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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 Convention[1] 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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1. International Convention for the unification of certain rules relating to the arrest of sea-going ships, Brussels, 10 May 1952; J. E. de Boer (ed.), *International Transport Treaties (ITT)*, pp. 1–65 *et seq.*

2. 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."

The International Convention on arrest of ships, Geneva 12 March 1999, *ITT*, pp. 1–639 *et seq.*, which has not yet entered into force, provides a more detailed rule to the same effect in subsections (2) and (3) of Article 6, *Protection of owners and demise charterers of arrested ships*:

> "2. The Courts of the State in which an arrest has been affected 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."

3. For a brief overview of the position in various countries, see *Berlingieri on Arrest of Ships* (3rd ed., 2000) (London), pp. 195 *et seq.*, pp. 266 *et seq.*, and Christian Breitzke/Jonathan Lux/Philomène Verlaan (eds.), *Maritime Law Handbook*, The Hague (looseleaf).

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.[4] 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.[5] 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

4. English language readers interested in Belgian law may be referred to Walter P. Verstrepen, "Arrest and judicial sale of ships in Belgium", in [1995] L.M.C.L.Q. pp. 131–153; J. Theunis, *Arrest of Ships – Belgium* (London, 1986), pp. 5–29 and *Berlingieri on Arrest of Ships* (3rd ed., 2000) (London, LLP).

5. E.C. van Ginkel, *Telling beslag op zeeschepen in Nederland en omringende landen*, Wetenschappelijk Onderzoek- en Documentatiecentrum, The Hague, 2002.

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.

Port	**Number of visiting sea-going vessels** *Per day*	*Per year*	**Average number of arrested sea-going vessels per year**	**Relative number of ships' arrests per 10,000 visiting sea-going vessels**
Rotterdam	80	29,200	300 (of which 132 long-term)	102 (of which 45 long-term)
Antwerp	43	15,695	105	67
Gand	8	2,920	14	48
Amsterdam	14	5,110	23	45
Le Havre	20	7,300	12	16
Marseille	25	9,125	13	14
London (incl. Medway ports)	46	16,790	7.5	5
Felixstowe	21	7,665	3	4
Hamburg	33	12,000	1	0.8
Bremen	24	8,760	0	0

(*Source*: E.C. van Ginkel, *Telling beslag op zeeschepen 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[6]

Introduction

14.7 It is well known that German law is generally rather restrictive in allowing conservatory and provisional measures.[7] 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[8] (or an arbitral award declared enforceable by the court) or a deed from a public notary.[9] 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):

6. For publications in English about the German law of ships' arrest see: J. Trappe, "The Law of a Ship's arrest in Germany", in *European Transport Law* (hereafter *E.T.L.*), 1991, p. 329; K. Soehring, *Arrest of Ships-Germany* (London, 1985), p. 51, V. Looks, "Federal Republic of Germany", in *Maritime Law Handbook*, A. Kirchner, *Maritime Arrest, Legal Reflections on the International Arrest Conventions and on Domestic Law in Germany and Sweden* (Stockholm University, 2001), pp. 14 *et seq.*

7. See Trappe, *E.T.L.*, 1991, p. 329.

8. §704, ZPO.

9. §794, ZPO.

"(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 herein 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[10] permitted a conservatory arrest in Germany in support of court or arbitral proceedings to the merits abroad.[11] 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 & Fester/Hatrex*,[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 *EJJC and EJR* 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 (*Grundgesetz*), thus making it possible to challenge even the constitutionality of an Act of parliament if this impedes upon this fundamental right.

10. The old wording of §917(2) of the ZPO was (in free translation): "No further justification for an arrest need be proven if the judgment has to be enforced abroad."
11. The leading opinion was in the negative, see Trappe, *E.T.L.*, 1991, p. 330 referring to Looks, *Transportrecht* (hereafter *TranspR*),1989, p. 345, and *The Mavro Vetranic* decision of the Hamburg Court of Appeal (Hanseatisches Oberlandesgericht Hamburg), 11 December 1989, *TranspR*, 1990, p. 112. *Cf.* Silke Nieschulz, *Der Arrest in Seeschiffe, Eine rechtsvergleichende Untersuchung des deutschen, niederländischen und englischen Rechts*, diss. Hamburg, 1997, pp. 32 *et seq.*
12. ECJ, 10 February 1994, C-398/92, [1994] E.C.R. I-467 [*Mund & Fester/Hatrex*].
13. Now replaced by the European Judgments and Jurisdiction Regulation (E.J.J.R.) 44/2001.
14. See Nieschulz, *Der Arrest in Seeschiffe*, 1997, pp. 65 *et seq.*, and the answer of the German MLA to the questionnaire in *Berlingieri on Arrest of Ships* (3rd ed., 2000) (London), p. 236.

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[15] 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)[16] or for non-observance of a time-bar set by the court (§942(3) of the ZPO).[17] 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,[19] it is common ground 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[21] or if his claim fails on the

15. §945, ZPO: "Erweist sich die Anordnung eines Arrestes oder einer einstweiligen 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 ersetzen, der ihm aus der Vollziehung der angeordneten Maßregel oder dadurch entsteht, daß er Sicherheit leistet, um die Vollziehung abzuwenden oder die Aufhebung der Maßregel zu erwirken."
16. The ground of §942(3), ZPO, relates to the lifting of an injunction for failure to observe the time fixed by the court for notifying the defendant party, and is of no relevance here. See Nieschulz, *Die Arrest in Seeschiffe*, diss. Hamburg, 1997, pp. 101 *et seq.*
17. Nieschulz, *Die Arrest in Seeschiffe*, diss. Hamburg, 1997, pp. 102 *et seq.*
18. German Federal Supreme Court (*Bundesgerichtshof*) (hereafter B.G.H.), 7 June 1988, N.J.W. 1988, p. 3269, B.G.H. 19 March 1992, N.J.W.-R.R. 1992, p. 736.
19. See Stein/Jonas, *Kommentar zur Zivilprozessordnung*, 21. Aufl., Tübingen, 1996, §945, Rdnr. 2 (Grunsky) and §717 Rdnr. 9 *et seq.* and name amongst others the concepts of vicarious liability (*Gefährdungshaftung*), Risk liability (*Risikohaftung*) and liability for illegal act in a wider sense (*Haftung aus unerlaubte Handlung im weiterer Sinne*).
20. B.G.H. 28 November 1991, N.J.W.-R.R., 1992, p. 1001.
21. *Münchener Kommentar zur Zivilprozessordnung*, 2. Aufl., 2001, §94, Rdnr. 19 (Heinze).

merits,[22] e.g. due to lack of proof.[23] The severity of this view is illustrated by the opinion defended in leading German Commentaries, that even if the applicant relied on a long and widely held interpretation of the law by the courts, which suddenly changed to his detriment in his particular case, he will nevertheless be liable for wrongful arrest.[24]

14.15 However, if the factual circumstances changed after the arrest was made, e.g. because of assignment or settlement of the claim, then this does not invalidate an otherwise validly ordered arrest. Neither will a change in the legal position with retroactive effect (e.g. because a legal act on which the claim was founded is declared null and void ab initio) create a liability pursuant to §945 of the ZPO.[25] In such cases, the other party can seek the lifting of the arrest in summary proceedings pursuant to §927 of the ZPO,[26] but no liability arises.

14.16 Repeatedly, the German Federal Court of Justice has explained and clarified the policy reasons behind the strict liability rule of §945 of the ZPO.[27] These reasons can be summarised as follows.[28] The liability of §945 of the ZPO places on the creditor and applicant the risk, which results from his own decision to take – inherently dangerous – conservatory and provisional measures against his debtor at a time that the legal position is still undecided in view of pending or future legal proceedings to the merits. It is the creditor who wishes to secure his legal position and the future enforcement of his claim without the justification of a prior judgment to the merits and he does so by interfering severely in the legal sphere of his alleged debtor. If this interference causes damage and the claim – in relation to which the arrest is instrumental – fails on the merits, then §945 of the ZPO consistently places the liability on the creditor irrespective of illegality or fault. Needless to say, the same reasoning and policy considerations equally apply if the arrest is lifted because the applicant failed to commence the main proceedings altogether.

14.17 Finally, the measure of damages that applies to the liability for wrongful arrest pursuant to §945 of the ZPO is the general measure applicable to tort liability in §249(1) of the German Civil Code (*Bürgerliches Gesetzbuch* or *B.G.B.*),[29] which provides that anybody liable in damages must restore the situation that would exist, if the circumstance obliging him to pay damages had not occurred. If it appears that the damage caused by the arrest was (partly) the result of own fault of the party whose property was arrested, this may mitigate the liability to compensate the damage.[30]

22. See Stein/Jonas, §945, Rdnr. 1–2, 4, 19 (Grunsky); MünchKomm ZPO-Heinze §94, Rdnr. 21, Rosenberg/Gaul/Schilken, *Zwangvollstreckungsrecht*, 11. Aufl., München, 1997, §80, p. 1056.
23. B.G.H. 7 June 1988, N.J.W.-R.R., 1988, p. 3269. See Thomas/Putzo, *Zivilprozessordnung*, 27. Aufl., 2005, §945, Rdnr. 7 (Reichold).
24. See Stein/Jonas, §945, Rdnr. 19, MünchKomm ZPO-Heinze, §945, Rdnr. 21.
25. See Stein/Jonas, §945, Rdnr. 19a, MünchKomm ZPO-Heinze, §945, Rdnr. 21
26. Nieschulz, *Die Arrest in Seeschiffe*, diss. Hamburg, 1997, p. 96.
27. See B.G.H. 22.3.1990, N.J.W. 1990, p. 2689 referring to B.G.H., B.G.H.Z., 54, p. 80; N.J.W. 1970, p. 1459; B.G.H. 4.12.1973, B.G.H.Z., 62, p. 9, N.J.W. 1974, 642; B.G.H. 23.5.1985, B.G.H.Z., 95, p. 14, N.J.W. 1985, p. 1959.
28. See MünchKomm ZPO-Heinze, §945, Rdnr. 4. *Cf.* Rosenberg/Gaul/Schilken, §80, p. 1054.
29. §249 BGB (1) "Wer zum Schadenersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen wurde, wenn der zum Ersatz verpflichtenden Umstand nicht eingetreten wäre."
30. B.G.H. 22.3.1990, N.J.W. 1990, p. 2690.

FRENCH LAW[31]

Introduction

14.18 French law is fairly liberal in allowing conservatory arrests of ships. In the words of Rodière, conservatory 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, conservatory 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 conservatory arrest that the claim is certain, of a determined quantity and payable."[33] Neither is it required that the claim for which leave for conservatory 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, provided it is a maritime claim.[38] This interpretation of the 1952 Arrest Conven-

31. For publications in English about the French law of ship's arrest, see J.-S. Rohart, "France", in *Maritime Law Handbook*, and *Berlingieri on arrest of ships* (3rd ed., 2000).
32. R. Rodière, *Traité Général de droit maritime, Le navire*, Dalloz, 1980, p. 231: "la saisie conservatoire est aussi fréquente et même banale que la saisie-exécution est rare". *Cf.* A. Vialard, *Droit Maritime*, 1997, p. 311, no. 364.
33. See J.-B. Racine, "Navire (Saisie et vente publique)" (2001), in L. Vogel (ed.), *Répertoire de Droit Commercial Dalloz (Rép. com. Dalloz)*, Tome IV (Looseleaf), p. 6, no. 34 and p. 10, no. 66: "La saisie conservatoire n'est pas une voie d'exécution au sens strict. Elle a principalement pour but d'exercer une pression sur le débiteur récalcitrant pour l'inciter à payer. C'est pourquoi, aussi bien en droit commun qu'en droit maritime, il n'est pas nécessaire pour exercer une saisie conservatoire de se prévaloir d'une créance certaine, liquide et exigible." *Cf.* C. Navarre-Laroche, *La saisie conservatoire des navires en droit français*, Moreux, 2001, p. 61.
34. See Cour de Cassation civ. 18.11.1986, *Droit Maritime Français* (hereafter D.M.F.), 1987, p. 697, Cour d'Appel (CA) Aix-en-Provence 26.1.1990, D.M.F. 1992, p. 354 [*Mont-Blanc Maru*], C.A. Aix-en-Provence 24.9. 1992, *Revue de droit français commercial, maritime et fiscal*, 1992, p. 89 [*Hassi R'Mel*]. Earlier differently, C.A. Aix-en-Provence 28.11.1985, D.M.F. 1986, p. 694 [*Shangri-La*]. See also Navarre-Laroche, *La saisie conservatoire des navires en droit français*, 2001, p. 61 and Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 11, no. 67.
35. Cour de Cassation Com 26.5.1987, D.M.F. 1987, p. 645 [*African Star*]: "la convention de Bruxelles n'exige pas que la créance alléguée ait une caractère et sérieux". Cf. Cour de Cassation Com. 12.1.1988, DMF 1992, p. 134 [*Nora*], Tribunal (Trib.) Nouméa 17.11.1979, D.M.F. 1980, p. 223 [*La-Bonita*]. See also the corrected decisions of C.A. Poitiers 13.11.1985, D.M.F. 1987, p. 646 [*African Star*] and C.A. Rouen 1.7.1985, D.M.F. 1986, p. 421 [*Nora*]. Critical about this approach is Vialard, *Droit Maritime*, 1997, p. 313, no. 367.
36. See in this respect also *Berlingieri on arrest of ships* (3rd ed., 2000), p. 156, no. I.598 *et seq.*, p. 160, no. I.612.
37. See, e.g., C.A. Aix-en-Provence 26.1.1990, D.M.F. 1992, p. 354 [*Mont-Blanc-Maru*].
38. C.A. Aix-en-Provence 6.12.1995, D.M.F. 1997, p. 591 [*Friday Star*] (comments by Y. Tassel): "(…) constatation qui confère un caractère maritime à la créance alléguée dont le Juge n'a pas à apprécier ni la certitude, ni le sérieux, ni l'éventuelle prescription.". *Cf.* Cour de Cassation Com. 26.1.1990 (unpublished), cited by: Navarre-Laroche, *La saisie conservatoire des navires en droit français*, 2001, p. 60, R. Rodière/ E. du Pontavice, *Droit Maritime* (12th ed., Dalloz, 1997), p. 169, no. 178, note 4. Critical: Vialard, "La saisie conservatoire des navires affrétés", in D.M.F. 1994, p. 305 *et seq.*

tion departs from French domestic law, which requires for a conservatory arrest that the claim[39] must appear to be grounded in principle,[40] allowing the court to verify and determine the strength of the claim.[41] The arrest-friendliness of the French courts is illustrated further by the fact that an applicant for arrest is rarely ordered to provide counter-security by the court.[42]

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] Article 22, Act No. 91-650 of 9 July 1991, which states (in free translation):

"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 each useless or abusive measure and to condemn the creditor to compensate damages in case of abusive arrest."

14.21 French law conceives the effecting of an arrest as a – in itself legitimate – way of exercising the claimant's basic civic liberty to seek recourse to justice (*voie de droit*).[44] In this approach, it is considered excessive if the mere defeat in court

39. This may be any kind of claim, i.e. not necessarily a maritime claim. See: Rodière/Du Pontavice, *Droit Maritime* (12th ed., 1997), p. 166, no. 176, Vialard, *Droit Maritime*, 1997, p. 314, no. 367.

40. See: Art. 29, §2 Decree no. 67-967 of 27.10.1967 as changed by the Decree no. 161 of 24.2.1971: "l'autorisation peut être accordée dès lors qu'il est justifié d'une créance paraissant fondée en son principe." Previously, the Decree of 27.10.1967 had required: "la saisie conservatoire (...) ne peut (...) être (autorisée) que si le requérant justifie d'une créance certaine". See: Navarre-Laroche, *op. cit.*, 2001, p. 58 *et seq.*, Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 10, no. 66, Rodière/Du Pontavice, *Droit Maritime* (12th ed., 1997), p. 166, no. 176, and *Berlingieri on arrest of ships* (3rd ed., 2000), p. 160, no. I.612.

41. *Cf.* Vialard, *Droit Maritime*, 1997, p. 314, no. 367.

42. E.g. C.A. Rouen 30.7.1980, D.M.F. 1980, 668 [*Georgios-K*]. See Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 19, no. 120. Some writers would favour it if French courts imposed counter-security more often: Rodière, *Le Navire*, 1980, p. 248, no. 199, Navarre-Laroche, *op. cit.*, p. 219. See also the critical comment of R. Achard below: C.A. Aix-en-Provence 26.1.1990, D.M.F. 1992, p. 354 [*Mont-Blanc-Maru*].

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 or la conservation de sa créance. L'exécution de ces mesures ne peut excéder ce qui se révèle nécessaire pour obtenir le paiement de l'obligation. – Le juge de l'exécution a le pouvoir d'ordonner la mainlevée de toute mesure inutile ou abusive et de condamner le créancier à des dommages-intérêts 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 each useless or abusive measure and to condemn the creditor to compensate damages in case of abusive arrest.). *Cf.* Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 12, no. 77.

44. *Cf.* L. Cadiet/Ph. le Tourneau, "Abus de droit", *Répertoire de Droit Civil Dalloz (Rep. Civ. Dalloz)*, Tome I, V°, 2002, p. 23, no. 113 with references, Navarre-Laroche, *op. cit.*, 2001, p. 215 and Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 19, no. 121: "Est-il possible de demander au saisissant la réparation de ce préjudice? La réponse est normalement négative. En effet, le fait de pratiquer une saisie est en lui-même légitime car il constitue l'exercise d'une voie de droit. On voit ici le conflit d'intérêts présent dans toute saisie. D'une côté, les intérêts du créancier qui, en garantie de sa créance, doit pouvoir sans entrave saisir les biens de son débiteur. De l'autre, les intérêts du débiteur qui subit un préjudice du fait de la saisie."

proceedings already constituted a "*faute*" (fault), obliging the defeated party to compensate the damage. It does not follow, however, that the claimant is entirely free in the exercise of his (procedural) rights. The public interest of a proper and efficient administration of justice and the legitimate interests of the defendant dictate that limits are set to procedural transgressions. Thus, where the exercise of a right, such as a conservatory arrest, becomes abusive (*abus de droit*),[45] the courts may intervene and condemn the guilty party to pay a civil fine to the state[46] and to compensate the damage[47] of the innocent party pursuant to Article 1382 of the Code Civil.[48] It is interesting and perhaps revealing that the interest of the owner who must bear that his property is being arrested is not mentioned here as ground for an *abus de droit*. It seems that French law does not require the court to balance the interest of the creditor in seeking an arrest, against the interest of the debtor not to suffer an arrest of his property.

14.22 As stated above, pursuant to French law an arrest will become wrongful if it meets the standard of an *abus de droit*, in which case the guilty party will be liable in tort.[49] It goes without saying that not each and every mistake on the part of the applicant for arrest will qualify as an *abus de droit*. Repeatedly, the French courts have rejected liability for applicants for arrest, who had acted under the influence of a mistake with regard to the law or the facts.[50] As stated above, the fact that the claim for which arrest was made failed on the merits, is insufficient as such to base a liability for wrongful arrest.[51]

14.23 There is no general definition of *abus de droit* in French law nor a specific one for abusive arrests.[52] *Abus de droit* has developed and still develops in case law and legal doctrine. Although over time various theories explaining and analysing *abus de droit* have been proposed, the French courts have never formally chosen for any of these interpretations and are far from united.

14.24 In theories about *abus de droit* two extreme poles can be distinguished. On the one hand, there is a narrow, subjective, interpretation, according to which there is only *abus de droit* if a right is exercised with the intent to cause harm to others, e.g. if a person insists upon the use or enforcement of a legal right although this is

45. See: J. Ghestin/G. Goubeaux, *Traité de droit civil*, Introduction générale, LGDJ, 4° ed., n° 761 *et seq.*, especially n° 777 *et seq.*

46. See: Art. 32-1 (Décr. n°78-62 du 20.1.1978) of the New French Code of Civil Procedure, which reads as follows: "Celui qui agit en justice de manière dilatoire ou abusive peut être condamné à une amende civile de 15 € à 1 500 €, sans préjudice des dommages-intérêts qui seraient réclamés."

47. Reputation damage due to the ship's arrest was rejected in: Trib. Nouméa 17.11.1979, D.M.F. 1980, p. 223 [*La-Bonita*] and Cour de Cassation com. 29.11.1983, D.M.F. 1984, p. 552 [*La-Bonita*].

48. See also Art. 22, Act no. 91-650 of 9 July 1991, see note 43 above, which general provision however does not apply to arrest of ships directly.

49. *Cf.* Ph. le Tourneau, *Droit de la responsabilité et des contrats*, Dalloz, 2004, p. 1089, no. 6865, Navarre-Laroche, *La saisie conservatoire des navires en droit français*, 2001, p. 215.

50. See Le Tourneau, *Droit de la responsabilité et des contrats*, 2004, p. 1101, no. 6950 *et seq.* and Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 23 *et seq.*, no. 113 *et seq.*

51. See Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 24, no. 123, p. 26, no. 135. See, e.g., C.A. Rouen 20.12.1995, D.M.F. 1997, p. 30 [*Cléo D*] in which the bunkers were released from arrest because it had not been proven that the bunkers were the property of the debtor or that the claim was endangered. Nevertheless, the Court of Appeal Rouen held that arrest being without ground, did not make the arrest abusive. *Cf.* C.A. Rouen 3.11.1998, D.M.F. 1999, p. 123 [*Pom Thule*].

52. See Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 3, no. 4, Vialard, *Droit Maritime*, 1997, p. 322, no. 378, Navarre-Laroche, *op. cit.*, 2001, p. 215.

entirely useless to himself, yet harmful to another.[53] 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.[54] 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.[55]

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.[56] 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),[57] with a "malicious attitude" or at least committing a "gross mistake equivalent to intent".[58] A striking example offers the case of *The Tipasa,*[59] 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 "*légèreté blâmable*" (reproachable lightheartedness),[60] "*imprudence grave*" (serious carelessness) or "*témérité fautive*" (recklessness), as sufficient for *abus de droit.*[61] 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".[62]

53. Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 8, nr. 24: "Dans cette thèse, l'abus n'existera que si le droit a été exercé avec l'intention de nuire, que lorsque le droit légal or contractuel, à l'application ou à l'exécution duquel le demandeur vient prétendre, apparaît tout à la fois inutile pour lui-même et préjudiciable au défendeur, cette conjonction révélant l'intention de nuire."

54. Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 8, no. 25 : "A l'opposé de cette conception individualiste, Josserand définissait l'abus de droit comme 'l'acte contraire au but de l'institution, à son esprit et à sa finalité' ".

55. Le Tourneau, *Droit de la responsabilité et des contrats*, 2004, p. 1089, no. 6865.

56. Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 23, no. 115.

57. See Cour de Cassation 29.11.1983, D.M.F. 1984, p. 552 [*La-Bonita*].

58. See Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 25, no. 128 and 129 and p. 26, no. 136 with further references.

59. C.A. Aix-en-Provence 10.3. 1987, D.M.F. 1988, p. 545 and p. 549 [*Tipasa*].

60. See also C.A. Montpellier 28.6.1984, D.M.F. 1985, p. 625 [*Hadj-Abdul-Satar-Issa*].

61. Cour de Cassation ass. plén, 25.3.1999, cited by P. Bonassies, *Le droit positif en 1999, D.M.F. [hors série]*, 2000, no 42 did not concern a ship's arrest, but an arrest by customs officials. See also Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 20, no. 124, Cadiet/Le Tourneau, *Rep. Civ. Dalloz*, Tome I, V°, 2002, p. 25, no. 131, p. 26, no. 137.

62. In free translation of Cour de Cassation com 29.11.1983, D.M.F. 1984, p. 552 [*La-Bonita*]: "La Cour d'appel, après avoir souverainement considéré que la mauvaise foi du sous-affréteur n'était pas établie, et avoir retenu, par une disposition motivée dont la cassation a été écartée par le rejet du premier moyen, que le sous-affréteur était partiellement fondé en son action au fond, a pu décider qu'il n'avait pas commis d'abus de droit en exerçant une saisie-conservatoire pour obtenir garantie de sa créance." In the same sense: C.A. Rouen 9.5.1978, D.M.F. 1979, p. 211 [*Ushgorod*]. See also Navarre-Laroche, *op. cit.*, p. 219.

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 Zaatari of Lemphy's ship in order to secure a claim against Klides – Lemphy and Klides being separate legal entities – did not involve the liability for wrongful arrest of Zaatari towards Lemphy.[63] In the same decision, the Cour de Cassation chastised the Court of Appeal even further for not responding to the allegation that applicant for arrest Zaatari 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 criticised[65] 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.[67] 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, DMF 1996, p. 503, 505 [*Alexander III*]: "Attendu qu'en statuant 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 Klides ne serait pas de nature à engager la responsabilité des saisissants à l'égard de la société Lemphy, dès lors que ces deux personnes morales sont distinctes, la Cour d'appel a violé susvisé."

64. Earlier C.A. Aix-en-Provence had already held in a decision of 24.5.1985, D.M.F. 1986, p. 681 [*Eva Danielsen*] that to use a conservatory arrest to obtain a bank guarantee for an excessive amount constituted *abus de droit*. In the same sense C.A. Aix-en-Provence 28.11.1985, D.M.F. 1986, p. 694 [*Shangri-La*].

65. See Vialard, "Personnalité morale des sociétés d'armement et apparentement abusif des navires saisis", in D.M.F. 1996, pp. 467, 472.

66. In this sense also Vialard, D.M.F. 1996, p. 473, Navarre-Laroche, "Navire saisi, saisie levee, saisie abusive?", in D.M.F. 2003, p. 775, C.A. Rouen 24.10.2002, D.M.F. 2003, p. 770 [*Tanabata*].

67. In this sense also Racine, "Navire", in *Rép. Com. Dalloz*, 2001, p. 20, no. 126; Vialard, D.M.F. 1996, p. 472; Navarre-Laroche, *La saisie conservatoire des navires en droit français*, 2001, p. 222.

DUTCH LAW[68]

Introduction

14.30 Similar to French law, Dutch law is fairly generous in allowing ship's arrests. 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.[69] 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.[70] 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[71] of the court will decide whether or not to grant leave for arrest.[72] Although the injunction judge has discretionary powers to make the leave for arrest conditional upon the claimant putting up counter-security first,[73] 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[74] 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 release shall be ordered amongst others in case of non-compliance with procedural requirements prescribed at the penalty of annulment, if the invalidity of the grounds relied on by the arrestor or the lack of necessity of the arrest is concisely shown, or, if the arrest is effected for a monetary claim, if sufficient security is put up for this claim.
3. (...)."[75]

68. For publications in English about the Dutch law of ship's arrest, see *Berlingieri on arrest of ships* (3rd ed., 2000) and W. Verhoeven/W. Jarigsma, "The Netherlands", in *Maritime Law Handbook*.

69. The general requirements of an arrest petition are stated in art. 700-2 Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure or CCP), which in free translation reads as follows: "The leave shall be requested by means of a petition in which are stated the nature of the arrest to be effected and the grounds relied on by the petitioner and, if it is a monetary claim, the amount or, if the amount is not established, the maximum amount of the claim, without prejudice to the special requirements under the law in respect of the specific type of arrest concerned."See also *Berlingieri on arrest of ships* (3rd ed., 2000), p. 238.

70. This follows from Art. 728-1 CCP.

71. In Dutch "*Voorzieningenrechter*".

72. Art. 700-2 CCP.

73. Art. 701-1 CCP.

74. In the Netherlands it is customary to offer alternative security in the form of a letter of undertaking on the basis of the latest version (2000) of the standard Rotterdam Guarantee Form, of which a Dutch and English language version are widely available. See for an English language commentary on the wording of the Rotterdam Form, H. van der Wiel, "The Rotterdam Guarantee Form", in *E.T.L.*, 1999, p. 315 *et seq.*

75. The original wording in Dutch of Art. 705 CCP is as follows:"1. De voorzieningenrechter die verlof tot het beslag heeft gegeven kan, rechtdoende in kort geding, het beslag op vordering van elke belanghebbende opheffen, onverminderd de bevoegdheid van de gewone rechter. 2. De opheffing wordt

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.[76] In doing so, he will try to restore the "procedural balance" between the parties, which had been tilted in favour of the arrestor 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 conservatory ship's arrests 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 close 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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onder meer uitgesproken bij verzuim van op straffe van nietigheid voorgeschreven vormen, indien summierlijk van de ondeugdelijkheid van het door de beslaglegger ingeroepen recht of van het onnodige van het beslag blijkt, of, zo het beslag is gelegd voor een geldvordering, indien voor deze vordering voldoende zekerheid is gesteld. 3. (...)"

76. It is settled case law in the Netherlands that a provisional judgment of the injunction judge in summary relief proceedings is not binding upon the parties or upon the court in main proceedings. See Dutch Supreme Court (*Hoge Raad)* (hereafter *H.R.*) 16.12.1994, *Nederlandse Jurisprudentie* (hereafter *N.J.*), 1995, no. 213.

of fault on his part.[77] Unlike 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),[78] 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. *Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right*, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
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.][79]

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 (property) 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 there is a 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.[80] If the claim fails on the merits, it becomes clear that there was no ground of justification after all, and the arrest must be deemed 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[81] 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, aant. 14 *et seq.* and 43 *et seq.* (looseleaf), and for the law prior to 1992 *Onrechtmatige Daad* (old), I Onrechtmatigheid enz., nr. 277 (looseleaf).

78. A translation of the French art. 1382 of the Code Civil.

79. 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 dientengevolge lijdt, te vergoeden. 2. Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond. 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 opvattingen 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."

81. See H.R. 4.4.1912, Weekblad van 't Recht (W.), 9358, p. 1 [*Biesing/Weissenbruch*], H.R. 27.12.1929, N.J. 1930, p. 1433 [*Het Hoekhuis/Broeks*], P. Scholten, "De 'schuld' in de leer van de onrechtmatige daad", in W.P.N.R. 2310 (1914), p. 165 *et seq.*

German law – construed the liability for wrongful arrest less in terms of fault and more in terms of the claimant acting for his own risk when effecting and maintaining a conservatory arrest.[82] This is illustrated by a decision of the Hoge Raad regarding the liability for wrongful arrest of two insolvency liquidators. It was held (in my free translation):

"He who effects and maintains an arrest, acts for his own risk and must, but for exceptional circumstances, compensate the damage suffered due to the arrest, if it appears that the arrest was unlawful, even in the case that he was convinced of his claim on defensible grounds and did not act rashly."[83]

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.[84] 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 arrestor may 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 recht*" (abuse of rights) pursuant to Dutch law.[85]

14.42 Under the general Dutch patrimonial law in Book 3 of the Dutch Civil Code, "abuse of rights" (*abus de droit*) 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."[86]

82. H.R. 15.4.1965, N.J. 1965, 331 [*Snel/Ter Steege*], C.A. 's Hertogenbosch 28.2.1984 incl. in H.R. 20.12. 1985, NJ 1986, 231 [*Doodkorte/Dane*], C.A. The Hague 21.1.1992, *Schip & Schade (S&S)* 1993, 61 [*Oranje 12*]; H.R. 21.2.1992, N.J. 1992, 321 [*Van Gastel q.q./Elink-Schuurman q.q.*], Court Rotterdam 9.7.1993, *S&S* 1994, 4 [*Yukon*]; H.R. 13.1.1995, N.J. 1997, 366 [*Ontvanger/Bos*]; H.R. 7.4.1995, N.J. 1996, 486; Court Rotterdam 26.6.1997, *S&S* 1998, 86 [*Yukon*]; H.R. 11.4.2003, N.J. 2003/440 [*Hoda/Mondi Foods*]; H.R. 5.12. 2003, N.J. 2004/150. For a description of this development in Dutch case law and legal doctrine, see Van Rossum, *Aansprakelijkheid voor de tenuitvoerlegging van vernietigde of terzijdegestelde rechterlijke beslissingen*, diss. 1990, p. 27 *et seq.* and p. 21 *et seq.*

83. H.R. 21.2.1992, N.J. 1992, 321 [*Van Gastel q.q./Elink-Schuurman q.q.*]: "dat degene die een beslag legt en handhaaft op eigen risico handelt en, bijzondere omstandigheden daargelaten, de door het beslag geleden schade dient te vergoeden, indien het beslag ten onrechte blijkt te zijn gelegd, zulks ook in het geval dat hij – in de bewoordingen van het eerste onderdeel van het middel – op verdedigbare gronden van zijn vordering overtuigd is en niet lichtvaardig heeft gehandeld."

84. See H.R. 11.4.2003, N.J. 2003/440 [*Hoda/Mondi Foods*]; H.R. 5.12.2003, N.J. 2004/150; Court Arnhem 20. 10.2004, N.J.F. 2005, 57.

85. H.R. 11.4.2003, N.J. 2003/440 [*Hoda/Mondi Foods*].

86. The original wording in Dutch of Art. 3:13 of the DCC is as follows: "1. Degene aan wie een bevoegdheid toekomt, kan haar niet inroepen, voor zover hij haar misbruikt. 2. Een bevoegdheid kan onder meer worden misbruikt door haar uit te oefenen met geen ander doel dan een ander te schaden of met een ander doel dan waarvoor zij is verleend of in geval men, in aanmerking nemende de onevenredigheid tussen het belang bij de uitoefening en het belang dat daardoor wordt geschaad, naar redelijkheid niet tot die uitoefening had kunnen komen. 3. Uit de aard van een bevoegdheid kan voortvloeien dat zij niet kan worden misbruikt."

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,[87] are meant to be illustrative and not exhaustive.[88] The Dutch legislator has therefore not excluded the possibility of other examples of "abuse of rights" developing in Dutch case law and legal doctrine.[89]

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.

87. *Cf.* H.R. 17.4.1970, N.J. 1971, 89 [*Kuipers/De Jongh*].

88. *Cf.* Asser-Hartkamp 4-III, (2006), p. 81, no. 57; *Vermogensrecht (Den Tonkelaar)*, art. 3:13, Aant. 34 *et seq.* (looseleaf), P. Rodenburg, *Misbruik van bevoegdheid*, Monografieën Nieuw BW, A-4, 1985, p. 37 *et seq.*

89. See, in greater depth, D. J. van der Kwaak, *Het rechtskarakter van het beslagrecht*, diss. Groningen, 1990, p. 149 *et seq.*, and B. T. M. van der Wiel, *De rechtsverhouding tussen procespartijen*, diss. Leyden, 2004, p. 79 *et seq.*, who compares Dutch law with French and Belgian law.