LIABILITY REGIMES IN CONTEMPORARY MARITIME LAW

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CHAPTER 14

Liability for wrongful arrest of ships from a civil law perspective
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INTRODUCTION

14.1 Pursuant to the 1952 Brussels Arrest Convention1 all questions relating to liability for wrongful arrest are governed by the law of the place where the arrest was made or applied for (lex loci arresti).2 This implies that one must be familiar with the laws of France, The Netherlands or Germany in order to know if and when a ship’s arrest made in Le Havre, Rotterdam or Hamburg may give rise to an action for damages for the shipowner.

14.2 As will be shown below, there exists no unified approach to wrongful arrest among civil law countries in Europe. In fact there appears to be a “North-South” divide on the European continent about the basic question whether the mere fact that the claim in support of which the arrest was made fails on the merits, is sufficient to base a liability for wrongful arrest. A group of “northerly countries” including The Netherlands, Germany, Poland, Denmark, Norway, Sweden and Finland answer this question decidedly in the affirmative and holds the applicant for arrest strictly liable if his claim fails on the merits, irrespective of fault or good faith.3 By contrast and similar to English law, the “southerly countries” including Belgium, France, Italy and Greece, answer the above question in the negative and require instead that various degrees of “fault” (“abuse of rights”, “gross negligence” or “bad

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3 Article 6-1 of the 1952 Arrest Convention provides:
   "1. All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for."
LIABILITIES ARISING UNDER MARITIME LAW

14.2

faith") must be proven on the part of the applicant for arrest before a liability for wrongful arrest may arise.

14.3 Needless to say, the above distinction is of an arbitrary nature and boundaries are on closer inspection rarely as neat and sharp. This is illustrated by the fact that the kinds and degrees of fault which give rise to a liability for wrongful arrest in the southerly countries, may do so equally in the northerly countries irrespective of whether the claim for which arrest was made succeeds on the merits. Similarly, where in the northerly countries the mere fact that the claim fails on the merits suffices to create a liability for wrongful arrest, this same fact may be relevant, if not sufficient, to a claim for wrongful arrest in the southerly countries as well.

SCOPE OF THE COMPARATIVE STUDY

14.4 In this chapter, I will examine and describe how liability for wrongful (ship's) arrest is construed in three European legal systems, two of the northerly group, i.e. Germany and The Netherlands, and one of the southerly group, i.e. France. The aim is to understand how each of the three countries deals conceptually with this problem in its legal system, the practical results to which this leads in its case law and (express or hidden) considerations of public policy which (may) lie behind this approach. Because of insurmountable language barriers and restricted access to foreign law reports and legal literature, I had to exclude other interesting legal systems such as the Scandinavian, Mediterranean and eastern European countries from the scope of this study in comparative law from the beginning. Although originally included within the scope of this study, Belgian law had to be excluded unfortunately due to time constraints. The inclusion of French and German law in this study is justified by the highly developed legal doctrine and case law in these countries and by the considerable influence that they have traditionally exerted on other civil law countries on the European Continent. Dutch law was not only included because of my personal knowledge and experience with this legal system, but also in view of the great practical importance of the generous facility to arrest ships in The Netherlands.

SOME STATISTICS

14.5 The importance for the international commercial and maritime practice of ship's arrest in The Netherlands is illustrated by the findings of a fairly recent (2002) statistical study into the relative frequency of ship's arrests in the major ports of England, France, Germany, Belgium and the Netherlands between 1995 and 2000. This study was commissioned by the Dutch Ministry of Justice for policy purposes. The table below originates from this report (which is in Dutch) and shows in the second and third column for each port the average number of visiting sea-going vessels per day and per year. In the fourth column the average number of ships arrested each year is shown and finally the fifth column contains the number of ships arrested per 10,000 visiting sea-going vessels for each port.

<table>
<thead>
<tr>
<th>Port</th>
<th>Number of visiting sea-going vessels Per day Per year</th>
<th>Average number of arrested sea-going vessels per year</th>
<th>Relative number of ships' arrests per 10,000 visiting sea-going vessels</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rotterdam</td>
<td>80 29,200</td>
<td>300 (of which 132 long-term)</td>
<td>102 (of which 45 long-term)</td>
</tr>
<tr>
<td>Antwerp</td>
<td>43 15,695</td>
<td>105</td>
<td>67</td>
</tr>
<tr>
<td>Gend</td>
<td>8 2,920</td>
<td>14</td>
<td>48</td>
</tr>
<tr>
<td>Amsterdam</td>
<td>14 5,110</td>
<td>23</td>
<td>45</td>
</tr>
<tr>
<td>Le Havre</td>
<td>20 7,300</td>
<td>12</td>
<td>16</td>
</tr>
<tr>
<td>Marseille</td>
<td>25 9,125</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>London (incl.</td>
<td>46 16,790</td>
<td>7.5</td>
<td>5</td>
</tr>
<tr>
<td>Medway ports</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Felixstowe</td>
<td>21 7,665</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Hamburg</td>
<td>33 12,000</td>
<td>1</td>
<td>0.8</td>
</tr>
<tr>
<td>Bremen</td>
<td>24 8,860</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

(Source: E.G. van Ginkel, Tiding beslag op zeehaven in Nederland en omringende landen, 2002, p. 7, Table 2.)

14.6 It is obvious from these results that in absolute terms the ports of Rotterdam and Antwerp account for far more ships' arrests each year than the other major ports in the region combined. In relative terms, the same applies for the Dutch and Belgian ports in comparison to the ports in England, France and Germany. Furthermore it is striking that both in absolute and relative terms the number of ships' arrests in England and (especially) Germany is so small.

GERMAN LAW

Introduction

14.7 It is well known that German law is generally rather restrictive in allowing conservatory and provisional measures. The general principle is that a debtor's property may only be attached if and when the creditor has obtained a legal title to that effect, whether a court judgment or an arbitral award declared enforceable by the court or a deed from a public notary. It is only as an exception to this rule, that §917 of the Zivilprozeßordnung (ZPO or German Code of Civil Procedure), permits the creditor to seek an arrest order without prior judgment in the following limited circumstances (in free translation):

8. §704, ZPO.
9. §794, ZPO.
14.7 LIABILITIES ARISING UNDER MARITIME LAW

“(1) The arrest of a movable or immovable thing takes place if one has to assume that without it the enforcement of a judgment would be rendered impossible or substantially more difficult.

(2) No further justification for an arrest need be proven if the judgment has to be enforced abroad and the reciprocity (of recognition of judgments) is not guaranteed.”

14.8 German law construes the exception of §917 of the ZPO and therefore the grounds for arrest contained therein rather narrowly. This is illustrated by the fact that the rule in §917(1) of the ZPO, permitting arrest if without it the enforcement of the judgment would be rendered impossible or substantially more difficult, is understood not to protect the creditor against possible or imminent deterioration of the financial situation of his debtor (a mere commercial risk), but to be aimed only at situations where the debtor has no assets within the jurisdiction or where he is hiding or selling off his assets, or moving his assets abroad.

14.9 Furthermore, it has long been controversial among German Courts and legal scholars whether the old wording of §917 of the ZPO permitted a conservatory arrest in Germany in support of court or arbitral proceedings to the merits abroad. This matter seems to have been clarified with the above new wording of §917(2) of the ZPO, which entered into force on 1 April 2004. It had already been decided by the European Court of Justice in Mund & Fisher/Harries,12 that the arrest ground in §917(2) of the ZPO (old wording) did not apply if a (German) judgment was to be enforced abroad in a EU Member State. This excluded 24 European countries from the application of this - already quite restricted - ground for arrest. The reason is that otherwise §917 of the ZPO would violate the EFJEC and EFJR and the non-discrimination rule of Article 6 of the EC Treaty.13

14.10 Finally, German law in §920 of the ZPO requires that the claimant provides together with the arrest petition prima facie evidence (“Glaubhaftmachung”) in support of his claim, that he is the holder of this claim and in respect of the grounds for arrest. Mere allegations are insufficient.14

14.11 It is probably no coincidence that this general restrictiveness with regard to conservatory arrests in German law, places the interest of the owner to be protected against interference with his property above the interest of the creditor to secure his claim through an arrest whilst he can. After all, this rule fits in nicely with the fact that Germany has even included the right of property in its list of basic rights enshrined in the German Constitution (Grundgesetze), thus making it possible to challenge even the constitutionality of an Act of parliament if this impede upon this fundamental right.

15. §945, ZPO: “Erweist sich die Anordnung eines Arrestes oder einer einwiegenden Verfügung als von Anfang an ungerechtfertigt oder wird die angeordnete Maßregel auf Grund des §926 Abs. 2 oder des §942 Abs. 3 aufgehoben, so ist die Partei, welche die Anordnung erwirkt hat, verpflichtet, dem Gegner den Schaden zu erstreiten, der ihm aus der Vollstreckung der angeordneten Maßregel oder dadurch entstehet, daß er Sicherheit leistet, um die Vollstreckung abzuwenden oder die Aufhebung der Maßregel zu erwirken.”


18. See Stein/Jonas, Kommentar zur Zivilprozeßordnung, 22. Aufl., Tübingen, 1996, §945, Rdnr. 2 (Grinsley) and §717 Rdnr. 9 et seq. and name amongst others the concepts of vicarious liability (Gefährdungshaftung), Risk liability (Risikhaftung) and liability for illegal act in a wider sense (Haftung aus unerlaubter Handlung im weiteren Sinne).


Wrongful arrest

14.12 It is against this general background of “arrest-unfriendliness”, that also the German law with regard to liability for wrongful arrest must be seen. The German Code of Civil Procedure, i.e. §945 of the Zivilprozeßordnung (ZPO), contains a special provision for liability for wrongful arrest. In free translation, this provision reads as follows:

“If it appears that an arrest order or an injunction was unjustified from the beginning or the measure that was ordered is subsequently lifted on the grounds of §926(2) of the ZPO or §942(3) of the ZPO, then the party who applied for the order is obliged to compensate the other party its damage resulting from the enforcement of the measure which was ordered or from any security provided in order to avoid the enforcement or to ensure the lifting of the measure.”

14.13 As follows from the wording of §945 of the ZPO, German law imposes a liability for wrongful arrest upon an applicant for arrest if: (1) it appears that the arrest order was unjustified from the beginning, or (2) the arrest is subsequently lifted by the court because of failure to commence main proceedings (the ground of §926(2) of the ZPO) or for non-observance of a time-bar set by the court (§942(3) of the ZPO). An arrest is unjustified from the beginning if the claim for which arrest was made fails on the merits or if there was no valid ground for arrest.18

14.14 Although there is some debate among German scholars about the proper dogmatic underpinning of the rule, it is commonly found that the liability for wrongful arrest pursuant to §945 of the ZPO is a strict liability which arises irrespective of illegality or fault on the part of the applicant for arrest. It is sufficient if by objective standards at the time the arrest was ordered, the preconditions for an arrest were missing.20 Therefore, even an applicant acting in good faith, who could reasonably assume that the arrest was in support of a valid claim and that the grounds for arrest pursuant to §917 of the ZPO had been fulfilled, is nevertheless liable if the arrest was subsequently lifted because of lack of ground for arrest in summary proceedings pursuant to §927 of the ZPO or if his claim fails on the
Introduction 14.18 French law is fairly liberal in allowing conservative arrest of ships. In the words of Rodière, conservative arrest (of a ship) is equally frequent and even commonplace, as enforcement through a public auction is rare. 32 A French Commentary writes: “that strictly speaking, conservative arrest is not an enforcement measure. Its principal aim is to exercise pressure upon an unwilling debtor to induce him to pay. This explains why under French general law and maritime law it is not required for a conservative arrest that the claim is certain, of a determined quantity and payable.” 33 Neither is it required that the claim for which leave for conservative arrest is requested, is endangered or urgent. 34

14.19 In The African Star, 35 the French Supreme Court, la Cour de Cassation, has stressed that the 1952 Arrest Convention does not require a “maritime claim” to be certain and sound, the allegation of a maritime claim is sufficient. 36 This rule applies not only to the decision on the arrest petition but also to summary proceedings (even in appeal) to lift the arrest (“Référé”). 37 Similarly, it was held in The Friday Star by the Aix-en-Provence Court of Appeal that the arrest court should not assess the certainty, soundness or possible prescription of the alleged claim, it was a maritime claim. 38 This interpretation of the 1952 Arrest Convention, published for instance in English about the French law of ship’s arrest, see J.-S. Rorbé, “France”, in Maritime Law Handbook, and Berliner on arrest of ships (3rd ed., 2000).

Wrongful arrest

14.20 Pursuant to French law, creditors may in principle enforce their claims on all assets of their debtors and it is up to the creditor to choose the proper measures to conserve and secure the (future) enforcement of his claim.


43. See Article 22, Act no. 91-650 of 9 July 1991, which states (in original and free translation): "Le créancier a le choix des mesures propres à assurer l'exécution ou la conservation de sa créance. L'exécution de ces mesures ne peut exécuter ce qui se révèle nécessaire pour obtenir le paiement de l'obligation. Le jugement de l'exécution a le pouvoir d'ordonner la mainlevée de toute mesure inutile ou abusive et de condamner le créancier ou de donner l'avantage aux mesures nécessaires en cas d'abus de saisie." The creditor has the choice of the proper measures to ensure the enforcement or conservation of his claim. The exercise of these measures may not exceed what will prove necessary to obtain payment of the obligation. The enforcement judge has the power to order the lifting of any useless or abusive measure and to condemn the creditor to compensate damages in case of abusive arrest.


entirely useless to himself, yet harmful to another. On the other hand, there is a wider, more objective approach, which defines *abus de droit* as an act which contradicts the purpose, spirit and objective of the legal or contractual right at stake. Such conduct constitutes a “fault”, because a careful, prudent and reasonable person, the famous *bon père de famille* (a good family father) would not act in this way.

14.25 This raises the question as to what may constitute an *abus de droit* in the exercise of procedural rights such as a conservatory arrest. Traditionally, the question was whether any mistake in the exercise of procedural rights suffices for *abus de droit* or whether intent or gross negligence equivalent to intent must be proven for this. In the past, the Cour de Cassation has held on many occasions that the losing claimant is not liable, except if he commenced proceedings in *mauvaise foi* (bad faith),75 with a “malicious attitude” or at least committing a “gross mistake equivalent to intent”. A striking example offers the case of *Tipasa*,50 in which on a Friday at the end of the morning, the claimant intentionally and without necessity arrested a ferry loaded with passengers and vehicles and ready to depart in an hour, although another vessel owned by the same debtor was present at the quay.

14.26 More recently, the Cour de Cassation tends to accept a lesser degree of fault, described as “légèrement blâmable” (reproachable lightheartedness), “imprudence grave” (serious carelessness) or “témérité fautive” (recklessness), as sufficient for *abus de droit*. Other decisions illustrate these conflicting tendencies further. In *La Bonita* the Cour de Cassation reasoned “that the Court of Appeal after having... decided that bad faith on the part of the claimant had not been shown, ... and after finding that the claim was partially grounded on the merits, could conclude that the claimant had not abused his right by exercising a conservatory arrest in order to obtain security for his claim”.82


60. See also C.A. Montpellier 26.3.1999, D.M.F. 1985, p. 625 [Hadj-Aboul-Sattar-Issa].


14.27 The outcome may, however, be different if it appears afterwards that from the beginning the legal basis for the claim was entirely missing. In 1996 in *The Alexander III* the Cour de Cassation criticised the C.A. Aix-en-Provence for not explaining why the conservatory arrest by Zaatar of Lemphy’s ship in order to secure a claim against Kldes - Lemphy and Kldes being separate legal entities - did not involve the liability for wrongful arrest of Zaatar towards Lemphy.63 In the same decision, the Cour de Cassation chasised the Court of Appeal even further for not responding to the allegation that applicant for arrest Zaatar had also committed an *abus de droit* by considerably exaggerating the claim amount and by demanding a guarantee for a disproportional amount.64

14.28 *The Alexander III* decision has been criticised65 for introducing “lack of proportionality” as an indication of *abus de droit*. In defence of that decision it can be argued that an excessively overstated claim and a demand for disproportional security can be indications of *mauvaise foi* (bad faith) on the part of the claimant and are therefore relevant in establishing an *abus de droit*. If, however, the Cour de Cassation considers lack of proportionality by itself as proof of *abus de droit*, then in my view the above-mentioned criticism is well-deserved, because it will not always be possible for a creditor to know the exact quantum of his claim early on, e.g. shortly after a maritime casualty has occurred. Nevertheless, in such a case he has a legitimate interest in obtaining security for his estimated claim through a ship’s arrest, even if afterwards the claim proves to be much lower than earlier expected or feared.66

14.29 Furthermore, it is submitted that (lack of) proportionality as such is not a good criterion for *abus de droit*, because there will almost inevitably be a considerable disproportion between the claim amount and the usually much higher value of the ship. For obvious reasons, however, that is not the whole story. First, even in the event of a forced sale, a creditor has no certainty whether he will be able to recover his claim from the sale proceeds because there may well be higher ranking claims of other creditors such as salvors or mortgage banks. But to deny him on that ground the possibility to seek security for his claim by way of a conservatory arrest, seems grotesque. Second, claims against the ship or its owners will often, if not always be covered by P&I insurance, which offers a widely available, efficient and relatively cheap instrument to the debtor to deal with ship’s arrests, i.e. the offer of a letter of undertaking from the P&I Club or from a local bank as arranged by the P&I Club.

63. Cour de Cassation com 19.3.1996, D.M.F. 1996, p. 503, 505 [Alexander III]: “Attends qu’en examinant ainsi, sans dire en quoi le fait de saisir un navire de la société Lemphy pour garantir le recouvrement d’une créance sur la société Kldes ne serait pas de nature à engager la responsabilité des saississeurs à l’égard de la société Lemphy, dès lors que ces deux personnes morales sont distinctes, la Cour d’appel a violé la loi.”


LIABILITIES ARISING UNDER MARITIME LAW

DUTCH LAW

Introduction

14.30 Similar to French law, Dutch law is fairly generous in allowing ship's arrest. A claimant who wishes to arrest a ship within the Dutch jurisdiction must apply to the court to obtain leave for arrest. In the ex parte arrest petition, the claimant must briefly explain: (1) the kind of arrest asked, (2) the factual and legal background of the claim, (3) its legal nature, (4) why it is a maritime claim, (5) the claim amount, (6) the court's jurisdiction, and (7) whether the main proceedings for the claim are already pending. Unlike German arrest law, it is not required in case of a ship's arrest that there is a grounded fear that the debtor will embezzle his assets. Neither is it required or customary to attach documentary evidence as prima facie proof to the arrest petition.

14.31 After a summary review of the arrest petition, the injunction judge of the court will decide whether or not to grant leave for arrest. Although the injunction judge has discretionary powers to make the leave for arrest conditional upon the claimant putting up counter-security first, in practice this is seldom required. Once leave for arrest has been given, it is up to the claimant to instruct the court bailiff to effect the ship's arrest. After the ship's arrest is made, it will usually be the P&I Club of the shipowner who decides whether to offer alternative security for the claim or to challenge the ship's arrest in summary relief proceedings.

14.32 Pursuant to Article 705 of the CCP, the injunction judge has discretionary powers to lift the arrest, but in some cases he is obliged to do so. Article 705 of the CCP reads in free translation as follows:

"1. The Injunction Judge who granted leave for arrest may, acting in summary relief proceedings, lift the arrest at the request of any interested party, without prejudice to the jurisdiction of the regular court.

2. The relief shall be ordered amongst others in case of non-compliance with procedural requirements proof of the penalty of arrest, or the impossibility of the grounds relied on by the arresting party or the lack of necessity of the arrest is conclusively shown, or if the arrest is effected for a monetary claim, if sufficient security is put up for this claim.

3. (...)"

14.33 In contrast to French law, the Dutch injunction judge will try to reach an informed, but inevitably provisional judgment at the summary hearing about the likely outcome of the main proceedings with regard to the merits of the claim for which the ship's arrest was made. In doing so, he will try to restore the "procedural balance" between the parties, which had been tilted in favour of the creditor by the ex parte decision to grant leave for arrest, by paying special attention to what the shipowner has to say in his defence.

14.34 This helps to explain why it is usually quite fatal to a ship's arrest, if it appears at the summary hearing that the initial arrest petition was incomplete or inaccurate as to the material facts and legal grounds and therefore misleading to the court. It follows also that in Dutch summary relief proceedings, contrary to French law, the mere allegation of a maritime claim will not be enough to defend the ship's arrest. Instead, the arrestor must substantiate his claim, provide prima facie evidence in support of it to the extent possible and respond as good as he can to the defences and arguments raised by the shipowner.

14.35 Although summary relief proceedings by their nature do not allow for the hearing of witnesses, the injunction judge will normally base his provisional judgment on all the evidence brought to his attention, including legal opinions on foreign law, but only to the extent that he considers it relevant or persuasive. The same applies mutatis mutandis to the shipowner, who will have to come up with quite a strong defence against the claim or with good other arguments in order to persuade the injunction judge to order the lifting of the arrest.

14.36 The result is that Dutch law – different from German law – allows conservative summary relief proceedings on a much greater scale. But on the other hand, in case of summary relief proceedings to have the arrest lifted it is – unlike French law – not only the interest of the creditor that counts, the court will also take into consideration the interests of the owner whose ship is arrested. Only if the arguments exchanged and the interests at stake cancel each other out – i.e. all other things being equal at the summary relief hearing – the injunction judge will give the benefit of the doubt to the creditor who wishes to secure his claim through arrest and the shipowner must make do with the strict liability for wrongful arrest of the creditor.

Wrongful arrest

14.37 Dutch law combines an arrest-friendliness similar to French law with a strict liability rule in case of wrongful arrest, which is closer to German law. If the claim in support of which an arrest was made, fails in court proceedings on the merits, then the arrestor is liable in tort for wrongful arrest, irrespective of good faith or absence

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of fault on his part. Therefore German law, this strict-liability rule under Dutch law
is not contained in a specific provision. Instead it is an application of the general rule
on "aansprakelijkheid uit onrechtmatige daad" (liability for unlawful acts), which until
1992 was governed by Article 1401 of the Burgerlijk Wetboek (Dutch Civil Code or
DCC), and since then by Article 6:162 of the DCC. In translation, this latter provision
reads as follows:

"1. A person who commits an unlawful act toward another which can be imputed to him,
must repair the damage which the other person suffers as a consequence thereof.

2. Exception to this rule: a person is not liable for the consequences of his unlawful act if
the consequence of his act is caused by the wrongful act of a third person, or if a
scarecrow or a comforter destroys or destroys it.

3. An unlawful act can be imputed to its author if it results from his fault or from a cause
for which he is answerable according to law or common opinion." [With added stress.]

14.38 Pursuant to Article 6:162 of the DCC the liability for wrongful arrest is
construed as follows. By effecting an arrest, the claimant has (willingly) violated the
(right) of the owner, which according to subsection (3) of Article 6:162 of the
DCC is imputable to him. Pursuant to subsection (2) of Article 6:162 of the
DCC, the violation of the property right of the owner is deemed to be unlawful
except where the ground of justification. A provisional ground of justification
results from the court's leave for arrest. The real justification, however, can only be
that the claimant has a valid claim against the owner, for which he is entitled to seek
recourse on all assets of his debtor. If the claim fails on the merits, it becomes
clear that there was no ground of justification after all, and the arrest must be
denied an unlawful act.

14.39 The origin of this rule can be traced to the beginning of last century, when
the Dutch courts and legal scholars construed conservatory arrest as an intentional
violation by the claimant of the right of property of the owner. This intrusion
may be justified if the pretended claim against the owner succeeds, but if it appears
afterwards that the claim fails on the merits, then the claimant is liable. That he
did or could believe to have a valid claim is irrelevant, because what counted was the
intentional violation of the owner's right of property for which in the end there
was no justification.

14.40 With regard to the question whether the unlawful arrest is imputable to
the creditor, the Dutch courts and legal scholars in later years have - similar to

77. See Onrechtmatige Daad (Van Maanen), Art. 162 lid 2, ass. 14 et seq. and 43 et seq. (boolesoef), and for the law prior to 1992 Onrechtmatige Daad (old). I Onrechtmatigheid enz., nr. 277 (boolesoef).

78. The original wording in Dutch of Art. 6:162 of the DCC is as follows: "1. Hij die jegens een ander een onrechtmatige daad pleegt, welke hem kan worden toegerekend, is verplicht de schade die de ander daardoor incasseert, ten onrechte, ten onrechtmatigheid enz." 2. Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of laten in strijd met een wettelijk of met het beheer volgens ongeschreven rechten in het maatschappelijk verkeer betaamt, en een ander behoudens de aanwezigheid van een rechtvaardigingsgroep. 3. Een onrechtmatige daad kan aan de dader worden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende voorschriften voor zijn rekening komt.

80. This follows from Art. 3:276 of the DCC which in translation reads as follows: "Unless the law or an agreement provide otherwise, the creditor can seek recourse for his claim on all assets of his debtor."


SHIP SOURCE POLLUTION

14.41 In two recent decisions of 2003, the Hoge Raad has made it clear that
the strict-liability rule in case of wrongful arrest applies only if the claim for which
arrest was made is, entirely unfounded on the merits. If the claim for which an
arrest was made only partially succeeds, then it does not follow that the arrest
was wrongful. The question whether an arrest is to be liable for the consequences
of an arrest, because the arrest was made for a too high claim amount, or was
effected rashly, or was maintained without necessity, must be determined by the
standards, which apply to "misbruik van rechts" (abuse of rights) pursuant to Dutch
law.

14.42 Under the general Dutch patrimonial law in Book 3 of the Dutch Civil
Code, "abuse of rights" (abus de droits) is defined in Article 3:13 of the DCC, which
provides as follows (in free translation):

"1. He who is entitled to exercise a right, may not invoke it, to the extent that he abuses it.

2. A right may amongst others be abused by exercising it with no other purpose than to
cause harm to another person or with a different purpose than for which it was given or
in case, taking into consideration the discrepancy between the interest in exercising it
and the interest that will be harmed by it, one may not reasonably decide to the exercise
of this right.

3. It may follow from the nature of the power that it cannot be abused."
14.43 As follows from the words "amongst others" in subsection (2) of Article 3:13 of the DCC, the three examples of "abuse of rights" listed there, i.e. the exercise of a right: (1) with the sole purpose to cause harm, or (2) with a different purpose than for which it was given, or (3) in case of an unreasonable discrepancy between the interest in exercising the right and the interest to be harmed by it, are meant to be illustrative and not exhaustive. The Dutch legislator has therefore not excluded the possibility of other examples of "abuse of rights" developing in Dutch case law and legal doctrine.

SOME COMPARATIVE OBSERVATIONS

14.44 Considering the above findings, what comparative conclusions can be drawn? Firstly, it is clear that the civil law approach to liability for wrongful arrest does not exist. Each of the countries examined solves the questions connected to wrongful arrest differently against the background of the fundamental values it holds dearly. Whereas in France the claimant’s “sacred” right to arrest is seen as part of the fundamental civic right to seek recourse to justice, in Germany and The Netherlands the protection of the property rights of the defendant is valued more. And whereas German law goes to the other extreme in discouraging conservatory measures as far as possible, Dutch law attempts a balancing act between the conflicting interests of creditors and debtors, by on the one hand allowing arrestors free rein, but on the other hand by imposing a strict liability upon them if their claim fails on the merits.

14.45 Finally, a conclusion which may be of particular interest to an English audience at a time that voices are becoming louder to change the law with regard to liability for wrongful arrest, is that apparently there is no correlation between the strict liability rule and a decrease of the number of ship’s arrests in a jurisdiction. The continued attractiveness of ship’s arrest in The Netherlands speaks for itself.