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Konu : Gemilerin Haksız Yere Tutuklanması İle ilgili Anket Çalışması Hk.**Sirküler No :105**

Sayın Üyemiz,

İlgi : Uluslararası Deniz Ticaret Odasının (ICS), 27/01/2020 tarihli ve MLC(20)05 sayılı yazısı.

Uluslararası Deniz Ticaret Odası (ICS) tarafından gönderilen ilgi yazıda, gemilerin haksız yere tutuklanmasına karşı güvenlik tedbirlerinin geliştirilmesine yönelik ICS tarafından yapılan çalışmaların desteklenmesi maksadıyla, Uluslararası Deniz Hukuku Komitesi (Committee Maritime International – CMI) tarafından hazırlanan ve Ek'te sunulan anketin, Deniz Hukuku alanında faaliyet gösteren firma ve kuruluşlar tarafından doldurularak CMI'a (Sayın Edmund SWEETMAN, esweetman@icatriet, ve Prof. Sayın George THEOCHARIDIST, gt@wmu.se) iletilmesi talep edilmektedir.

Yazıda ayrıca, ICS'ın konu hakkındaki önceki çalışmalarında "Gemilerin Tutuklanması Uluslararası Sözleşmesi"nin (International Convention on Arrest of Ships, 1999) 6'ncı maddesiyle ilgili olarak, gemilerin tutuklanması ile sonuçlanan vakalarda, sanığın maruz kalabileceği kayıplar ile gemi sahiplerini korumak maksadıyla haksız yere gemi tutuklanmalarından kaçınılması konusundaki desteğine yer verilmektedir.

Bilgilerinizi ve gereğini arz/rica ederim.

Saygılarımla,

*e-imza*İsmet SALİHOĞLU
Genel Sekreter**Ek:** İlgi Yazı ve Ekleri (9 sayfa)

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27 January 2020

MLC(20)05

TO: MARITIME LAW COMMITTEE

Copy: All Full and Associate Members (for information)

WRONGFUL ARREST OF SHIPS – CMI QUESTIONNAIRE AND ICS POSITION

Action required: *Members are requested to promote the ICS position on counter-security for wrongful arrest of ships in discussions with their national Maritime Law Associations and to encourage them to complete and return the attached questionnaire to CMI if they have not already done so.*

Members may recall that ICS has been supportive of past efforts to achieve greater protection for owners from wrongful arrest, including the 1999 Arrest Convention, Article 6, which provides that courts may oblige claimants to provide counter-security for any losses that may be incurred by the defendant as a result of the arrest.

A CMI international working group (IWG) was established in 2015 to consider the issue of liability for wrongful arrest of ships and whether it could be possible to achieve greater uniformity in this area. A meeting of the IWG meeting was subsequently held at the CMI Colloquium in London in November 2018 which was preceded by a questionnaire issued to national maritime law associations (MLAs).

ICS participated in the IWG meeting and noted that the consequences of wrongful arrest are very serious (delay, loss of income, loss of reputation) and that these are not generally covered by shipowners' usual insurances (P&I, H&M). The MLC Secretary indicated that, subject to consultation with members, ICS would be supportive in principle of CMI work to try to achieve greater uniformity in this area with regard to liability for wrongful arrest.

Members of the BMLA and other common law MLAs that attended the IWG meeting argued there was no need for new regulation in this area because the process was settled in their jurisdictions and well understood. The same representatives noted also that introducing a requirement to provide counter-security for wrongful arrest would discourage legitimate claims against the shipowner/vessel from being brought forward and that this could therefore be seen to be a bar to justice. Crew claims for unpaid wages in particular were mentioned in this regard.

The IWG agreed to investigate the extent of the issue of liability for wrongful arrest on the basis of a further questionnaire. The questionnaire has been sent to all national

MLAs (having initially been sent only to the lawyers that attended the IWG meeting in November 2018). In recent exchanges with CMI, ICS has noted the importance of assessing this issue also in the light of the UNCITRAL discussions on Judicial Sales of Ships. In supporting wide dissemination of the questionnaire, ICS suggested that the underlying infrastructure as to the circumstances that can lead to arrest of ships and the need to ensure a reasonable balance between the rights of legitimate claimants and the need to protect the shipowner against wrongful claims (that could lead to judicial sale), should be put to practitioners in all jurisdictions with targeted inquiry.

Whilst this further questionnaire was circulated to all MLAs, ICS understands that not many have so far responded. CMI has recently advised that the deadline for replies has been extended to 15 February 2020.

To assist members in their discussions within their MLAs and in view of the length of time since the matter of wrongful arrest was last on the MLC agenda (when the Arrest Convention 1999 was under discussion), the secretariat has prepared a short ICS position paper in support of efforts being made by CMI to address liability for wrongful arrest. This has been approved by the MLC Chairman and is attached at **Annex A** together with the CMI questionnaire at **Annex B**. Members are requested to bring the CMI questionnaire to the attention of their national MLAs and to promote the ICS position. National MLAs should be encouraged to complete the questionnaire and return it to the IWG rapporteurs - the email address details are at the head of the document.

The matter is on the agenda for discussion at the MLC Meeting on 3 February and members' comments will be invited on the ICS position.

Kiran Khosla
Secretary, Maritime Law Committee

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Follow-up Questionnaire

Please complete this document and send it to the Rapporteurs of this project: Edmund Sweetman (esweetman@icasf.net) and Professor George Theocharidis (gt@wmu.se), who will collate and analyse the answers.

PLEASE NOTE THAT YOUR REPLIES WILL BE DEALT WITH DISCREETELY, AND ONLY THE GENERAL CIRCUMSTANCES OF ANY CASE WILL BE REFERRED TO, WITHOUT IDENTIFICATION OF THE PERSON WHO HAS COMMUNICATED THE SAME.

Your Name	(1.1) Jurisdiction
(1.2) How many years have you been practising?	
(1.3) How many arrests of ships take place annually, more or less, in your jurisdiction?	
(2) Have you or your colleagues dealt with a wrongful arrest case, or one that was considered to be close to wrongful?	
(3) Did it take place within your jurisdiction – or in another- and which?	

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<p>(4) If yes, provide details of the case.</p>	
<p>(5) Was there a procedural mistake or defect?</p>	
<p>(6) Were any tactics used by the arrestor to put pressure on the shipowner?</p>	
<p>(7) Was the arrest aiming to challenge: 7.1) the inherent jurisdiction of another state; or</p>	
<p>7.2) the jurisdiction agreed by the parties to the dispute in an arbitration agreement; or</p>	
<p>7.3) was the arrest made for the sole purpose of obtaining security for the claim?</p>	

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<p>(8) Was security for the claim readily available?</p>	
<p>(9) What was the outcome in your example?</p>	
<p>(10) Do you want CMI to make proposals for some degree of uniformity in the law on wrongful arrest of ships, or not?</p>	
<p>(11) Instead of unification, would you support the provision of: 11.1) counter security (i.e. a requirement to lodge funds or equivalent security in Court); or</p>	
<p>11.2) cross undertaking to be provided as a condition of the arrest?</p>	
<p>(12) What exemptions should there be in such a provision and for whose protection?</p>	

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<p>(13) What should the test for wrongful arrest be (i.e. negligence, gross negligence or other)?</p>	
<p>(14) In the event of a finding of wrongful arrest, what remedy do you consider would be appropriate/fair? 14.1) an award of the legal costs incurred by the S/O to bring the W/A claim?; or</p>	
<p>14.2) damages for all losses suffered by the S/O, if he proves that they were caused solely by reason of the wrongful arrest?</p>	
<p>(15.1) Would you opt for an alternative remedy to damages?</p>	
<p>15.2) if yes, what would you suggest?</p>	

Please provide any further comments or observations which you believe would assist CMI in the furtherance of this project.

Thank you.

Dr Aleka Sheppard - IWG Chairman

**INTERNATIONAL CHAMBER OF SHIPPING
POSITION PAPER
WRONGFUL ARREST OF SHIPS**

ICS would be supportive of CMI undertaking efforts to achieve uniformity in the law of wrongful arrest, or at least the provision of counter-security for wrongful arrest or a cross-undertaking to be provided as a condition of the arrest.

A CMI International Working Group has been considering the issue of liability for wrongful arrest and has produced and circulated a questionnaire to the CMI national Maritime Law Associations to further inform its work on this important matter. The questionnaire is attached.

ICS has been supportive of past efforts to achieve greater international uniformity in the law relating to wrongful arrest of ships, the consequences of which can be very serious (delay, loss of income, loss of reputation) and are not generally covered by the usual shipowners' insurances such as P&I, defence and H&M insurances.

International law relating to the enforcement of maritime claims by ship arrest is generally on the basis of the 1952 Arrest Convention (some 70 jurisdictions). However, the 1952 Convention does not deal with liability of the claimant for wrongful arrest, leaving such questions to the national law of the *forum arresti*.

During the negotiations that led to the adoption of the 1999 Arrest Convention, ICS maintained that claimants should have a mandatory obligation to provide counter-security for wrongful arrest. This view, however, did not prevail and ICS supported the compromise wording that was adopted in Article 6 of the 1999 Arrest Convention, which provides that courts *may* oblige claimants to provide counter-security for any losses that may be incurred by the defendant as a result of the arrest. This includes, but is not restricted to, losses incurred because the arrest was wrongful or unjustified or excessive security was demanded and provided.¹

¹ International Convention on Arrest of Ships 1999

Article 6 Protection of owners and demise charterers of arrested ships:

1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of: (a) the arrest having been wrongful or unjustified; or (b) excessive security having been demanded and provided.
2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of: (a) the arrest having been wrongful or unjustified, or (b) excessive security having been demanded and provided.
3. The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.
4. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.
5. Where pursuant to paragraph 1 of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

In response to concerns that a requirement for counter-security for wrongful arrest could be a bar to justice for some claimants, such as seafarers, it was recognised during the 1999 Arrest Convention negotiations that courts would have discretion as to the form, amount and terms of the security that may be required, which could be nominal in the case of seafarers.

While the 1999 Arrest Convention contains provisions that would permit counter-security to be provided, this remains discretionary. It is also the case that the Convention has not been widely ratified (12 ratifications) and so there remains a lack of uniformity.

ICS maintains that there is a need for a mandatory obligation for claimants to provide counter-security for wrongful arrest and therefore ICS supports the CMI inquiry into this issue. In support of this position, ICS notes the following:

- In most jurisdictions that permit ships to be arrested, the arrest application can be made and effected without prior notice to the shipowner, therefore depriving the shipowner of the opportunity to object, and/or show that it would be wrongful and unjust. This inherent unfairness would be counter-balanced to some degree by a requirement for counter-security for wrongful arrest. Such a requirement would align shipping practices with other procedures designed to protect against the risk of dissipation of assets (such as in English law, the procedure for a freezing injunction which usually requires cross-undertakings for security).
- In response to the concerns that the requirement for counter-security would act as a bar to claims by seafarers who would not be in a position to provide counter-security, it is noted that the protections for seafarers have greatly improved since the adoption of the Arrest Convention, 1999, by the entry into force in 2017 of the 2014 amendments to the 2006 Maritime Labour Convention (MLC), which have been accepted and implemented in most of the 96 States Parties to the MLC. These amendments to the MLC require ships to have documentary evidence that financial security is in place for the consequences of abandonment (including repatriation of crew, essential needs such as food, accommodation and medical care and up to four months' outstanding contractual wages and entitlements). Furthermore, the MLC financial security requirements provide seafarers with direct access to compensation from insurers in cases of abandonment and provide a much easier remedy for seafarers than arrest.
- Most claims against the ship that lead to ship arrest are insured – for example, cargo claims - and therefore the arresting party is effectively a commercial entity with substantial financial resources and in a position therefore to provide counter-security. A requirement for counter-security is unlikely to be a bar to justice in these cases. At the same time however, the shipowners' usual losses arising from a wrongful arrest are generally uninsured.
- A mandatory obligation to provide counter-security would help to ensure that recourse to ship arrest is an exceptional measure given the disruption to trading and consequent losses that can be caused by arresting what may be the shipowner's sole asset and revenue stream.

To conclude, it is acknowledged that it could be difficult in practice to achieve greater international uniformity in the law relating to the enforcement of maritime claims by ship arrest than that which exists today on the basis of the 1952 Arrest Convention which is widely ratified. However, as noted above, the 1952 Convention does not deal with liability of the claimant for wrongful arrest, leaving such questions to the national law of the *forum arresti*. This is unsatisfactory and ICS would be supportive of efforts being undertaken by the CMI to achieve some degree of uniformity in the law of wrongful arrest, or at least the provision of counter-security for wrongful arrest or a cross-undertaking to be provided as a condition of the arrest. (Questions 10, 11.1 and 11.2 of the CMI questionnaire refer.)

A solution along the lines of Article 6 of the 1999 Arrest Convention could be supported, although ICS would prefer that claimants had a mandatory obligation to provide counter-security for any losses which may be incurred by the defendant as a result of wrongful arrest, rather than discretionary. It is also significant that under Article 6 of the 1999 Arrest Convention, claimants may be found liable to pay damages not only for “wrongful” arrest (which in common law countries requires gross negligence or bad faith on the part of the claimant) but also for “unjustified” arrest i.e. where the case does not succeed on its merits.

27 January 2020