that leave was not obtained before the processes were served on the particular party. So it may be served on the correct party later, but because there is an allegation they did not obtain leave to serve outside jurisdiction before arrest, it is vacated and that has absolutely nothing to do with the merits of the claim; so in that

scenario if there has been such a vacation and the ship owner comes back to start claiming for some damages because the last claim couldn't proceed, then it is unfair by all respects. So, I align myself with the submissions that the security which needs to be provided by the ship owner should be provided as quickly as possible and the ship continues doing business and the losses mitigated and essentially the status quo should remain.

Aleka: Nigeria is a common law jurisdiction, isn't it?

Edmund Sweetman: I might just intervene there, Spain has been mentioned and wearing my Spanish hat for a moment to speak about the idea of a cross undertaking, which would be perhaps what one would expect in a freezing injunction situation; obviously you have to undertake to be liable i.e. the applicant for the injunction would have to undertake to be liable for any costs or damages by reason of tying up the defendant's property. That is effectively a promise to pay, but different to counter security, such as it exists in Spain, where money must actually be lodged in court or a bank guarantee be furnished to a percentage of the amount being claimed, and that certainly has the potential to be a barrier to access to justice and to this particular and specific asset which is the ship.

Aleka: but arrests happen in Spain, don't they?

Edmund Sweetman: well I can just imagine, I can see the argument where perhaps a crew member or a person is perhaps injured on a ship, perhaps a serious injury where someone is quadriplegic and would have a very significant claim and would have to effectively post a bond of a significant amount of money in order to arrest a ship in Spain and that would certainly be an issue and as regards the test of the merits, what they say in Spain, it is very easy to arrest but you need leave from a judge; but you effectively set out in bold terms your grounds of arrest and once it comes within the convention your arrest order is issued, but you don't arrest the ship until you have actually posted the security. That is in Spain, there is then the application to balance against the ease of arrest the potential to set aside that arrest, but it is not on the merits, it has to be on a technical ground and then, if you lose your action, you are liable for costs. But I think it is an interesting question, I am wondering if anyone else has views on why shouldn't the unsuccessful litigant be liable for the cost of the failed

action, but also the costs of tying up the vessel because it is a distinct issue in those circumstances; why is it necessary to protect the unsuccessful litigant?

Aleka: we will come back to that

Damilola Osinuga Nigerian MLA: I would just like to echo what Emeka has said; basically, Nigeria is a common law jurisdiction and it is almost the same thing as happens in England, except for the fact that you need a cost order to get an arrest. However I seem to be in favour of a cross undertaking because what you have in Nigeria now is that there are impasses where lawyers decide to arrest a vessel so as to frustrate, maybe the charterer, knowing fully well that the vessel has to sail and knowing fully well that the charterer is not the relevant party; and they know that because the charterer will also be liable for other contracts that he may be in breach of that contract and so they arrest that vessel. So I agree that the Evangelismos test is not the best we should have now but I am definitely not in support of the strict liability regime and I feel that a cross undertaking might just be the solution; this cross undertaking should be given for the arrest. We have a situation in Nigeria where you can give security for costs after the arrest. The owners of the arrested vessel can come to court with an application to get security for costs. However, that can only be given in two conditions when the claim is above five million, or when the defendant or the claimant are not resident in Nigeria. And it is still at the discretion of the judge.

So not everyone is entitled to security for costs in Nigeria so I believe it should be a situation where cross undertakings should be given before the arrest and I am in favour of that.

Aleka: Well, if a cross undertaking as a condition to arrest were to become a requirement before arrest, we should have exceptions – i.e. for the crew and the weaker parties who are not protected by compulsory insurance.

Damilola Osinuga: Yes, I agree that crew members should be exempted, but there is an unfortunate situation in Nigeria that the court decided that the crew members did not have a maritime lien! They do not have a right of maritime lien any more, and they should go to the Industrial Court to pursue their claim. It was a High Court decision.

Aleka: that is very strange!

Nelson Otaji (Nigeria): I just want to make a little clarification about what my colleague has just said. Crews have a maritime lien in Nigeria, as is provided in the Merchant Shipping Act. But the issue that comes up now is that there was a little amendment to the Constitution, so that if the action you are filing is not an action in rem, but an action *in personam*, which means you sue the employers of the crew, – may be a mining company owing crew wages; so therefore if you are suing them *in personam* then you have to go to the Industrial court.

Aleka: Okay, that is an *in personam* action.

Nelson Otaji: so that is the main distinction that needs to be drawn.

Kiran Khosla: we have been hearing a lot of comments about crew claims and I want to point out that there is now compulsory insurance for crew claims under the MLC and that has provided quite a significant amount of protection for particular types of claims; and I also think, and I want to come back on this, for a freezing order there is a requirement to put up counter security and we can't see why this should not apply for arrest of ships as well.

Aleka: thanks

Laurence Mc Kenzie (UK): I am an English lawyer; I just wanted to support what Mr Sweetman said about the arrest in Spain. I had a contractual claim on behalf of a client and, as far as I was concerned, there was a good contractual claim and I had taken legal advice from myself and also from Spanish lawyers; but the Spanish system requiring security through the Proctor at Law, a court official, effecting the arrest, discouraged the arrest even though we felt it was a good claim; so there are issues against counter security in certain jurisdictions.

Sertac Sayan - Turkish MLA: I am a lawyer – I would like to give you clarification about Turkish law on the arrest of vessels. Since the 1st July 2012 there were big changes in Turkish court of arrest in order to arrest a vessel and it has been simplified; also, steps have been taken for both the party who applies for the arrest and for the judge to follow in order to arrest the vessel. First of all, the vessel must be within the territory of that court and the judge writes a letter to the port authority and tries to find out whether the vessel is in that territory or not and also they go one step further and ask who the owner is.

If the vessel is found within the territorial jurisdiction of that port, then you have to pay 10,000 SDR lump sum amount of money which is the equivalent to 17,000 or 18,000 USD; then you have to submit supporting evidence to prove your right to arrest the vessel and if the judge is satisfied to arrest the vessel, they issue the arrest order in three days. So, the party who suffers the arrest has the right to oppose this and the judge must fix the date of hearing from three days to seven days to handle the oppositions, and the judge may increase or decrease the amount of security. Under these circumstances, I have not come across any wrongful arrest claim under Turkish law; it is very difficult because the defence will be: "we submitted all the supporting documents, the judge accepted this", unless you submit fraudulent documents, which may slip from the attention of the judge; and if there is a wrongful arrest it should be examined under the law of obligations and the causing of indirect or direct losses to the party who is subject to the arrest.

Aleka: Does it not take rather long to arrest a ship?

Sertac Sayan: No, there is a very specialised maritime court in Istanbul and most of our cases and files are in front of the judge; you cannot make any false declarations to the judge because they say you will go again to the same judge – it takes only one day to arrest a vessel if all the documents are in front of the judge, otherwise it is easy.

Edmund Sweetman: There is an interesting issue, that is, with respect to what is demanded of the applicant for an arrest in English law and, certainly, it is referred to in the English answer to the questionnaire. In England there is no duty when applying for arrest, when swearing the witness statement; it is not necessary to make full and frank disclosure of all matters which might be relevant to the issue.

Under Irish law there is a certain obligation that whatever matters are deposed to should be bona fides and in utmost good faith and has a duty to make frank disclosure to the court when applying for the order.

Aleka: do you wish to add something?

Another unidentified delegate: That is correct but you still have to attest to believing what is being said is true; so there is no utmost good faith and full and frank disclosure duty, but it is not a million miles away from that; you are still having to attest the truth of what you are saying and putting forward prima facie evidence as to your claim as

well. And you have to say, if it is a statutory arrest for example, which heading it falls under, i.e. under Section 20 of the Supreme Court Act 1981.

Another Delegate: I think it is fair to say from what we have been hearing today, and it has certainly been my experience, that in the English jurisdiction people do tend to be quite responsible in terms of arresting a vessel.

Aleka: True. Like in Canada. Civilised jurisdictions

John Kimball: to come back to Edmund's question, as to why an arresting party who has proceeded in good faith but ultimately loses on the merits and whether he/she should have to pay damages, I would like to talk about that, and I would also like to make a comment about the civil losses, as I am not sure that the opposite is always fair either. Under the US system, to have an arrest you have to have a maritime lien to start with and our law is not always clear exactly as to whether there is a lien or not. Under our system if you act in good faith, bringing arrest action which ultimately fails, because it turns out that you did not have a lien, that could take a couple of years for a court to decide. Under our system, at least in my view, it would be inappropriate to penalise the plaintiff for bringing the action and to impose damages on the party for bringing the law suit. Under the American rule we don't even ask that party to pay for the other side's legal fees and it would be inconsistent with our system to impose damages on the plaintiff for bringing the case in the first place. And, I think, the American Law makes a lot of sense; But I think this group, the IWG, is a great idea and the discussion has been fantastic. I think it should continue and you should try. But to go back to the civil law system, I should just ask the question: If in the case you talked about earlier, suppose the ship owner never put up any security and just left the ship there for 13 years, or however long it took, would the arresting party be liable for damages for detention for that long period of time. How does that work?

George Theocharidis: I have not come across a situation where that happened. From a strict legal point of view yes, if you cannot put up security, post a bank guarantee or anything else, if there is no P & I cover, then you have nothing else left to do but leave your ship there under arrest; then yes, if the claim on the merits by the arrestor is fully rejected then he would be liable for the entire damages, yes.

John Kimball: There should be a debate as to whether that were really a fair outcome.

Tim: surely you would have to mitigate the loss.

Edmund Sweetman: In Spain, certainly that is the situation because you have strict liability for an arrest where it fails; – obviously, there is a lot of litigation there, but what is the quantum of that loss? There is no article dealing with it but the effective jurisprudence of the court suggests, and the way the courts normally treat it, you are only liable so long as it would take the ship owner, in normal circumstances, to post the security, so effectively it is a limited amount of time.

Aleka: ok thank you. At the moment, I feel this discussion illuminates the problems with the fragmentation of the systems between civil law jurisdictions and also, of course, the contradiction between common law and civil law. That is undesirable to me; we need to find the right balance; is there anybody from the insurance industry here, cargo insurance? I think we had some bookings by some insurers; who wants to speak? We want to find the right balance, we don't want to push reform in favour or against. It is a balanced position we are trying to find.

Mark Meredith - Xchanging Claims Services(UK): for us, having listened to the discussion, it seems quite clear when you have a big loss on a cargo claim; the first step you take is to contact the P & I Club and hope you get security firmly in place. The prospect of an arrest is the last resort. You don't even want to go down that avenue. You have got to make sure everything is set, and you have got everything right. I think Andrew Chamberlain makes a very good point, as well; from the cargo point of view, it is quite straightforward, there is not much appetite, we understand, for unifying everything, but it is always a matter of being sensible, looking at the claim, looking at the merits, who your target is, where are your proceedings; so to us, it is reasonably straightforward in that respect, get good security in place for your claim and let's discuss the merits thereafter.

Aleka: Anyone from a P & Club here still?

Evgeniy Sukachev (Ukraine): I would like to make a short comment about my country.

Aleka: Where are you from?

Evgeniy Sukachev: From Ukraine. There is a new Procedure and we like it because lots of Turkish clients come to Ukraine.

Aleka: Quid pro Quo, is it?

Evgeniy Sukachev: Yes, because we are in one region. This is very interesting because last year we had also new procedural courts – a civil procedural court and a commercial procedural court, where there are new procedures to arrest and, nowadays, in our ports the judge should make a decision in two days from when the application comes to the court; so if you apply to the court today with a claim until the end of the next day the courts should make a decision anyway.

Aleka – It takes a rather long time –

Evgeniy Sukachev – no just two days so much shorter than in Turkey! – [big laugh]

Also, put joking aside, the judge does not have any time to find out any other points to make a decision; so if you apply, you have for the application all documentation you would like to show the court; if the judge finds them in order, you can have an arrest because all the documents prove your claim. If not, no arrest.

Aleka – so it seems you have to prove a prima facie case and the judge has discretion to grant the arrest order? – is it so?

Evgeniy Sukachev: of course, but his decision is based on submitted documents. Afterwards you can make a counter-claim, or anything else, but this is also a timed procedure, which is shorter than in Turkey.

Another person: (Turkey) In relation to cargo damage, the arrest of the vessel is such a straightforward thing because you go onboard the vessel and then you discover that the cargo is damaged. You stop discharging and call in court appointed experts to determine the damage and usually the judge comes together on board the vessel, determines the damage and they arrest the vessel so there is no problem for the cargo interests...

Reinier van Campen: can I flag maybe a difference, a problem area? We are trying to unify the arrest of ships. But if we have a different test for the arrest of ships, for instance, we now should amend the 1952 or 1999 Convention, or something similar; for my jurisdiction the rules would change – (if counter security, for example, becomes a provision before being allowed to arrest a vessel); – then all of a sudden, we might have a little bit of unification, but there will be a big new difference because bunkers

are not a ship, and for bunkers the provision of counter security would not apply, so then everyone goes after the bunkers.

Currently we have a system where you say we leave it up to each national jurisdiction to set the rules; as I said, in my country, I think, in general, in Holland, we are quite happy with the way we arrest vessels and what the risks are – in fact we have currently a revision of the arrest paragraphs in our procedural code - on ships nothing is changing - and yes if we solve one problem we may create another; we have to be careful about that as well.

Aleka: Absolutely, the fragmentation is so broad, it would be very difficult to unify really. Do you want the CMI to try to find a balanced position? If you don't, the next point is: do you really want counter security, or cross undertaking? it seems to me that you do not want that either (or there may be little support for that) because that will take time to set up and it would be unfair for some parties; so that is out of the question. I will disappoint Sir Bernard about that. And then, since we are not going to be unifying anything, there is no point talking about what damages you get because we will stay as we are, and everybody is happy. Is that a fair understanding?

[Common law jurisdictions do clap], I hear the approval for doing nothing!

Laurence Mc Kenzie: (UK) I would like to comment in support of the Turkish lawyer that I do have experience of a vessel trying to leave Turkish port when it was under arrest and the court ordered the coastguard to fire a warning shot across the bow of the vessel – the Turkish press reported this and a lot of Turks were upset because it was a Turkish vessel being fired upon! but a lot of other people supported the rule of law because the vessel had tried to escape arrest; so I am rather fond of the Turkish jurisdiction

M Toda (Japan): In Japan, two days, perhaps longer, well in Japan it may be one day in most of the cases that the court will decide from the time of receiving the application for arrest, particularly, in ship collision cases; well I have a lot of experience in arresting ships involved in collision cases; just after the collision, maybe several hours after, or the next day, the court issues arrest since such claims give rise to a maritime lien; so in Japan no countersecurity is required, but it should be very, very clear that 100% liability should attach to one vessel. I would like to tell you that as regards

countersecurity, we may differentiate the claims; for example, in terms of this collision claim you should put up countersecurity, but on the other hand, with another type of claim no countersecurity would be required. Such discussion perhaps may be useful.

Aleka: It is very rare to have 100% liability in collisions.

So to recapitulate from what it has been said so far: - you prefer a fragmented system, you don't want counter-security or a cross undertaking, and we dump the damages question too.

Dr Liang Zhao, City University of Hong Kong: I am from the city of Hong Kong and of course I was from China before, so I saw the response from the Hong Kong maritime association and no response from the China Maritime Association, so I can comment on Chinese law. First of all, China is not a party or State Party to any Arrest Convention; further just a couple of weeks ago, I attended a forum organised by the China's Maritime Court. I asked the question: is there a wrongful arrest concept in the view of judges? and they said: yes, theoretically there is a concept, but in practice no, we do not make the judge wrong, or if the claim is wrong, because the judge will have the primary trial of the case and decide whether there can be arrest or no arrest But I had a case a few years ago with these facts: the vessel was arrested by the China Maritime Court, but it was proved it was wrongful arrest because the name of the vessel was mistaken, and the applicant wrongfully arrested a vessel with a similar name and not the vessel which should have been liable. It was wrong, but the China Maritime Court said no, it was not a wrongful arrest, because that is a human error—everyone can make a mistake! So they would not say it was wrong but theoretically in China the people could claim for the wrongful arrest against the applicant who wrongfully arrested the vessel and also claim against the court. That means claiming against the government; in China it is possible but it is complicated. But for countersecurity in China yes, it is very important; the arrested vessel is the kind of security for the claimant but for balance of interest of course the claimant should provide security except in 2 exceptions; (i) in claims for personal injury and (ii) in claims by the crew for the salary because in China they believe they should assist the weaker party; counter security is difficult for individual claimants, not for a company.

Aleka: thank you. please raise your hands if you know, you or your colleagues, have had experience of a wrongful arrest in any part of the world - Oh many hands! So,

something must be done! At least to try, am I right? Anyone who supports the CMI Project? We want to hear – yes or no? – do you want the CMI to try with another questionnaire to seek the views of the NMLAs whether uniformity is favoured or not? You must answer yes or no. You are hesitant; it seems the answer is No.

Do you say yes for us to try to pursue the project?

[Show of hands (about half of the audience more or less)]

How Many people say no – they do not wish the CMI to do anything?

it looks like it is 50:50

With so many hands up with experience of wrongful arrest, the questionnaire may focus broadly on the issues arising from this debate.

Then we could have a further discussion.

John Kimball: My experience is that wrongful arrest may occur only in exceptional cases.

Reinier: So, we actually come to accept that all those hands showing that they are aware of some case of wrongful arrest we should come to accept that this is a rare phenomenon? And we accept, therefore, that the system functions well? If we see some problems and there is a need for fine-tuning, we do not want to open the whole Arrest Convention. I mean it is obvious also, as Anne said, we should go to the specific issue of arresting a ship. We just want to see through a questionnaire to be answered by practitioners, the NMLAs, based on experience and real cases, what the problems have been, what damages were awarded; maybe some fine-tuning could be done on a practical level.

Hugh Bryant (UK): I am an ancient P & I man. As you have been calling for a position from P & I Clubs I just wanted to say to you that it seems to me there is a big distinction to be drawn between places where a P & I club can give security and situations where they can't. If you look at *the Alkyon* case, it was a bank that was arresting for something where there could not be security from a P & I club; there has been some suggestion that FD&D can help. It can't – FD& D never guarantees the principal amount in dispute, so it seems to me in fact that the mischief, if there is a mischief, is in those cases where there isn't readily available security to release the ship, that is in

cases where a ship is arrested and security by P & I letter or whatever or bank guarantee by P & I Club is provided quickly but, even if it is a wrongful arrest, there is actually no harm done. It is where you have actually got a case where the ship owner's ship is denied to them, but perhaps we have all been there; there is a lot of comity here – nobody is naughty. When I was in practice, a long time ago there was an expression, sometimes used, which was called 'judicial wrongful arrest' and there were certain people who did that as a way of putting pressure on people and it seems to me that that's where the mischief is and if the CMI wants to try to address that, it is really a matter of focusing on those cases where security is not easily provided.

Aleka: Yes, they are very rare though, I suppose.

Kiran, could I hear from you what the position of the ICS would be? Any examples?

Kiran Khosla: I can obtain examples, but I don't have any at the moment, but our position is that we would like to see uniformity in this area. We think it is questionable as to whether it can be achieved; past attempts have not resulted in uniformity, but we don't think that there is any reason not to try.

Aleka: I think we might be wasting our time! CMI projects take a long time; then they go to the IMO to pass the Convention, and then there will be another 50 years, if not rejected outright!

Kiran: I think you are right. It is; I can't remember whether your questionnaire obtained results of cases which have caused real problems

Aleka: No, it was not in that first questionnaire, so we must ask in a new questionnaire.

Kiran: that would be a worthwhile exercise and then we can decide whether there is merit going forward and spending the time and resources.

Aleka: that is correct and a good answer for the CMI and I believe there is consensus—we do not want to go empty-handed! By the way, this project is for the young generation because they have to continue it. They have to have something to do at the CMI!

Edmund Sweetman: I think we have all come across tactical uses of an arrest in a case whether that be legitimate, semi-legitimate or illegitimate – that is what Reinier was referring to: do you arrest the ship when she was in port, or do you arrest her

when she was leaving. If you arrest when she is leaving, you put huge pressure on the shipowner to concede a greater amount to be secured plus creating a greater load on the ship owner and incentivising perhaps an earlier settlement. These are, certainly, speaking realistically, the issues that I think all of us must come across in practice where the shipowners are the victims.

Dermott Conway, Irish Maritime law Association: it strikes me that hard cases make bad law, sometimes, and certainly in the context of jurisdictions where there are no consequences for wrongful arrest. I think on the point made by my American colleague earlier about needing context in things, you really want the context of how many wrongful arrests there are in, say, common law jurisdictions before you'd want to be taking on a body of work – several hands went up when you asked the question how many people had been involved in wrongful arrest; well the other question should be how long have you been practising, how many were there and in common law jurisdictions like Ireland and UK, where there are no consequences, the question becomes well how many in the context of that jurisdiction each year are there, how many arrests are there, and then you would want to find out how many findings for wrongful arrest did you have in each year, because that is the real context – and if you find one ship owner in the context of the global shipping market who has had a wrongful arrest does that justify the moving of mountains that you described a minute ago?

Aleka: Thank you, that will go into the Minutes as part of the Executive Summary

Would you want me to round up or do you have any more contributions to make or have you had enough?

Yes, let us go for drinks, courtesy of the UK Club to whom we are grateful.

Steve Cameron – Anecdote - And the court proceedings were being relayed to us by a P & I Club lawyer, in a very English tone: “we went through the week and things were going in our favour and the judge called both parties into his chambers and said: at the end of the week he was minded to find in favour of the shipping line (which was us) but now we got to the second part of the proceedings, where we established who has got the biggest brown envelope; it was at that point that our lawyer, who may have been the only straight lawyer in this particular country, was

incensed and had completely lost his temper, leaned over the desk and bit off the bottom of the judge's ear”!

Aleka: thank you for cheering us up and, on this note, I close the proceedings.

Jeremy Thomas – thanks were given on behalf of the LSLC and the CMI to the panel, to the audience, and to Thomas Miller for their hospitality in providing the venue, facilities and drinks generously.