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THE TEST FOR WRONGFUL ARREST OF VESSELS:
IN SEARCH OF HARMONISATION
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The other part of the requirement for this qualification was the completion of a programme of courses.

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IN SEARCH OF HARMONISATION

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CHAPTER 1 INTRODUCTION

I **Purpose**

The purpose of this dissertation is to evaluate and analyse the test for the wrongful arrest of vessels and cargo, and the liability for the payment of damages consequent thereto. The primary focus of this study will be on vessels. The test for wrongful arrest was established over a century ago. It has been adapted and varied, with every jurisdiction having a variation of the test. While there are two international conventions in existence in respect of the arrest of vessels, neither appears to have given rise to a uniform approach. I am of the view that the test is anachronistic, in need of revision and no longer applies effectively in the present day.

I will begin by explaining the test for wrongful arrest, and discuss its origins and history in the United Kingdom, the approach of both jurisdictions and how the test for wrongful arrest has been applied with a focus on common law jurisdictions. The approach to the application and interpretation of this test differs markedly between the civil and common law jurisdictions, in the context of their adaptation of the test, and has contributed to the lack of uniformity in the application of the test. This factor has inevitably given rise to the practise of forum shopping by ship owners and charterers.

There are two international Arrest Conventions in existence having come into being in 1952 and 1999 respectively. Both Conventions have in effect left the resolution of this issue of the test for wrongful arrest to be dealt with by the *lex fori*. The Conventions have unfortunately not given rise to a situation where uniformity is a driving factor.

The recognition of the need to reform the test for wrongful arrest of vessels is a long standing one, and, according to Sir Bernard Eder, he has campaigned for over thirty years for the reform of the test.[1]

This dissertation also refers to the renewed campaign to reform the test for wrongful arrest of vessels, initiated by Professor Mandaraka-Sheppard,[2] and recently debated between Sir Bernard Eder[3] and Martin Davies.[4] This campaign is not only in respect of reform in the United Kingdom but has recently given rise to a renewal of the campaign to implement reform by amending the 1999 Arrest Convention by way of a Protocol to the Convention.

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[1] Eder (2013-2014) A Time for Change 113.
[2] Mandaraka-Sheppard (2013) 41.
[3] Eder (2013-2014) Wrongful Arrest of Ships Rejoinder 143.
[4] Davies (2013-2014) 137.

The differing views, supporting justification, arguments in favour and against the reform of the test will be considered. Solutions as to how the test should be reformed, and other alternate options to determine malice and wrongfulness will also be considered.

The argument will essentially be that when the test was first established, it was geared to address the challenges of a particular context in time, and now, not only is that context no longer in existence, but the test has created the perhaps unintended consequence of denying potential litigants access to courts, thus creating an inequitable and unjust situation.

The work of the International Maritime Committee and the International Working Group on Wrongful Arrest of Vessels,[5] will be considered, and reference made to the results of the Questionnaire issued by the International Maritime Committee and the role it seeks to play in achieving harmonisation of the law relating to wrongful arrest.

Therefore, there are two aspects of relevance. The first is that the test in itself must be substantively reformed and the second is that this newly reformed test should be uniformly applied.

In conclusion, based on the discussion of the issues above, I will affirm my view that the time has come for the revision of the test as it stands in respect of wrongful arrest, and further that this revision should be one that establishes uniformity and harmonisation in this area of the law.

II **Origins of the test in the United Kingdom**

The concept of wrongful arrest and the test to determine the nature of the arrest whether wrongful or not was established in English law in the Privy Council decision of *The Evangelismos*,[6] and followed in *The Volant,*[7] and *The Strathnaver.*[8] The court held:

> "It is urged by the Appellant that damages ought to have been awarded in addition to costs, according to the practice of the Admiralty Court, because the arrest was improper. On the other hand it is said that the arrest of the ship was the foundation of the action, and therefore was not an illegal or improper act. Their Lordships think that there is no reason in this case for giving damages. Undoubtedly, if the arrest of the ship is an act of mala fides, or of that crassa

[5] Berlingieri CMI Yearbook 2016 297.

[6] (1858) 12 Moo PC 352 at 359 (*The Evangelismos*). This was followed in *The Volant* (1864) 167 ER 385 (Adm), and *The Strathnaver* (1875) 1 App Cas 58 (PC). *The Evangelismos* decision was preceded by a number of similar cases which considered the concept of wrongful arrest, including *The Orion* (1852) 12 Moo 356, *The Glasgow* (1855) Swa 145, *The Nautilus* (1856) Swa 105, and *The Gloria de Maria* (1856) Swa 106. However, none of these decisions established a standard or test for wrongful arrest. It may be that it was not warranted that it be necessary to deal with for the purpose of the decision of the court at the time.

[7] (1864) 167 ER 385 (Adm).

[8] (1875) 1 App Cas 58 (PC).

> negligentia from which the law implies malice, the Court of Admiralty would be justified in giving damages, as in an action brought at common law damages might be obtained. In the Admiralty Court however the proceeding is very convenient, because in the action in which the main question is disposed of damages may be awarded.
>
> The real question in this case comes to this: - Is there, or is there not, reason to say that the action was so unwarrantably brought, or brought with so little colour, so little foundation, that it implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it? Their Lordships are of opinion that there is nothing whatever to establish the Appellant's proposition. It is true the identity of the vessel was not proved; but there were circumstances which afforded ground for believing that the Evangelismos was really the vessel which came into collision with the Hind."[9]

This test is undoubtedly a part of English law, though the origin of the rule or test is unclear as is its basis or rationale.[10]

The current position as outlined in the British Maritime Lawyers Association's response to a CMI questionnaire on the implementation of the 1952 Convention is that a claimant will not be liable in damages for having arrested a vessel in the absence of proof of *mala fides* or gross negligence the claimant is not liable in damages for having arrested a vessel. This was established in *The Evangelismos*,[11] and confirmed in *The Strathnaver*,[12] and, most recently, in *The Kommunar (No 3)*.[13]

The three main approaches to the issue of damages for the wrongful arrest of ships are; first a narrow entitlement to damages based on the Admiralty decisions where *mala fides* or *crassa negligentia* must be demonstrated; secondly, a narrow entitlement to damages based upon the test of "reasonable and probable cause" from common law decisions; and lastly, the broader claim to damages in the civil legal systems where the arrest is unjustified.[14]

With regard to the wording used in these approaches, *mala fides* will be accepted to exist in those cases where the arresting party has no honest belief in its entitlement to arrest the ship.[15] Gross negligence arises in those instances where objectively there is so little basis

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[9] *The Evangelismos* (1858) 12 Moo PC 352 at 359.

[10] Eder 124.

[11] (1858) 12 Moo PC 352.

[12] [1875] 1 AC 58.

[13] *Centro Latino Americano De Commercio Exterior SA v Owners of The Ship Kommunar (The 'Kommunar') (No 3)* [1997] 1 Lloyd's Rep 22 (QBD) (*The Kommunar (No 3)*).

[14] Woodford 146.

[15] *The Kommunar (No 3)* 30.

for the arrest that it may be inferred that the arrestor did not believe in its entitlement to arrest the ship, or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel.[16] Unless a ship owner can prove the narrow category of wrongful arrest, it may find it difficult to obtain a remedy. There is no question of damages being awarded for unjustified arrest, where the claim has failed on the merits.[17]

[16] *The Kommunar (No 3)* 30
[17] BMLA Response to CMI Questionnaire re Implementation of 1952 Convention, accessed 21 August 2017

CHAPTER 2 APPLICATION OF THE TEST

I **Introduction**

A ship owner may be faced with substantial financial loss when a ship is arrested when it should not have been. The question is whether damages are recoverable to compensate the ship owner for those losses and the answer to this depends on whether the ship owner can establish that the conduct of the arresting party in arresting the vessel was effected *mala fide*s or *crassa negligentia*.[18] The wrongful arrest of a vessel is regarded as an arrest founded on a claim which is rejected on its merits by the court, or, abandoned by the arresting party without reason or where the arrest is not undertaken for *bona fide* reasons.[19] The issue is whether that loss may be recovered from the arresting party who has wrongfully arrested the ship.[20]

This question may be answered in the affirmative subject to the fulfilment of the test as to whether the conduct of the arresting party in arresting the vessel was effected *mala fide*s or *crassa negligentia*.[21]

II **Three phases of development**

Three phases in the development of the test for wrongful arrest can identified, beginning with its establishment in *The Evangelismos,* and running through the decisions that emanated in the immediate period thereafter, to the most recent the decision in *The Kommunar (No 3)*, and these three phases are traced in what follows.

III ***The Evangelismos***

The starting point is the decision in *The Evangelismos*, and it is useful to provide context to consider the facts of the case which were that an unknown ship collided with the plaintiffs' ship, *The Hind*, while at anchor. Despite pursuit of the ship responsible for the collision, it escaped. The following day, *The Evangelismos* was found in the docks and believed to be the colliding vessel and was subsequently arrested. At the trial, however, it was found to not be the 'guilty' vessel. *The Evangelismos* lay under arrest for three months, and after the outcome of the trial the vessel's owners claimed damages for wrongful arrest. Damages for wrongful arrest were not awarded as the Court was of the view that the arrest had been made in the

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[18] Meeson 133.
[19] Meeson 133.
[20] Meeson 133.
[21] Meeson 133.

bona fide belief that *The Evangelismos* was the ship that had collided with *The Hind* and that there was no *mala fides* in the arrest.

On appeal, the ship owner argued that the arrest was without probable cause. The ship owner faced a dual burden not only of proving *mala fides* but also the absence of reasonable and probable cause.[22] No reason was evident to hold *The Evangelismos* liable as the 'guilty' ship. The arresting party averred that the arrest was made in good faith. The court found that the identity of the colliding ship was not proved but there were grounds to believe that *The Evangelismos* had collided with *The Hind*. The arrest was thus not wrongful and the arresting party was not liable in damages.[23]

The Privy Council upheld the decision of the court *a quo* and rejected the ship owner's argument.[24] The ship owner was, despite his vessel being under arrest for three months, not even compensated for the legal costs incurred.[25]

The test as stated in *The Evangelismos* is:

> 'is there or is there not, reason to say, that the action was so unwarrantably brought or brought with so little colour or so little foundation that it rather implies malice on the part of the Plaintiff, or gross negligence which is equivalent to it.'[26]

The impact of these facts lies in that the case was not one where the claim against the ship was unsuccessful at trial, but a case where the arrest was brought against an 'innocent' ship. The notion of malice has been closely linked to the concept of the absence of reasonable or probable cause of action. The concept of the implication of malice as alluded to above is a matter for the judgment of the court and would have to be determined by a court taking into account the facts of each case.

IV **After *The Evangelismos***

The principle in *The Evangelismos* was applied consistently through the late 1800s.[27] In *The Kate*,[28] the court drew an express analogy with the common law action of malicious prosecution:

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[22] The Evangelismos (1858)12 Moo PC 352 at 356
[23] The Evangelismos (1858)12 Moo PC 352 at 357
[24] The Evangelismos (1858)12 Moo PC 352 at 359
[25] The Evangelismos (1858) 12 Moo PC 352 at 359
[26] The Evangelismos (1858) 12 Moo PC 352 at 359
[27] See *The Active* (1862) 5 LT (NS) 773, *The Eleonore* (1863) Br & L 185, *The Volant* (1864) Br & L 321; 167 ER 385 and *The Cathcart* (1867) LR 1 A&E 314, *The Collingrove, The Numida* (1885) 10 PD 158 and *The Keroula* (1886) 11 PD 92.
[28] (1862) Br & L 218.

> 'The defendants are not in my opinion entitled to damages, because the circumstances of the case do not shew on the part of the plaintiffs any *mala fide*s or *crassa negligentia*, without which, according to *The Evangelismos*, unsuccessful plaintiffs are not to be mulcted in damages.'

Mala fides is defined generally as bad faith or malice.[29] The test does not require both *mala fides* and *crassa negligentia*, but either one or the other; i.e. either *mala fide*s or *crassa negligentia*.[30] *Crassa negligentia* is regarded as gross negligence which implies malice, as is indicated in the following:

> 'gross negligence covers those situations where objectively there is so little basis for arrest that it may be inferred that the arrestor did not believe in its entitlement to arrest the ship or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel.'[31]

This approach was followed through in *The Strathnaver,*[32] where it was held that no damages were payable as 'there was simply an error in judgement in bringing the suit'. Despite the fact that the wrong vessel had been arrested, the court found that there was no *mala fide*s or *crassa negligentia*, and damages were therefore not payable by the arresting party.

In *The Cathcart*,[33] damages were awarded for the wrongful arrest where the vessel was arrested by the claimant of a mortgage bond before the debt was due. The court found that the plaintiffs had full knowledge of the facts and should have had regard to the terms of the mortgage agreement, from which it was clear that the debt was not due.[34] The vessel was about to embark on a profitable voyage, and would have suffered loss consequent to the arrest.

In *The Walter D Wallet*, the court found that the arresting party did exhibit *mala fide*s and *crassa negligentia* in seizing the vessel and were accordingly found liable for damages.[35] The court held that the action while brought at common law applied the same principles as would have been applicable in the Admiralty Court:

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[29] The Evangelismos (1858) Swa 378 381.
[30] *The Evangelismos* (1858) Swa 378 381.
[31] Berlingieri 253.
[32] (1875) 1 App Cas 58 (PC).
[33] (1867) LR 1 A & E 314.
[34] (1867) LR 1 A & E 333
[35] (1893) P 202 208.

> 'Still, the action of the defendants was, I think, clearly in common law phrase, without reasonable or probable cause; or, in equivalent Admiralty language, the result of *crassa negligentia*, and in a sufficient sense *mala fide*s, and the plaintiffs ship was in fact seized.'[36]

In *The Walter D Wallet*,[37] the vessel was alleged to have been wrongfully arrested by the defendants. The defendants had agreed to sell the vessel to the plaintiffs, subject to the condition that the policies of insurance covering the vessel on her voyage from London to Barry would be endorsed in favour of the sellers. Problems arose in respect of the policies and while the vessel was loading at Barry, the defendants communicated with their agent Mr Hamilton at Barry instructions that he was not to interfere with the loading but must arrange to stop the vessel from sailing without their authority.

Hamilton had prior to the sale been a part owner of the vessel but had sold his share by the time of these events. He then issued a writ in an action of restraint as a co-owner and arrested the ship in the usual way. The Plaintiff argued that an action at common law for the arrest with nominal damages in respect of the infringement of the plaintiff's right of possession; and that an application could be made on the same ground in an Admiralty proceeding for similar damages. The action turned on the fact that the writ issues was a writ in an action of restraint as a co-owner when Hamilton had seized to be a co-owner.

The court used the concept of 'without reasonable or probable cause' which was borrowed from the common law malicious prosecution cases and was equated to *crassa negligentia,* and nominal damages were awarded for seizing the vessel.[38] This matter involved an action in common law for the malicious arrest of a ship as distinct from an action in the Admiralty Court. The reference to the term 'reasonable or probable cause', does not appear to be an admiralty term but was in fact at the time a common law principle derived from the actions for malicious prosecutions of persons.

The court was of the view that, 'what was in consideration was not the appropriate test for wrongful arrest of a vessel but whether there was a right in common law to nominal damages for the malicious arrest of a vessel where no actual damage had been proved'.[39]

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[36] (1893) P 202 208.
[37] (1893) P 202 208.
[38] (1893) P 202 208.
[39] *The Kiku Pacific* [1999] SGCA 96.

V ***The Kommunar (No 3)***

In *The Kommunar (No 3)*, it was held that where the arresting party held no honest belief in its entitlement to arrest the ship, *mala fide*s must be found to exist.[40]

The arresting party in *The Kommunar (No 3)* was well aware that the beneficial owners and the person in possession of the ship were, at the time the cause of action arose, a different entity from the owners of *The Kommunar (No 3)* at the time of the arrest, the owners did not succeed in its claim for damages, despite arguing that the conduct of the arrestor amounted to *crassa negligentia*.

The court referred to the decision in *The Evangelismos* and interpreted the test as follows:

> 'Two types of cases are thus envisaged. Firstly, there are cases of *mala fide*s which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel. It is in the latter sense that the phrase *crassa negligentia* and gross negligence are used and are described as implying malice or being equivalent to it.'[41]

The court held that the difficulty in awarding damages, including wasted costs or other expenses incurred during a wrongful arrest, is inherent in the procedural rules of arrest of ships under English law. The reason why this is the position is due to the *in rem* jurisdiction of the Admiralty Court which requires no undertaking in damages from a claimant who obtains the benefit of security for his claim by arresting a vessel even if the jurisdiction has been wrongfully invoked.

The court held that:

> 'Even if the plaintiff's claim fails or he is found to have wrongly invoked the jurisdiction he will not have to compensate the ship owner for the expenses and losses arising out of the arrest unless *mala fide*s or *crass negligentia* is proved. This is a rule of English law which can bear very harshly on ship owners' who for some special reason may be unable to obtain release of their vessel by putting up security. It is not a rule which is found in the civil law systems. The more widely used procedure for obtaining security for a claim in personam in English law is the Mareva injunction, but there is an undertaking in

[40] [1997] 1 Lloyds Rep 22 (QBD) 30.
[41] (1997) 1 Lloyds Rep 22 QBD 30.

damages required and the liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction.'[42]

The absence of a similar facility in Admiralty proceedings *in rem* may thus leave without remedy an innocent defendant ship owner who has suffered loss by an unjustifiable arrest but who is unable to establish malice or *crassa negligentia*.[43]

While recognizing the injustice borne by the ship-owner the judge did not however deem it appropriate to exercise his discretion to allow a reduction of the ship owner's recoverable costs incurred due to the wrongful arrest, in order to give credit for the benefit of the bunkers remaining on board. This case did present an opportunity for the test to be revised but the court did not avail itself to this end.

Colman J in his judgement held that whether the conduct in *The Kommunar* amounted to *crassa negligentia* or not, it was not possible to say that it should have been obvious to the arresting party or their legal advisors that the claim in England was bound to fail taking into consideration the privatisation process and the complexity of Russian legislation.[44]

The court was of the view that the difficulty in granting damages, including wasted costs or other expenses incurred during wrongful arrest is,

> 'inherent in the procedural rules of the arrest of ships under English law … because the in rem jurisdiction of the Admiralty court requires no undertaking in damages from a plaintiff who obtains the benefit of security for his claim by arresting a vessel, even if he has wrongfully invoked the jurisdiction'. [45]

It is very difficult for a ship owner to obtain a remedy unless it is able to prove wrongful arrest, and the decision in *The Kommunar (No 3)* showed how difficult it is for the owner to succeed in its claim for damages for wrongful arrest.[46]

Unfortunately, there is no question of damages being awarded for unjustified arrest merely because the claim failed on its merits. Following the decision in *The Walter D Wallet* and *The Kommunar (No 3)*, the courts have continued to apply the test set out in *The Evangelismos.*

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[42] *The Kommunar (No 3)* [1997] 1 Lloyds Rep 22 33.
[43] *The Kommunar (No 3)* (1997) 1 Lloyds Rep 22 33.
[44] *The Kommunar (No 3)* (1997) 1 Lloyds Rep 22 33.
[45] Mandaraka-Sheppard vol 1 at 164.
[46] Mandaraka-Sheppard vol 1 at 174.

The court, in *The Kommunar (No 3)*,[47] citing the decision in *The Evangelismos* as regulating the recovery of damages for wrongful arrest, identified the following two principles:

> 'Firstly there are cases of *mala fides*, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without serious regard to whether there were adequate grounds for the arrest of the vessel. It is, as I understand the judgement in the latter sense that such a phrase as "*crassa negligentia*" and "gross negligence" is used and are described as implying malice or being equivalent to it.'[48]

According to Cremean, the terms 'unreasonable' and 'without good cause' must be read conjunctively, and that this is a wider notion than bad faith and may not require malice or implied malice.[49]

The argument proposed is that 'unreasonable' assesses a person's conduct to see if it is unreasonable, and 'without good cause' looks at the basis on which a person has acted to see whether such grounds constitute acting with without good cause.[50]

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47 [1997] 1 Lloyds Rep 22 (QBD) 33.
48 [1997] 1 Lloyds Rep 22 (QBD) 33.
49 Cremean 80.
50 Cremean 80.

CHAPTER 3 THE INTERPRETATIONS OF THE TEST

I **Confusion in the interpretation of the test for wrongful arrest**

Professor Mandaraka-Sheppard is of the view that there is confusion as to the application of the test.[51] The justification for this view is based on an interpretation of the test by Colman J in *The Kommunar (No 3)* as placing the cases in one of two categories.[52]

These are:

a) '*mala fide*s arrest', where it is shown from the *prima facie* evidence that the arrestor did not have an honest belief in the reason of the arrest; or
b) 'obviously groundless arrest, objectively judged, from which it can be inferred that the arrestor did not believe in, or did not give serious regard to, its entitlement'. This requires that there should be an objective assessment of the subjective state of mind of the arresting party.[53]

This is regarded as the equivalent of the test of without reasonable and probable cause, while taking into consideration the view of the court in the *Kommunar* to the effect that to,

> 'characterise their continued pursuit of the proceedings and maintenance of the arrest as without reasonable and probable cause would be putting the threshold of *crassa negligentia* far too low.'[54]

Professor Mandaraka-Sheppard is of the view that the court meant that without an assessment of the subjective state of mind of the arrestor, the threshold of the test would be too low. This view, she argues probably originates from the interpretation of the test in the *Walter D Wallet*, where the concept of without reasonable or probable cause was borrowed from the common law malicious prosecution cases and was equated to *crassa negligentia*.[55]

This view is based on a literal interpretation that 'without reasonable and probable cause' in the context of the wrongful arrest of ships, ought to mean that there are no reasonable grounds for the arrest and/or the basis for the arrest is more likely than not to fail. It is submitted that this phrase, in contrast to the malicious prosecution cases, should only require an objective assessment of the situation without inquiring about the subjective belief

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[51] Mandaraka-Sheppard vol 1 at 166.
[52] Mandaraka-Sheppard vol 1 at 166.
[53] Mandaraka-Sheppard vol 1 at 165.
[54] Mandaraka-Sheppard vol 1 at 165.
[55] Mandaraka-Sheppard vol 1 at 165.

of the arrestor. The use of this phrase by the courts as the test for the wrongful arrest of ships gives rise to confusion as different meanings are attributed to it.[56]

Two further factors serve to exacerbate this interpretational dilemma. These are:

a) 'no reasonable and probable cause' has been regarded as the common law test derived from the malicious prosecution cases instead of the Admiralty law test. This test also requires malice which may not be inferred from a finding of 'no reasonable or probable cause'.
b) The court in *The Evangelismos* asked the question, 'is the action so unwarrantably brought, or brought with so little foundation that it rather implies malice, or gross negligence which is equivalent to it?'.[57]

By the use of the word 'malice' Professor Mandaraka-Sheppard is of the view that the test has been conflated and this has given rise to the confusion that prevails today.[58]

II **Narrow and Broad interpretations of the test**

Nossal, in his 1996 article on damages for the wrongful arrest of a vessel,[59] argues that there is no justification for the wide protection under the law provided to plaintiffs who effect a wrongful arrest. Further this protection is not aligned with recent developments in analogous areas of the law and these pitfalls in the present situation may be rectified by abandoning the narrow rule found in *The Evangelismos*, and reverting to the broader principles provided for in *The Evangelismos*.[60]

The seemingly simple application giving rise to wrongful arrest of a vessel does not in itself entitle the ship owner to damages for any economic loss suffered. Damages only become a factor if it is proved that the arrest is made with *mala fide*s or *crassa negligentia*.

The various cases following *The Evangelismos* have placed undue emphasis on paragraph 1 of the judgement containing the concepts and failed to focus on the amplification in the second paragraph.[61]

According to Nossal, the narrow test established in *The Evangelismos* has prevailed and dominates this factual scenario so much so that other legal commentators are of the view that no plaintiff should be apprehensive when arresting a vessel within English jurisdiction that he

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[56] Mandaraka-Sheppard vol 1 at 165.
[57] Mandaraka-Sheppard vol 1 at 165.
[58] Mandaraka-Sheppard vol 1 at 165
[59] Nossal 368
[60] Nossal 368.
[61] Nossal 369.

would be then rendered vulnerable to an action for wrongful arrest.[62] The justification for this attitude is that an action for wrongful arrest is rarely commenced due to the severity of the test established by *The Evangelismos* and adopted by the courts for the award of damages.[63]

The view expressed by Cremean is that the test is not wrong, and while accepting that by implication the test is too narrow, also suggests as a solution that it is only a question of policy whether a proper test should be a little wider.[64]

This perception adds credence to the theory that the test in *The Evangelismos* has discouraged access to courts. The test is so severe and not easily satisfied thus leaving potential litigants discouraged from approaching the court because the probability of being successful in proving the requirements of the test is so difficult that one may be said to have given in at the thought of the battle before setting foot on the battlefield.

Nossal identifies five factors in answer to the question as to why, bearing in mind the potential financial harm to the ship owner as a result of the arrest of his vessel, that the party who effects the wrongful arrest is protected by law.[65]

These inter related reasons are:

(a) Access to courts

To ensure that plaintiffs have a wide access to the courts, '[p]laintiffs should not be discouraged from pursing their claims by the imposition of the risk of heavy damages in the event that they are unable to prove adequately their allegations at trial.'

(b) Action *in rem*

The plaintiff in an action *in rem* proceeds against the *res* itself and the ship owner or owner of the rest is regarded as irrelevant to the action. (If the owner of the *res* seeks to defend the action then he enters an appearance to defend, lodges security for the release of the rest and the action then proceeds as a hybrid both *in rem* and *in personam* despite the fact that the *res* may have already been released by the court. Should the ship owner decide not to defend, then the proceedings continue *in rem* and if the plaintiff is successful in his claim the property may be sold and the proceeds used to satisfy the judgement awarded.

[62] Nossal 370.
[63] Nossal 370.
[64] Cremean 11.
[65] Nossal 370-371.

(c) Malicious prosecution

The historical position was apparently that of jurisdiction being conferred on the Admiralty courts by the arrest of the res. Therefore, cases dealing with the wrongful arrest of vessels are defined as part of the delict of malicious prosecution, characterised by the requirements of malice and lack of reasonable and probable cause.

(d) Security

Ordinarily bail or security would be provided by the defendant in exchange for the release of the vessel, this ensures that the law enables where the defendant suffers losses greater that the transaction costs incurred under the security arranged that 'such losses ought to be considered too remote in that they flow more from the defendants conduct or impecuniosity that from the plaintiffs' arrest'.

(e) Costs

This final reason is termed a fiction in that the successful litigant is fully compensated by an order of costs in their favour granted by the court for expenses and losses consequent upon the litigation.

These five reasons are admittedly not cogent enough to sustain the ship owner's argument that he should not bear the commercial losses incurred by the arrest of his vessel due to the honest mistake of the arrestor.[66]

III **The link to malicious prosecution**

The test for wrongful arrest of ships as provided for in *The Evangelismos* provides for an objective assessment of the subjective intention of the arresting party, objectively viewing the evidence supporting the erroneous arrest.[67] The question that remains to be answered is whether the malice was actual or implied.[68]

The decision in the *Walter D Wallet*,[69] in introducing common law concepts into the wrongful arrest of ships- which is an Admiralty concept, has contributed to the prevailing level of confusion.[70]

This marrying of diverse concepts and contexts was alluded to by the court in the *Kiku Pacific* case,[71] where the court commented that reference to 'reasonable and probable cause'

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[66] Nossal 371.

[67] Mandaraka- Sheppard (2013) 49

[68] Woodford 118.

[69] Walter D Wallet [1893] P 202.

[70] Woodford 124.

[71] *The Kiku Pacific* [1999] 2 SLR 91 at para 13.

is a well-established common law principle in actions for malicious prosecution of persons. Furthermore, the facts in question were not appropriate for the test for the wrongful arrest of a vessel what was at issue was whether there was a right at common law to nominal damages for the malicious arrest of a vessel where no actual damage had been proved.[72]

The use of the words 'probable cause' may be regarded as conflating that common law phrase drawn from the law relating to malicious prosecution with the Admiralty view of wrongful arrest of ships and maritime property and thus providing an opportunity for misunderstanding.[73]

Generally, lawmakers are extremely careful in the use of word or terms that are ambiguous or have multiple meanings. Does it mean therefore that we remain stuck with an odious test simply because someone refuses to accept that the wrong meaning of the word was used?[74]

This simply serves as a further reason for the reform of the test for wrongful arrest so that clarity and a proper interpretation may be achieved. Once there is clarity, there will be certainty in how the law is applied and this will enhance confidence when one approaches a court.

As early as 1996, it was argued that the narrow test established in *The Evangelismos* is not in line with the modern development of the law. The actual test and its scope are regarded as uncertain.[75]

It is not clear if malice is a necessary requirement of the rule. The court in *The Evangelismos* indicated that malice per se was not required to be proved by the defendant in the original arrest proceedings, (who would in a claim for damages for wrongful arrest bear the onus of proving malice as plaintiff), but crass or gross negligence.

In *The Strathnaver*,[76] the test appears to have been somewhat varied to read as '*mala fide*s or malicious negligence'. The implication of this revised version is that mere, or gross, negligence is not sufficient, and that malice is required to be part of the test even in relation to negligence. This adds impetus to the view that the action for damages for the wrongful arrest of a vessel and the delict of malicious prosecution, where the plaintiff is required to prove that the defendant instituted or maintained the proceedings maliciously, are the same.

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[72] Woodford 125.
[73] Woodford 121.
[74] Woodford 121.
[75] Nossal 371.
[76] *The Strathnaver* (1875) 1 App Cas 58 (PC).

The same court - (Barnett J)- in *The Cathcart*,[77] *The Margaret Jane*,[78] and *The Walter D Wallet*,[79] found the plaintiffs liable for damages for wrongful arrest but only in *The Margaret Jane* was malice not proved.

In three other cases damages were awarded for wrongful arrest where no malice was evident; these are *The Victor*,[80] *The Eleonore*,[81] and *The Cheshire Witch*.[82]

> 'If malice is indeed a necessary requirement of the rule then it will be only in exceedingly rare cases that the defendant will succeed in his claim for damages for wrongful arrest. Malice may be proved by evidence demonstrating that the plaintiff arrested the defendant's vessel because of spite or ill will toward the defendant or due to indirect or improper motives.'[83]

It is evident from the decisions above that there is inconsistency is awarding damages whether malice is present or not.

As Professor Jackson indicates for damages to be awarded there must be some element in the arrester's conduct apart from enforcement of his claim, that will give rise to the satisfaction of the element of malice.

In *The Ohm Maria ex Peony*,[84] the court concluded that the true basis of the claim is to use the common law phrase without reasonable or probable cause and use the Admiralty language of *crassa negligentia*; or *mala fide*s.[85]

The rule as phrased above creates a test that is far more easily satisfied. But this test does however detract from the principles of *The Evangelismos* and *The Strathnaver* and 'appears to be refuted by every other case on point which emphasizes the requirements of malice or negligence.'[86]

This is the basis for the contention that the test for determining whether damages for wrongful arrest ought to be awarded is uncertain. Should the applicable test be the narrow rule established in *The Evangelismos* then the ceiling remains far too high as established by the courts, and appears to be overwhelming.[87]

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[77] *The Cathcart* (1867) LR 1 A & E 314.
[78] *The Margaret Jane* (1869) LR A & E 345.
[79] *Walter D Wallet* [1893] P 202.
[80] *The Victor* (1860) Lush 71.
[81] *The Eleonore* (1863) Br & L 185.
[82] *The Cheshire Witch* (1864) Br & L362.
[83] Nossal 372.
[84] [1992] 2 SLR 623 637.
[85] Nossal 374.
[86] Nossal 374.
[87] Nossal 374.

Should a plaintiff ship owner use the argument of having obtained legal advice as happened in the case of *Glinski v McIver*,[88] where the House of Lords in handing down judgement on malicious prosecution commented that where an arrest is wrongful the arresting party who obtained and acted upon legal advice prior to the arrest may be protected in a subsequent action for malicious prosecution as it may not be said that he acted without reasonable or probable cause. This opinion is refuted in the context of the shipping industry as the likelihood of a ship owner commencing arrest or *in rem* proceedings without obtaining prior legal advice is exceptional.[89]

The position in United Kingdom law following the implementation of the Judicature Acts 1873-1875 changed Admiralty Practice by the introduction of the writ of summons. Proceedings have since then been commenced by the issue of an Admiralty writ *in rem* and the service of that writ or acknowledgement thereof by the defendant serves to establish the jurisdiction of the Court. While the right to arrest the *res* may be perceived as a complementary action to the action *in rem*, the functions of the writ and the warrant of arrest are distinct and the two procedures are not required to prosecute an action *in rem*.[90]

Proceedings *in rem* may continue and even default judgement taken under an action *in rem* without the arrest of the *res* that is the subject of the action. The arrest of a vessel is not therefore a necessary step or relevant to the commencement of an action *in rem*.[91]

[88] *Glinski v McIver* [1962] AC 726.
[89] Nossal 374.
[90] Nossal 375.
[91] Nossal 375.

CHAPTER 4 APPROACH BY CIVIL AND COMMON LAW JURISDICTIONS

I **Introduction**

II **Approach in common law jurisdictions**

(a) Canada

Amongst the objections to reforming the rule in *The Evangelismos* is that the practice in Canada would not be consistent with other maritime states which retain the rule; and further that modifying the threshold for wrongful arrest actions would not undermine Canada's position among maritime nations, but may instead serve to encourage plaintiffs to act more carefully when arresting ships or cargo in Canada, but there would be no other far reaching implications.[92]

According to Michell arrest of a ship or cargo is a powerful weapon in a plaintiffs' armoury, and may be invoked with little regard for the damage that may result. The view advanced is that the rule as provided for in *The Evangelismos* has a threshold that is too high, and the middle ground of a standard of unreasonableness while preferable would bind the courts to a costly and lengthy enquiry into the plaintiff's motives for initiating the arrest.[93]

> 'The undertaking in damages requirement and the imposition of liability upon plaintiffs who are unsuccessful at trial regardless of their motives or the reasonableness of their actions, represent a clearer rule and would achieve a more appropriate balance between the interests of plaintiffs and defendants in maritime cases.'[94]

The decision by the Canadian Court of Appeal in the matter of *Armada Lines td v Chaleur Fertilizers Ltd*[95], in respect of the wrongful arrest of cargo and security lodged as a condition of release, were set aside, and amounted to a finding by implication that the arrest was unlawful and the security unnecessary. The court held that the shipper was entitled to damages for wrongful arrest of its cargo. The court expressly acknowledged the Federal Court Rule 1003 which provides for arrest of vessels as not specifically requiring an undertaking as to damages for wrongful arrest, and it was therefore a necessary inference that a plaintiff assumes the consequences of an arrest should the arrest be wrongful.

One of the requirements of a Mareva injunction as set out by Lord Denning MR in *Third Chandris Shipping Corp v Unimarine SA*,[96] whereby a plaintiff must give an

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[92] Michell 491.
[93] Michell 491.
[94] Michell 491.
[95] [1997] 2 S.C.R. 617.
[96] [1979] 2 Lloyds Rep 184 (CA) 189.

undertaking in damages in the event that the plaintiff fails in its action or the injunction turns out to be unjustified, was also suggested as a possible approach.[97]

On appeal, however, this approach was rejected and the rule in *The Evangelismos* expressly confirmed. The court cited the following expression with approval, 'the gravamen of the right to recover damages for wrongful seizure or detention of a vessel is the bad faith, malice or gross negligence of the offending party.'[98]

The Supreme Court of Canada while presented with an opportunity to reconsider the rule in *The Evangelismos*, declined to avail itself of the opportunity. The court's justification for refusing to do so was that of all the common law jurisdictions only Australia had actually departed from the rule and did so by way of statutory enactment and that any modification to the rule in *The Evangelismos* should be done by the legislature not the courts.[99]

This decision has been criticised as a failure by the courts to modify or remove the test in *The Evangelismos* which rule was a part of its colonial inheritance, and is not reflected in the Supreme Court of Canada, which is regarded as rarely being reluctant to overrule private law precedent for reasons of principle.[100] This is evidenced by two decisions[101] of the Canadian Supreme Court released a few months after the decision in *Armada Lines v Chaleur Fertilisers* where the Supreme Court modified common law rules and established the principles in order to determine whether it would be appropriate to do so.[102]

Michells' argument is that since in the above decisions the Supreme Court held that:

> 'Courts may change common law rules where this is necessary to achieve justice and fairness by bringing the law into harmony with social moral and economic changes in society and where the change will not have complex and unforeseeable consequences",[103] that similarly as the rule in *The Evangelismos* is in conflict with the modern day principles of justice and fairness that by breaking away from the rule would not give rise to complex and unforeseeable repercussion but would by modifying the rules align the law of maritime arrest with civil remedies in general and on a principled basis.'[104]

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[97] Margolis 12.
[98] Margolis 12.
[99] Michell 480.
[100] Michell 482.
[101] *Porto Seguro Companhia De Seguros Gerais v Belcan SA* [1997] 2 SCR 1278 and *Bow Valley Huskey (Bermuda Ltd) v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210.
[102] Michell 482.
[103] [1997] SCR 1278 1292.
[104] Michell 482.

This begs the question therefore as to why the Supreme Court saw fit to amend other rules but declined to do in respect of wrongful arrest.

(b) New Zealand- Wrongful arrest of aircraft under admiralty jurisdiction

In the unreported judgement of *Transpac Express Ltd v Malaysian Airlines*[105] involving the application of admiralty jurisdiction to arrest a Boeing 737 in respect of a carriage of goods dispute.[106] The Auckland High Court issued a warrant of arrest and the aircraft was arrested and detained for two days before being released. The plaintiff thereafter admitted that there had been no jurisdiction to arrest the aircraft under the Admiralty Act. The defendant counterclaimed for abuse of process and wrongful arrest. The court confirmed that the rule as established in *The Evangelismos* is part of New Zealand law, and in applying the rule to the facts of the matter, the court found that the plaintiff's incorrect view that there was jurisdiction under the Admiralty Act to arrest the aircraft was merely an error of judgement with no bad faith or gross negligence discernible.[107]

The plaintiff was consequently found to have acted in bad faith or was grossly negligent in bringing admiralty proceedings on what it either knew, or should have known, was not a binding charter and this act is what constituted a wrongful arrest and abuse of process.[108]

A number of pertinent questions are raised:[109]

(i) Why should a plaintiff not incur liability for immobilising a commercially valuable asset when it was, or should have been, evident that there was no admiralty jurisdiction on the plain wording of the act?

(ii) Where an error of judgment is discovered, or should reasonably have been discovered, after arrest why should a plaintiff not be under a positive duty to ensure that the arrested property is released immediately?

(iii) Surely it adds insult to injury to require the defendant to argue for the release of its wrongfully detained vessel?

These are all valid questions, and have as a linking thread the notion of reasonableness. Particularly with regard to the latter two questions, in relation to the test in *The Evangelismos*, the arresting party should be under a duty to ensure that the arrested vessel is

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[105] HC Auckland, AD 36-SD/99, 18 June 2002.
[106] Myburgh 296.
[107] Myburgh 296.
[108] Myburgh 297.
[109] Myburgh 297.

released immediately should the arrest have been effected consequent to an error of judgement. Allowing an arrest to continue despite knowing that it has been effected without justification or valid reason, is perpetuating a wrong already committed by another wrong.

Reasonableness would require, as would any sense of equity, that a defendant whose vessel has been arrested should not have to argue for the release of his own vessel where the arrestor stands by and listens to these arguments and opposes them knowing full well that he had no valid reason for the arrest of the vessel to begin with and yet allows the defendant to argue for the release of the vessel.

In a later New Zealand judgement before the High Court in the matter of *Mobil Oil New Zealand v The Ship Rangiora*,[110] involving an application by the owners of three arrested vessels to set aside the arrest on the basis of the courts *in rem* jurisdiction having not been properly invoked, the court held that damages for wrongful arrest may only be recovered where the arrest has been procured with malice. The court commented as follows:

> 'The situation for an owner is not so bleak in Australia where, as noted, the federal admiralty legislation imposes a liability for damages for unreasonable arrest on parties procuring the arrest of a ship. The test of unreasonableness is a much lesser burden that the test of malice. In my view a case can be made out for a legislative rebalancing of odds which disproportionately favour plaintiffs in this jurisdiction. In making these observations I acknowledge that our jurisdiction is modelled on the English system which has an ancient heritage. Arrest has always been a very powerful remedy recognised in most jurisdictions- malice is the measurement of English law in wrongful arrest actions. The need for international consistency is…... deserving of consideration. But in my view, we ought not to allow that factor to deter reform where the interests of justice so require.' [111]

(c) South Africa

The potential for substantial commercial loss as a result of the arrest or attachment of a ship, or even of its bunkers, cargo or equipment, may lead to delays in its schedule, and lead to further problems. The issue of wrongful arrest in South African law is governed by statute. South Africa is not a signatory to either the 1952 or the 1999 Arrest Conventions. The statute governing admiralty matters in South Africa is the Admiralty Jurisdiction Regulation Act 105 1983, (AJRA).

Section 5(4) of AJRA addresses the issues of wrongful arrest and demands for excessive security by providing that any person who makes an excessive claim or requires

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[110] [2000] 1 NZLR 49.
[111] [2000] 1 NZLR 49 65.

excessive security or without reasonable and probable cause obtains the arrest of property or an order of court shall be liable to any person suffering loss or damage as a result thereof for that loss or damage. The test as provided for in the 1992 Amendment to AJRA is the same as the common law test for damages for the wrongful arrest of persons.

Where a party invokes the Act and obtains an order of court for the arrest or attachment of a ship, that party is regarded as having impliedly submitted to the jurisdiction of the court. This then enables the court to have jurisdiction to hear a counterclaim for damages against the arrestor under s 5(4) of the Act.

According to Hofmeyr,[112] if a party described in the summons as the owner or insurer of a ship or cargo, or if notice of intention to defend is given in an action in rem, the power of attorney may describe the parties as they are described in the action, and together with the power of attorney filed, an undertaking must also be filed by the attorney to pay any costs awarded against the party represented by him and any damages awarded against that party in terms of s 5(4) of the Act. The undertaking provided is enforceable by the other parties to the action.

In *Mediterranean Shipping Co v Speedwell Co*,[113] it was held that the words loss or damage are no different from and are to be equated with delictual damages and like delictual damages are subject only to considerations of causation and remoteness.[114] The expenses that were incurred in obtaining security in order to obtain the release of maritime property from arrest or attachment are recoverable as damages flowing form the wrongful detention of the property. However, attorney and client costs incurred in setting aside an arrest or attachment order in a proceeding to recover damages for the wrongful detention of property are not recoverable as damages.

The South African courts have judicially considered the expression “reasonable and probable cause” in relation to the delict of malicious prosecution. The courts have held that the meaning reasonable and probable cause as referred to in S5 (4) was intended to have the same meaning as the meaning recognised in the context of malicious prosecution.[115]

An action for damages can potentially arise where the person obtaining the order did not have information which would lead a reasonable person to conclude that it was probable

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[112] Hofmeyr 208.
[113] 1986 (4) SA 329 (D)
[114] 1989 (1) SA 164 (D) 166B-D
[115] MV Heavy Metal Belfry Marine Ltd v Palm Base Maritime SDN BHD [1999] 3 All SA 337 (SCA) 342. See too *The Cape Athos* 2002 (2) SA 327 (D).

that he was entitled to the order sought. The arrestor must have had the honest belief that the information in his possession made it probable that he was entitled to the order sought. Should the arrestor raise the defence of a reasonable and probable cause this could be repudiated by the lack of this honest belief. [116]

The existence of a reasonable and probable cause may also be extinguished if the arrestor acting on legal advice did not honestly believe that the advice was probably correct.

Where an arrest may be set aside for whatever reason, does not automatically mean that the arrest was obtained without probable cause. The provisions of S5 (4) are not geared to penalise an unsuccessful litigant, but rather to penalise a litigant who acted unreasonably and thus obtained an order.[117]

S1(1) of the AJRA allows as a maritime claim: “wrongful or malicious proceedings…or the wrongful or malicious arrest, attachment or detention…. wherever such proceedings, arrest, attachment or detention took place.”

This paragraph should be read with S 5 (4) and includes damages for an arrest or any order of court obtained without reasonable or probable cause or resulting from an excessive claim or demand for excessive security.

Sir Eder refers to the South African approach as cited in the Law and Practise of Admiralty Matters[118], as together with Australia, being notable exceptions. The legislation in these jurisdictions refer to a party who obtains an arrest “without reasonable or probable cause” in South Africa or acts “unreasonably and without good cause” in Australia as potentially liable in damages.

Sir Eder maintains the view that these tests are broadly similar to that applied in *The Walter D Wallet*,[119] and poses the question that if so, whether the law in South Africa or Australia differs materially from English Law.[120]

Section 5(4) reads:

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

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[116] *The Cape Athos* 2000 (2) SA 327 (D) 335E -336D.
[117] Hofmeyr 243.
[118] Derrington and Turner 7.73-78.
[119] *Walter D Wallet* (1893) P 202.
[120] Eder 119.

Originally the test for wrongful arrest in section 5(4) was that it should be effected 'without good cause'. In 1992, the Act was amended to provide for the test of 'reasonable and probable cause'. In the application of this test the courts have been clear in that the application must make full disclosure of all the elements of the claim.

In the *Snow Crystal*,[121] the Supreme Court of Appeal, in acknowledging the consequences of the failure of a ship to maintain its schedule of delivery and taking on of cargo and the commercial loss associated thereto held that the loss of future charter hire was allowed as foreseeable damages consequent upon the delay of the ship in breach of a dry docking contract.

The court in its judgement referred with approval to the dictum of Didcott J, made in the context of attachments though equally relevant in the context of wrongful arrest, in the matter of *Katagum Wholesale Commodities Co Ltd v The MV Paz*:[122]

> 'to stop or delay [a ship's] departure from one of our ports, to interrupt its voyage for longer that the period it was due to remain, can have and usually has consequences which are damaging to its owner and charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo.'[123]

In *The Cape Athos*,[124] the arresting party and both local and foreign attorneys were held jointly and severally liable to the complainant owner of the arrested vessel. In affirming that the lack of honest belief negatives the defence of reasonable and probable cause the court was of the view that where the defence to a claim under s 5(4) is that the party concerned relied on reasonable grounds that the arrest was justified and where such defence is based on legal advice received, the question as to whether a reasonable client would have accepted the advice and would have acted upon it, is a question of fact. The question in issue was whether the defendants in causing the arrest of *The Cape Athos* did so without reasonable and probable cause.

The court in its application of the s 5(4) of AJRA and the expression 'without reasonable or probable cause' held that the expression should bear a similar meaning to that attributed to it in the context of malicious prosecution which is that a lack of honest belief negatives a defence of reasonable and probable cause. Where the defence to a claim under s 5(4) is that the party believed on reasonable grounds that the arrest was justified and such

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[121] *The Snow Crystal* 2008 (4) SA 111 (SCA).
[122] 1984 (3) SA 261 (N) 269H.
[123] *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) 581G-H.
[124] *The Cape Athos* 2002 (2) SA 327 (D).

defence is based upon legal advice received the question whether in a given case a reasonable person would have accepted that advice and proceeded accordingly is a question of fact. In addition, the value to be attached to the legal advisers' advice would depend upon whether the client had placed all the relevant facts before the legal advice and the circumstances under which the advice was given. The test is whether a reasonable person would have believed that the advice was probably correct.

The court referred to a number of English authorities in its judgement, as well as the South Africa Supreme Court of Appeal judgment in the *MV Heavy Metal*,[125] and concurred that 'without reasonable and probable cause' had the same meaning in Admiralty as it did in malicious prosecution, and further that this was the intention of the legislature.

The argument of the defendant was that in terms of the legal advice they had received that the non-arrest clause had no binding effect on them and was not able to be enforced by the other parties to the agreement. The court held that the defendants could not reasonably have believed that the provision was no longer of force and effect.[126]

The court noted that it appeared from the evidence that the defendants had decided that they wanted to seize the opportunity to arrest the vessel and left it to their lawyers to arrive at a plausible argument to justify the arrest.

The court in arriving at its conclusion referred with approval to various international law decisions. The court referred to the Appeal Court judgement of Schreiner J in *Beckenstrater v Rottcher and Theunissen*,[127] where the court referred to the United Kingdom judgment of *Leibo v D Buckman*,[128] where the court held that the definition of reasonable and probable cause should be defined as an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds of the existence of a set of circumstances which if believed to be true would reasonably lead any ordinary prudent man to conclude that the person charged was guilty of the crime accused of. The court also referred to *Glinski v McIver*,[129] where the court held that just as a prosecutor is justified in acting on information given to him by witnesses one may also accept advice on the law provided by a competent

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[125] *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal* [1999] 3 All SA 337 (SCA).
[126] *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal* [1999] 3 All SA 337 (SCA) 342.
[127] 1955 (1) SA 129 (AD) at 136A-B.
[128] [1952] 2 All ER 1057 (CA).
[129] [1962] 1 All ER 696 (HL) at 701f.

lawyer. This would be the course of action of a reasonable man and if so the objective test would be satisfied.

In the matter of the *MV Snow Petrel*,[130] involving an application for security in terms of S 5(2) of the Admiralty Jurisdiction Regulation Act and security for costs in terms of Rule 47 of the Uniform Rules of Court, the second applicant was the owner of the first applicant until recently, and in instituting the action the respondent caused the first applicant to be arrested.

The first applicant was released from arrest following on receipt of a bank guarantee. The second applicant instituted a counter claim against the respondent for damages arising from an alleged repudiation of a charter party agreement concluded between itself and the respondent, and claims loss of profits which it would have earned from use of the vessel between the date of the end of the charter and the date of release of the vessel from arrest being an amount of over R2m. Damages were also claimed by the second applicant pursuant to the wrongful arrest of the vessel based on crew and agents fees.

The court held that in respect of the claim for both losses of profit and damages following the arrest of the vessel the second applicant must establish that the arrest of the vessel was without reasonable and probable cause and accordingly wrongful in terms of s 5(4) of the AJRA.

In referring to the decision in the *MV Heavy Metal*,[131] the court made reference to the interpretation of the phrase 'reasonable and probable cause' meaning an honest belief founded on reasonable grounds.[132] Unfortunately in this matter the second applicant failed to allege facts which would establish that the plaintiff did not have an honest belief that the arrest of the vessel was a necessary step in the prosecution of its claim against the applicants.

The court in considering the phrase 'without reasonable and probable cause' in s 5(4) commented on the existing use of the phrase in the malicious prosecution context, and that it was the intention of Parliament as the national law making body that the phrase had the same meaning. The court was of the view that a person acting with honest belief at the time founded on reasonable grounds does not act without reasonable or probable cause; 'by

[130] *MV Snow Petrel: Blue Waters Marine LLC v EX-Ex Travel CC t/a Extraordinary Expeditions* 2013 JDR 1603 (ECG) 1.
[131] *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal* [1999] 3 All SA 337 (SCA).
[132] *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal'* [1999] 3 All SA 337 (SCA).

invoking such a well-known phrase, the intention was to import both the subjective and objective elements referred to earlier. However, malice is not a requirement.'[133]

Woodford notes the criticism of the Australian Law Reform Commission in respect of the South African Admiralty Jurisdiction Regulation Act, to the effect that the language in s 5(4) of the AJRA is vague.[134] The provision was later amended in 1992.

Section 5(4) of the AJRA forms the basis for S 34 of the Australian Admiralty Act 1988.

Section 34 provides that in relation to a proceeding commenced under the Act that a party who unreasonably and without good cause obtains the arrest of a ship or other property under the Act is then liable in damages to a party to the proceedings or to a person who has an interest in the ship or the property being a party or person who has suffered loss or damage as a direct result. The wording of this test - 'unreasonably and without good cause' - in the Australian Admiralty Act and s 5(4), in the South African AJRA – it must be noted that neither Act makes mention of gross or *crassa negligentia*.

A person acting in bad faith or with gross negligence may well be acting unreasonably and without good cause but if one acts unreasonably and without good cause does this mean one is being grossly negligent or there is *crassa negligentia*.

Clearly 'acting unreasonably and without good cause' is a wider notion and there is no link to malice or implying malice in these terms. Can malice or gross negligence be regarded as included in 'acting unreasonably and without good cause'?

The test is phrased conjunctively by the use of the word 'and 'and therefore both parts of the test must be satisfied.

Secondly only a person who has suffered loss and damage is within the scope of the provision and only if such loss or damage is suffered as a direct result of the wrongful arrest. This therefore ensures that only those directly affected by the conduct are able to claim.

(d) United Kingdom

(i) Gulf Azov v Idisi[135]

The owners of the cargo detained the ship and her crew in Nigeria. An exorbitant amount of USD 17 million was demanded as security for the release of the ship. The P & I

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[133] *Belfry Marine Ltd v Palm Base Maritime SDN BHD Name of Ship: MV 'Heavy Metal'* [1999] 3 All SA 337 (SCA) at 355.

[134] Woodford 144.

[135] [2001] 1 Lloyd's Rep 727 EWCA Civ.

club offered security by way of a letter of undertaking for USD 1,5 million but it was rejected. Following further negotiations an amount of USD 3million was eventually accepted as security. The owners and the P & I club then obtained a freezing order on the USD 3m and alleged that the agreement to pay the amount was voidable due to the duress and further that the vessel was wrongfully arrested. Judgement was obtained in default and the defendants applied to set the judgement aside.

The court decided in favour of the owners and this decision was further affirmed by the Appeal Court. The court held regarding the issue of the wrongful arrest that there was no objective justification for the amount claimed and the issue then arose as to whether the arrestor believed that there was such justification. The evidence showed that in the absence of any serious considerations, as to whether there was a sufficient basis for the arrest in respect of which such an excessive amount of security was demanded, led to the conclusion that wrongful arrest was clearly established.

(ii) The Kallang (No 2)[136]

In this instance although *The Evangelismos* test was not applied, had it been applied the outcome would have been the same. The facts in this matter entails Axa Senegal, the cargo receiver and insurer who in awareness of the fact that any disputes between the owners and receivers would be subject to arbitration in London, arrested the vessel in Dakar for the dual purpose of obtaining security and for establishing jurisdiction. Security offered by the owners P & I club was also rejected. Axa demanded a bank guarantee enforceable in the Senegalese jurisdiction, with the underlying agenda of using the arrest to force the owners to abandon the London arbitration clause which would be amount to a breach of the contract between the owners and the receivers and render them liable for damages on the basis of procuring breach of contract. The damages awarded were based on the ten days' wrongful arrest during which time the owners suffered losses for the use of the vessel, loss of hire for the next scheduled charter, and usage of gas oil and port charges, amounting in total to USD 130,350.00.

The test for determining damages for wrongful arrest is interpreted as being a two-step process.[137]

The first step involves a consideration of whether the arresting party honestly believed that it was entitled to arrest the vessel. Should it be established that the arresting party did not

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[136] [2009] 1 Lloyd's Rep 124.
[137] Chong 8.

have such an honest belief there is then no need to enquire further and that party will then be held liable for damages for wrongful arrest of the vessel on that basis.

Secondly, where the lack of an objective basis for the arrest gives rise to the inference that the arresting party held no actual belief in his entitlement to arrest or pursued the arrest regardless of whether grounds existed for a valid arrest, then this conduct will give rise to the conclusion of male fides, rendering the arrest wrongful and the arrestor liable in damages.

The test is considered to be an extremely onerous one,[138] and the high threshold established has proved to be effective in apparently discouraging ship owners from engaging in claims for damages for wrongful arrest.[139] According to Steven Chong, this is a fact best 'exemplified by the dearth of reported cases on wrongful arrest in England in the 20th century'.[140] The 1896 decision of *The Schooner Village*[141] marked the beginning of the period of no reported decisions on damages for wrongful arrest in English courts until the 1971 Court of Appeal decision in *The Damianos*.[142]

The nature of the test for wrongful arrest is widely regarded in this modern age as being out of step with the current times. The explanation as to why such a high threshold exists in respect of this issue is since at the time when the test developed the arrest of a ship constituted the commencement of an *in rem* action. The existing perception at the time was that at the initiation of the proceeding the plaintiff might not be able to prove its claim on a balance of probabilities.[143] The position therefore would be that it should not be held liable for an action wrongfully commenced unless it could be proven that the action was malicious or initiated without reasonable or probable cause.[144]

The analogy between claiming damages for wrongful arrest and the delictual action for malicious prosecution where either malice or an absence of reasonable or probable cause must be evident. Chong argues that were this still position there might be an important policy rationale to maintain the high threshold in *The Evangelismos* 'since allowing recovery for wrongful arrest too easily might have the unintended effect of stifling what would otherwise be legitimate in rem claims'.[145]

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[138] Chong 8.
[139] Chong 8.
[140] Chong 8.
[141] *The Village Bell* 1985-1986 12 TLR 630.
[142] *The Damianos; Astro Vencedor Compania Naviera SA v Mabanaft GmbH* [1971] 1 Lloyds Rep 502 (CA).
[143] Chong 8.
[144] Chong 8.
[145] Chong 8.

The introduction of the Supreme Court of Judicature Act 1873 in the UK enabled the commencement of admiralty actions by way of the issuing of a writ without the accompanying arrest of the vessel. Therefore, the historical justification for the stringent test established in *The Evangelismos* has no basis. [146]

Chong views the test as being one sided and excessively plaintiff friendly. He refers with approval to the Singapore decision of the *Vasiliy Golovnin* that 'the law ought not to perpetuate the now false analogy between malicious prosecution and damages for wrongful arrest'.[147] The perpetuation of this test and its high threshold will simply serve to cause immense financial loss to ship owners, and even where an arrest will prove to be ill founded , the costs awarded as compensation may be prove to be insufficient in comparison to the monetary losses caused consequent upon the wrongful arrest.[148]

(e) Australia

Australia has, after South Africa, promulgated legislative provisions to provide for damages for wrongful arrest. This is provided for in s 34 of the Admiralty Act of 1988 of Australia which provides that where a party unreasonably and without good cause demands excessive security in relation to the proceeding or, obtains the arrest of a ship or other property under this Act; then the person is liable in damages to a party to the proceeding or to a person who has suffered loss or damage as a direct result.

The above statutory provision is considered as necessary otherwise wrongful arrest is very difficult to prove and practical experience has made clear that the vexation or plaintiff will not often be concerned with the potential liability of paying damages.[149]

As at October 2015 there was no decided case in Australia where a ship owner successfully sought damages for wrongful arrest.

The Australian Admiralty Act 1988, provides that a plaintiff in Australia may recover damages for wrongful arrest if it can be proved that the arrest was initiated unreasonably and without good cause. The test established in the Australian statute is considered as being designed to strike an equitable balance between the interests of the claimant and the ship owner.[150]

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[146] Chong 8.
[147] Chong 9.
[148] Chong 9.
[149] Derrington and Turner 184
[150] Chong 9.

(f) Singapore

In the jurisdictions of both Singapore and Hong Kong, recent decisions have given rise to the view that *The Evangelismos* test is too harsh.

The decision of *The Rainbow Spring*[151] has been considered as the commencement of a pro-ship owner trend in the formulation of arrest decisions in Singapore courts.[152] In the Rainbow Spring the arrest was set aside for two reasons: firstly due to the claimants inability to demonstrate that the ship-owner was liable in respect of the claim and secondly due to the claimants failure to render full disclosure of all material facts in support of its claim.

In the case of *The Vasily Golovnin*,[153] before the Singapore High Court, the court criticised the test established in *The Evangelismos* and commented that the high threshold to be met in satisfying the test undoubtedly acted as a deterrent to ship owners in lodging claims for wrongful arrest. The relevance of the test in the light of its establishment over a century ago could not continue to retain its pertinence bearing in mind that potential litigants could commence in rem proceedings by way of service of a form without actually arresting the *res* i.e. the ship.[154]

The court stated: 'it is always open to this court to depart from this judicially created test when the day comes when it no longer serves any relevant purpose.'[155]

The court then back-tracked and decided that it would leave the issue to be addressed more fully at a more appropriate juncture after receiving full arguments from counsel and submissions from the maritime industry.[156]

The test was nevertheless satisfied on the facts and the vessel was held to be wrongfully arrested. As was the case in *Armada Lines v Chaleur Fertilisers*, though for different reasons, the court while acknowledging that the test could no longer be relevant, declined to review or discard it, thus leaving the test for wrongful arrest as established in *The Evangelismos*, applicable and in place for future similar situations.

The appeal of a lower threshold to be adopted in place of the continued use of the test as set down in *The Evangelismos* was evident in the Singapore judgement of *The Vasiliy Golovnin*. The Court of Appeal set aside the second arrest in Singapore by the bank of the

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[151] *The Rainbow Spring* [2003] 2 SLR 117.
[152] Tan & Pui 253.
[153] [2008] 4 SLR 994; [2008] SGCA 39.
[154] Derrington and Turner 185.
[155] Woodford 124-125.
[156] Derrington and Turner 186.

sister ship of the carrying ship which had been arrested at Lomé, Togo, and released on the grounds that there was no arguable case shown by the bank for the non-delivery of the cargo discharged at Lomé and further that the bank had failed to disclose material facts of an *inter partes* hearing at Lomé ventilating these same issues which were at the hearing resolved in favour of the owners.

The court was of the view that it was necessary for a party seeking to rely on the arrest of a vessel as security for a potential arbitration award to disclose in its affidavit brought under an ex parte application for a warrant of arrest, all the material facts. It transpired that had these facts been disclosed it would have made the court aware that the owner had delivered the cargo at the correct port.

When the owner of the ship brought a cross appeal for the wrongful arrest of the vessel the court held that the arrest was wrongful. This decision was based on the test of *crassa negligentia*, which was satisfied; the court holding that the bank could not in all honesty have believed in the validity of its claim.

In its obiter discussion of *The Evangelismos* test the court questioned the continued validity of the test and its relevance in modern times.

> 'with the historical background in mind and in the light of the legislative reforms undertaken by some other Commonwealth countries, it may be rightly asked if *The Evangelismos* test which appears conceptually anachronistic, should continue to be the governing rule for wrongful arrest in Singapore. Should not a lower threshold be adopted instead?'[157]

The comments of the court are indicative of the receptiveness of the court towards no longer accepting without question a test that is outdated and of the opening up of the court to a consideration that perhaps the test cannot be said to be applicable in modern times, but more so a recognition that the test is no longer functional or efficacious and is actually leading to unjust and inequitable situations.

> 'The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. An arrest of a ship can lead to tremendous inconvenience, financial distress and severe commercial embarrassment. Even the briefest of delays can cause significant losses. It can also in certain instances prejudice the livelihood of the ship's crew and the commercial fortunes of the ship owner. Maritime arrests can, when improperly executed, sometimes be as destructive as Anton Piller orders and even as potentially ruinous as

[157] *Vasiliy Golovnin* [2008] 4 SLR 994 at para 126.

> Mareva injunctions, the two nuclear weapons of civil litigation. As such, a plaintiff must always remain cautious and rigorously ascertain the material facts before applying for a warrant of arrest. While there is no need to establish a conclusive case at the outset there is certainly a need to establish a good arguable case before an arrest warrant can be issued. This determination plainly requires a preliminary assessment of the merits of the claim.' [158]

Despite their losses in Togo the Swiss banks decided to arrest a sister ship in Singapore a few weeks later. Their claim was struck out and held to be without merit and unarguable.

The arrest was set aside and found to be wrongful, the court holding that the plaintiffs acted maliciously and were liable to pay damages to the owners for the detention of the vessel. The court was of the view that not only disclosure that was deliberate or calculated to mislead would lead to damages but also where there was a failure to disclose material facts due to gross negligence or recklessness.[159]

The impact of this decision for wrongful ship arrests is that the Court affirmed the high threshold test for assessing claims for wrongful arrest by holding that the ship owner would need to show malice or gross negligence. It appears that the Singapore Appeal Court exhibited a propensity toward lessening the standard on the facts in holding the plaintiffs liable to the owners for damages for wrongful arrest. The focus would henceforth be on the court making an objective inquiry in to the circumstances prevailing as at the time of the arrest so as to assess whether action and the arrest were unwarrantedly brought or brought with so little colour or so little foundation to imply that they were brought with malice or gross negligence.[160]

The decision in the *STX Mumbai*,[161] by the Singapore Court of Appeal, which reversed the decision of the Singapore High Court, which latter court had awarded damages for wrongful arrest to the ship owner and set aside the arrest. On appeal the court was asked to confirm that the arrest was wrongful. This could have been an opportunity to restate or revise the Singapore judiciary's approach to the test for wrongful arrest. The arresting party, a bunker supplier argued that the impending insolvency of the owner of the STX Mumbai, the STX Pan Ocean would result in an anticipatory breach of the defendant's obligations and thus claimed it was justified in pursuing the arrest. Payment for the bunkers was however not due

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[158] *Vasiliy Golovnin* [2008] 4 SLR 994 at para 51.
[159] *Vasiliy Golovnin* [2008] 4 SLR 994 at para 140.
[160] *Vasiliy Golovnin* [2008] 4 SLR 994 at para 137.
[161] *STX Mumbai* [2014] SGHC 122.

until a later specified date. The court held that the vessel could not be arrested until such time as the defendant defaulted on the payment as per the contract. The court endorsed the test as established in *The Evangelismos* as upheld by the Singapore Court of Appeal in *The Kiku Pacific*,[162] and *The Vasiliy Golovnin*, and determined that both *mala fide*s and *crassa negligentia* were present. An exacerbating fact in this regard is the fact that even after being informed by the defendants that there was no legal basis for the arrest the Plaintiffs maintained the arrest of the vessel, and delayed in providing information on the security required for the release of the vessel.

The status of the city state of Singapore as the world's busiest bunkering port and an arena where ship arrests while prevalent remain subject to a progressive judiciary seeking to craft a balance between providing the remedy of arrest to compliant claimants and the economic need to protect ship owners from unsupported claims involves the assessment of these rival interests by imposing on arresting parties a duty of disclosure of all material facts failing which the arrest may be set aside but not penalising the same arresting party with damages for wrongful arrest unless the alternate factors of *mala fide*s or *crassa negligentia* are evident.[163]

In this matter the *mala fide*s of the arresting party was evident, and hence the court upheld the test for wrongful arrest. It is essential therefore that where a party seeks to effect an arrest that this far reaching step be taken with care and cognisance of the rights of the vessel owner or charterer.

There is no minimum claim in order to exercise the right to arrest a vessel. Hence a claimant with a claim of R50,000.00 may arrest a vessel of R50m. Such an act may serve to hamstring the operations of that vessel and its parent line.

At the same time a claimant with a modest claim may decide not to proceed by way of arrest of a vessel, regardless of the justification for his claim, if he anticipates that he will be faced with a counterclaim for damages.

A recent decision emanating from the High Court of Singapore in December 2015 serves to provide further evidence of the entrenched nature of the test for wrongful arrest that the arrestor will be liable for damages caused to the ship owner or charterer if the arrestor has acted with gross negligence.[164] In the decision of *Big Port Service v Owners of 'Xin Chang*

[162] [1999] 2 SLR 91.
[163] Tan & Pui 264.
[164] Berlingieri CMI *Yearbook* 2016 338.

Shu', the High Court of Singapore held that claimants were liable for damages for the wrongful arrest of the vessel.

It transpired that the owners had ordered bunkers and after payment for the supply thereof the ship was arrested by Big Port Service which claimed to have supplied such bunkers to the ship following a request by OW Bunkers Singapore who alleged that they were agents of the owners. However, it transpired that the arrestor was aware that the company was not the agent of the owners but a company who had supplied the bunkers purchased from claimants to the actual agents and had been paid for the supply. The court applied the test for wrongful arrest as established in *The Evangelismos* and cited with approval and applied in *The Vasiliy Golovnin*.

(g) Hong Kong

The Hong Kong High court, in *The Avon*, was of the view that the test of malice was harsh and a lesser standard would be more appropriate for wrongful arrest. However, the courts did not implement this view in applying a lower threshold test consistently so as to give rise to a more robust movement in moving away from the test as set down in The Evangelismos.

In the case of the *MV Jimrise*,[165] the court confirmed the approach of the Hong Kong High Court to awarding damages for wrongful arrest, which is that damages are only granted in circumstances where there is evidence of malicious negligence on behalf of an arresting party. The court displayed its reluctance to issue an order inquiring into damages for wrongful arrest. The test for showing that an arresting party has acted in bad faith or with malicious negligence sets a high threshold and is generally regarded as difficult for an arrested party to satisfy. While espousing a view that the test is too harsh and that something less should be required, this view has not been translated into reforming the test itself.

(h) Approach in Civil Law Jurisdictions

The Dutch law approach of a strict liability rule in the case of wrongful arrest in similar to German law, it terms of which if the underlying claim in respect of which the arrest was made is unsuccessful on the merits, the arresting party may be liable in delict for wrongful arrest, irrespective of good faith or absence of fault on his part.

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[165] HCAJ 180/2011.

Bearing in mind the nature of an ex parte application being brought without notice, and if it appears that the application also failed to include all material facts and therefore mislead the court, this can prove to be the end to the ship arrest.[166]

Steele makes it clear that there is no specific set Civil law approach to liability for wrongful arrest. Every country respectively approaches the issue of wrongful arrest differently through the prism of the fundamental values and liberties of significance to it. In France the right to arrest is considered part of civic rights to seek recourse to justice, whereas in Germany and the Netherlands greater emphasis is placed on the protection of property rights.[167]

Following the advent of the 1952 Arrest Convention, the issue of liability for wrongful arrest is governed by the law of the place where the arrest occurred and by implication necessitates a familiarity with the law of that place to determine whether the wrongful arrest of a vessel may give rise to the payment of damages.

The civil law countries in Europe are divided about the basic question as to whether if the claim in respect of which the arrest was made is unsuccessful on the merits is it then sufficient to found liability for wrongful arrest.

The Netherlands, Germany, Poland, Denmark, Norway, Sweden, and Finland are in agreement with this question and hold the applicant for arrest strictly liable if its claim fails on the merits, irrespective of fault or good faith.

Belgium France Italy and Greece follow an approach similar to English law and require that various degrees of fault viz. abuse of rights, gross negligence or bad faith must be proved by the applicant for arrest before liability for wrongful arrest may arise.

(i) The way forward

It is established that the claim in respect of which the arrest has arisen does not have to be rejected by the court in order to result in the liability of the arrestor. The conduct of the arrestor must have been grossly negligent. This is the prevailing practice in Belgium, England, France, Greece, Haiti, Italy, Nigeria, and Spain. In Holland, Norway, and Germany the arrestor is liable in damages if the claim is rejected, irrespective of fault, whereas in Denmark the arrestor is rendered liable for damages if the claim is unjustified- either by

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[166] Smeele 14.34.
[167] Smeele 14.44.

being rejected or the ship is released and it is proved that the claims made could not stand at trial.

In other jurisdictions, even if the claim is rejected on its merits, the arrest is not justified where due to the financial conditions of the debtor the claimant had no need for security.

The common and civil law divide looms ominously in any endeavour to achieve uniformity. This difference in approach between the two jurisdictions does not appear to me to be an insurmountable chasm. There can be a meeting of the minds towards the achievement of a common objective in revising the test and implementing it uniformly. It seems almost like the natural order of things and processes that that which differs would invariably draw together in the quest for harmony and uniformity. Where such concepts are rooted in the law, whether of civilian or common law in character, this may prove to be an arduous task.

Arrest is a powerful weapon. It is not dependant on there being an arguable claim or that the judgement may not be met.

Jackson is of the view that if the arrest is itself malicious, or has been made in respect of a malicious claim, damages may be awarded under malicious prosecution. Furthermore, in the event of an arrest made despite the existence of a caution, damages may be awarded.[168]

According to Meeson the judgements of *The Kommunar No 3* in the United Kingdom and the *Chaleur Fertilizers* judgement in Canada provide hints that the rule established in *The Evangelismos* should be changed, but in both judgments the test of *mala fide*s or *crassa negligentia* was nonetheless applied.[169]

The court in *Chaleur Fertilizers*, while considering the argument put forward in Nossal's article, remained of the view that any changes to the law falls within the scope of the legislature and not the courts, and this is the method whereby perceived failings in *The Evangelismos* rule have been corrected in Australia.[170]

The decision of the court in the *Kommunar No 3* and its application of the test for damages as laid down in *The Evangelismos* is affirmed by many commentators as the correct test to apply. The provisions of the test in *The Evangelismos* appear to be entrenched and clearly any departure therefrom will be fraught with difficulty, especially in the context of competing interpretations and agendas.

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[168] Jackson 424.
[169] Meeson 134.
[170] Margolis 11.

CHAPTER 5 THE ARREST CONVENTIONS

I **International Arrest Conventions**

There are currently two international conventions in existence relating to the arrest of ships. These are the International Convention Relation to the Arrest of Sea-Going Ships finalised at Brussels on the 10 May 1952 ("the 1952 Arrest Convention") and the International Convention of Arrest of Ships done at Geneva ("the 1999 Arrest Convention"). The issue of wrongful arrest was addressed in both Conventions, with much debate between the parties.

The common law countries owe the origins of their test for wrongful arrest of ships to the test as laid down in *The Evangelismos,* while the civil law countries hold the arresting party liable when it is proved that the arrest was unjustified.

II **The 1952 Arrest Convention**

Article 6 of the 1952 Arrest Convention states that:

> 'All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.'

The 1952 Arrest Convention provides that the rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in article 4, and all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

At the CMI Naples Conference of 1951, the associations of Finland, Norway, and Sweden objected to the provision whereby the issue of wrongful arrest was subject to the rules of the *lex fori*, and submitted a proposal in terms of which, save in exceptional cases, the claimant would have to provide security, the nature and amount of which would be fixed by the court, and should the arrest then prove to be unjustified, the claimant would be liable for the payment of damages.[171] The proposal was not supported by any other association, thus lending credence to the view that even amongst civil law countries there were differing views.

It is evident that even as far back as 1951, the suggestion of an arrest subject to the condition of security being secured in order to create a reasonable balance between the parties and relieve the harshness of a one sided test, was present.

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[171] Berlingieri 250.

According to Berlingieri, where an arrest is wrongful a claimant may be held liable in damages. However, the situations under which such liability may arise differ from jurisdiction to jurisdiction.

The issue of whether the Convention should contain a provision on the right of the owner of an arrested ship to claim damages in the event of wrongful arrest was a matter of controversy and fiercely debated. The civil law countries were mostly in favour of this provision and the common law countries against.[172] " The difference of view being a product of different tests applied in the different legal systems."[173]

The Convention in seeking to find a solution to the debate between the civil and common law jurisdictions was to leave the matter to be determined by the lex fori.

The 1952 Convention remains in force in 77 countries, with the United Kingdom being a signatory to the Convention.

III **The 1999 Arrest Convention**

The 1999 Arrest Convention states as follows:

Article 6: Protection of Owners and Demise Charterers of Arrested Ships

1. The court may as a condition of the arrest of a ship, or of permitting an arrested already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:
   (a) the arrest having been wrongful or unjustified, or
   (b) excessive security having been demanded and provided.
2. The courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:
   (a) The arrest having been wrongful or unjustified, or
   (b) Excessive security having been demanded and provided.

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[172] Berlingieri 249.
[173] Woodford 126.

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 State where the arrest was effected.
4. If a court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of Article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.
5. Where pursuant to paragraph 1 of the article security has been provided, the person providing such security may at any time apply to the court to have that security reduced, modified or cancelled.

At the Lisbon Conference the issue was debated between the participants and the CMI International Sub-committee on the issue of whether uniform rules should be provided in respect of the obligation of the arrestor to provide security and the liability of the arrestor in the event of wrongful arrest.[174]

A major objective of the 1999 Convention is to achieve a balance between the interests of claimants and owners. In order for an owner to be successful in an application for wrongful arrest, it would have to prove that the arrest is wrongful or unjustified.[175] Her view is that these words could be interpreted to mean that there was no legal ground for the arrest and it was therefore wrongful or unjustified, considered objectively without reference to the belief of the arrestor. The arrestor ought therefore to take reasonable care to find out whether there were reasonable grounds for the arrest.

The argument in support of a diminished threshold in relation to the higher standard of malice or *crassa negligentia* is based on the premise that since unjustified is defined in the dictionary[176] as "wrong, indefensible, unacceptable, outrageous, unjust, unwarrantable"; that such words imply that the conduct in question is to be judged objectively by applying a standard of what a reasonable man would have done had he been in the position of the arrestor at the time of the arrest.[177]

As the underlying premise of the Convention is to balance the interests of the parties, it may be understood that the intention of the drafter was to establish the test of a lower

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[174] Mandaraka-Sheppard at 53.
[175] Mandaraka-Sheppard at 53.
[176] Collins English Dictionary 2016. sv-"unjustified".
[177] Mandaraka-Sheppard at 54.

threshold than that of malice or *crassa negligentia*.[178] The Convention also makes provision for an undertaking in damages to be provided by the arrestor which is aligned to the underlying rationale of balancing the interests of the parties.

While the 1952 Arrest Convention provides that the issue of a cross-undertaking of security for damages is a matter for determination by the *lex fori*, the 1999 Convention allows courts discretionary powers in this regard. The proposal put forward by the associations of Finland, Norway, and Sweden in 1998 is very similar to the suggestion put forth by Sir Bernard Eder in 2013, which is one of a cross-undertaking in security in respect of damages.

The meaning and use of the word 'unjustified' in the drafting of the 1999 Convention was subject to much debate between the parties with the German contingent supporting its retention while the United Kingdom sought to have it removed. The word remained in Article 6 following the United Kingdoms' withdrawal of its objection.

So what does the phrase (?) 'wrongful or unjustified' mean in the context of Article 6? 'The answer appears to be that it means a variety of things to a variety of States and that there is no unified approach taken to wrongful arrest by the international community.'[179]

During the debate in respect of the use of the word 'unjustified' in Article 6, the Iranian delegate commented as follows:

> 'It seems to me that when we are drafting the Convention we should clarify and should go more in the detail of the debate. If everything is left to the discretion of the court we do not reach uniformity.'[180]

This view seems to favour an approach that the Convention should be clearer and more accurate in not only providing the test but also to provide clarity as to how to interpret the test, rather than leaving it to the discretion of the court to determine, which, it remains trite to say, will vary from state to state.

According to William Tetley, Article 6 (2) enabled courts to award damages for the distinct categories of wrongful arrest, unjustified arrest, or excessive security claimed.

> 'These provisions are an important recognition of the need to sanction arrests inspired by bad faith, malice, or gross negligence on the part of the claimant (in other words "wrongful arrests", as understood in the United Kingdom, United States, Canada and other countries of common law tradition). The Convention goes further however in also permitting damages to be assessed and counter security to be imposed in respect of

[178] Mandaraka Sheppard at 54.
[179] Woodford 128
[180] Berlingieri 533.

> "unjustified arrest (in other words arrest effected erroneously without proper legal foundation, but not motivated by bad faith or gross negligence). This position is taken by many civilian jurisdictions. Common law jurisdictions on the other hand have tended to award costs for bona fide arrest effected by simple mistake of law. The final text appears to have enshrined the civilian rule.'[181]

This extract clearly establishes the distinction between common law states such as the United Kingdom, Singapore and Canada who employ the criteria of bad faith, malice or gross negligence, and who usually award costs for bona fide arrest effected by mistake of law, and civil law jurisdictions who allow for damages to be assessed and counter security to be demanded in instances where arrest may have been effected by error or mistake but not effected for underlying reasons of malice or gross negligence. The outcome of the debate has resulted in the final text of the 1999 Convention adhering to the approach of civilian states, and the provisions of the Convention allowing for the use of the lex fori.[182]

If the common law states were to abandon the standards of mala fides and gross negligence and become signatories to the 1999 Convention, the dilemma of a non standard approach to the wrongful arrest of vessels would be resolved, and ultimately the application of the test may approach a level of uniformity that would be practical and in step with the demands of commercial shipping activity.

The interpretation of Article 6(2) by Woodford is that it does not limit the class of potential claimants of damages for wrongful arrest. The requirement for application of this section is that the loss or damages must have been incurred in consequence of the wrongful arrest.[183]

The 1999 Convention has come into force in 2011 on the accession of the tenth state being Albania.

According to Ruiz Abou Nigm, allegedly Member states of the European Union may not individually ratify the 1999 Convention on the basis that it contains jurisdictional provisions which would affect the rules contained in the Brussels I Convention. Ratification or accession would have to be effected by the European Union as a single entity. The accession of the European Union as a single entity to the 1999 Arrest Convention would serve to establish jurisdictional uniformity and the equal application of justice in the

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[181] Tetley 1970-1.
[182] Berlingieri 534.
[183] Woodford 129.

European Union. If this happens as anticipated, then this will consolidate a balanced special jurisdictional scheme for maritime claims,[184] and advance the enforcement of maritime claims in Europe.

IV **How does this impact on the test for wrongful arrest?**

In the pursuit of harmonisation and consistency in the law, accession to the 1999 Arrest Convention may provide the least complicated method of achieving uniformity. While encouraging this position, it comes with the caveat that while accession to the 1999 convention may lead to uniformity this is only so provided the terms used are clearly defined.[185]

By analogy, as the pursuit of uniformity has initiated reform in other areas of the law such as limitation of liability, ship owners' liabilities and international trade, why not Admiralty law.

The CMI international subcommittee and the Lisbon Conference debated the issue of whether uniform rules would be required in respect of the obligation of the arrestor to provide security and of his liability in respect of wrongful arrest.[186]

The reasons which existed previously which prevented the establishment of such a rule in the 1952 Convention were still in existence.

> 'It was therefore decided not to regulate the substantive aspects of the matter but specifically to give the court power to impose security and jurisdiction in respect of the assessment of liability for wrongful or unjustified arrest.'[187]

The court referred to is that in which the arrest is sought. The person in whose favour security may be granted is the defendant, which term presupposes the existence or imminent commencement of proceedings on the merits of the case between the arrestor and the person liable for the maritime claim in respect of which the arrest is sought.[188]

Berlingieri draws attention to the fact that this is not the only possible scenario. Under article 7 jurisdiction on the merits is granted, alternatively to the courts of the State in which the ship has been arrested and to the courts of the state in which security has been provided to obtain the release of the ship which may in fact be a state other than the state in which the

[184] Ruiz Abou-Nigm 207-8.
[185] Mandaraka-Sheppard 54.
[186] Berlingieri 391.
[187] Berlingieri 391.
[188] Berlingieri 392.

arrest was initially effected.[189] Equally courts may have refused to exercise jurisdiction or the parties may have agreed to submit to the jurisdiction of another state or even to arbitration.

The achievement of harmonisation of laws in this regard by the amending of the 1999 Convention by way of a Protocol may provide a solution.[190]

At the level of the International Maritime Committee ("CMI") and other international maritime bodies a possible solution may be for the states seeking a change in the United Kingdom legislation to actively lobby for the United Kingdom to change its stance in respect of the issue and negotiate further toward a compromise or mutually acceptable solution, which if properly negotiated and defined could be ultimately regarded as a win-win situation for all parties.[191]

The test for wrongful arrest used by common law states has its origins in the test established in *The Evangelismos* while civil law systems hold the arrestor responsible whenever it is proved that the arrest was unjustified. The Conventions both 1999 and 1952 in addressing this, appear to avoid direct resolution by leaving the issue to be dealt with by the *lex fori.* In so doing how can there ever be harmonisation of laws, as each state will apply and interpret the law differently, which is the current position.

Australia has determined not to be a signatory to either of the Arrest Conventions. The Australian Law Reform Commission indicated that Australia has not ratified the 1952 Arrest Convention as the proposed domestic legislation is more consistent with Australian interests.[192]

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[189] Berlingieri 392.
[190] Berlingieri 392.
[191] Berlingieri 392.
[192] Woodford 129.

CHAPTER 6 ARGUMENTS IN FAVOUR OF, AND AGAINST, CHANGE

I **The movement for reform**

The issue at hand was crisply defined by Sir Bernard Eder as: 'the right of a ship owner to claim compensation for loss caused by the detention of the owner's ship while under arrest.'[193] Sir Eder has campaigned for over 30 years to change the law and the approach of the courts in respect of the issue of wrongful arrest.

This view gained greater momentum following the article written by Professor Mandaraka-Sheppard in 2013, [194] which led to an article by Sir Bernard Eder, a response by Martin Davies, and a rejoinder by Sir Eder. This has served to shine a spotlight on the contentious and varied approaches to wrongful arrest and the application of the test or not by jurisdictions world-wide and has prompted the CMI to establish an International Working Group with the objective of establishing uniformity and harmonisation of the law.

The position remains one of the issue above being determined by the law of the contracting state in whose jurisdiction the arrest was either made or where the arrest was applied for.

Since *mala fides* or *crass negligentia* are the only grounds for the awarding of damages in English law where a ship owner has suffered loss by way of an unjustifiable arrest but is unable to establish *mala fide*s or *crassa negligentia* means that such a ship owner may be without a remedy. The onus of discharging this evidentiary burden is generally considered to be extremely difficult especially in the modern age, bearing in mind that the test was established in the 1858 decision of *The Evangelismos*. 'The need for reform has been recognised by commentators who see no justification in the different procedural treatment given to ship arrest and freezing orders in this context.'[195]

The availability of a variety of jurisdictions, and the opportunities and disadvantages each offers, inevitably leads to the practice of forum shopping. The potential for injustice and manipulation and inconsistencies in judgements have established a call for the harmonisation of domestic laws in respect of this subject.[196]

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[193] Eder 116.
[194] Mandaraka- Sheppard 19 (1) JIML 41.
[195] Ruiz Abou-Nigm 88.
[196] Eder 117.

The judgement in *The Kommunar (No 3)*[197] adds impetus to the call for a review and change to this area of the law. In this case, the defendant ship owner sought to recover damages for the wrongful arrest of the vessel. The claim was dismissed but the comments of Colman J were of significance, in pointing out the inherent characteristic of the action in rem which is to not require an undertaking in damages from a plaintiff who has obtained the benefit of security for his claim by arresting a vessel. Regardless of the success of the plaintiffs claim he will not have to compensate the ship owner for expenses or losses incurred unless *mala fide*s or *crassa negligentia* is proved thus creating an inequitable situation for ship owners.

Even if the plaintiffs claim fails or his is found to have wrongly invoked the jurisdiction he will not have to compensate the ship owner for the expenses and losses arising out of the arrest unless *mala fides* or *crassa negligentia* is proved. This will create difficulties for ship owners who are unable to put up the security for the release of their vessel. This rule does not apply in civil law systems. In English law the Mareva injunction is widely used for obtaining security for a claim *in personam* operates to provide security but an undertaking for damages is required and the liability for that undertaking will surface should the underlying claim fail, and thereby render the plaintiff liable for all losses caused by the injunction.[198]

The judge was of the view that, the lack of a similar approach in *in rem* proceedings has the effect of leaving an innocent defendant ship owner who having suffered loss by an unjustifiable arrest and in addition, also unable to establish malice or *crass negligentia*, now being devoid of a remedy.[199]

The problem thus appears to be the nature of the action *in rem* in its treatment of the test for wrongful arrest, and is considered by Sir Eder as placing a would be arrestor in a privileged position, in that it does not have to establish a link to found jurisdiction, and the owner is then in an untenable position because there is no cross-undertaking for security for damages, in the event of wrongful arrest.[200]

According to Professor Mandaraka-Sheppard, in her argument in support of the reform of the law in relation to wrongful arrest, the fact that the test to determine the wrongfulness of arrest was formulated in very different conditions from the current conditions and that it has

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[197] [1997] 1 Lloyd's Rep 22 (QBD).
[198] [1997] 1 Lloyds Rep 22 (QBD) 33.
[199] [1997] 1 Lloyds Rep 22 (QBD) 33.
[200] Eder 128.

not been critically examined in the context of modern commercial litigation is in itself a reason for the reassessment of the test.[201] This is a very cogent argument and the validity thereof should be recognised in the event of the next opportunity that may arise in commercial litigation where wrongful arrest is in issue.

The test could have been critically examined by the Canadian Appeal Court in the *Chaleur Fertiliser* case,[202] but the court determined instead, that this was a matter best dealt with by the Legislature, and consequently declined to revise the test.

Claimants who seek damages for wrongful arrest of their ships are often one-ship owners, who face the constant risk of their asset either being sold or lost at sea.[203]

The stringent nature of the test for wrongful arrest under English law operates in effect by practically providing claimants with immunity from being sued for damages since they know the owner of the arrested vessel will be discouraged from seeking damages for wrongful arrest.

The following instances are examples of where claimants have sought to abuse the right to arrest: by making unreasonable demands for excessive security; refusing to accept an undertaking from the owners P&I club, and continuing the arrest until the arrestors demands were met; failing to thoroughly interrogate the basis or foundation for the arrest; where the claimant lacks the requisite standing to arrest the ship; where the ship was not in the beneficial ownership of the alleged defendant.[204]

In such situations, the owner has been unable to discharge the burden of proof, except in certain exceptional cases that the arrestor acted *mala fides* or *crassa negligentia*.

The court commented in *the Kommunar No 3* that to characterise the proceedings and the arrest as without reasonable and probable cause would be putting the threshold for *crassa negligentia* too low.[205] According to Professor Mandaraka-Sheppard, what the court meant is that without an assessment of the subject state of mind of the arrestor the threshold would be too low.[206] This state of confusion, referred to earlier, must be considered in the context of the interpretation of the test in the *Walter D Wallet* where the concept of 'without reasonable

[201] Mandaraka-Sheppard 42.
[202] Mandaraka-Sheppard 42.
[203] Mandaraka-Sheppard 42.
[204] Mandaraka-Sheppard 42.
[205] Mandaraka- Sheppard 49.
[206] Mandaraka- Sheppard 49.

or probable cause' is adopted from common law malicious prosecution cases and has been equated to *crassa negligentia*.[207]

The view is that 'without reasonable or probable cause' in the Admiralty context should mean that there are no reasonable grounds for the arrest and or the cause of the arrest is likely to fail.[208] Where the expression 'without reasonable or probable cause' is used 'confusion arises because different meanings can be ascribed to it.[209] Reasons of uniformity and justice require that this outdated test is abandoned'.[210]

The procedural background against which *The Evangelismos* was decided has changed and the law in other jurisdictions has evolved to keep pace with the challenges of commercial reality.

The civil law test used for malicious prosecutions and then applied to wrongful arrest has caused confusion. The reason why this is so, is because of the varying terminology and definitions which give rise to inconsistency in the application of the law.

Sir Eder's view regarding the introduction of a cross undertaking in damages is supported by Professor Jackson who views the test as a somewhat one-sided practice in the context of the opposite and regular imposition of a cross-undertaking where a person is seeking a Mareva injunction.[211]

> 'The conceptual and jurisprudential association between ship arrest and the in rem claim has thus many disadvantages: it creates confusion between the different function of ship arrest: the protective function, on the one side, and the jurisdictional function on the other side by making ship arrest dependant on merits jurisdiction. This linkage has especially undermined the correct application of the 1952 International Arrest Convention in English law. In the opinion of Jackson the intricacies of English law in this respect show the "schizophrenic" approach of English law to maritime claims.'[212]

According to Professor Mandaraka-Sheppard, the test established in *The Evangelismos* having been based on the criminal law concept of malicious prosecution, pre-dates the evolution of the delict of negligence and is outdated thus leading to confusion and conflicting judgments.[213]

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[207] [1893] P 202.
[208] Mandaraka-Sheppard 49.
[209] Mandaraka-Sheppard 49.
[210] Mandaraka-Sheppard 49.
[211] Jackson 417.
[212] Ruiz Abou-Nigm 90.
[213] Mandaraka-Sheppard vol 1 at 163.

The argument in favour of reform of the test for the wrongful arrest of ships is simply that the test in civil cases for wrongful arrest of ships should be an objective test and should be based on whether or not there were reasonable grounds for the arrest.[214]

II **Arguments in favour of change**

The economic climate and jurisdictional background during which *The Evangelismos* was decided is not applicable in this present day. The courts have remained bound by the decision and continued to apply the test as set down therein, even as recent decisions above have shown, the test in The Evangelismos may be outdated but certainly not abandoned.

(a) Basis for test out-dated

Since the test is derived from the test for the delict of malicious prosecution, it has caused confusion. However the test in delict has been adapted to suit present times therefore there is no reason why this should not be the same approach in Admiralty.[215]

(b) Inconsistent application of test

The test for wrongful arrest in Admiralty has been inconsistently applied. The courts have awarded damages for wrongful arrest of a ship without there being *mala fide*s. In these matters, the arrestor was unsuccessful in the claim on the merits. Other instances have seen the owner being awarded only costs and not damages as no *mala fide*s or *crassa negligentia* was evident.

(c) Awarding damages and a cross undertaking in security

Damages have been awarded in the following cases where the test of mala fides or crassa negligentia was fulfilled.

In the matter of *The Kos*,[216] the Court allowed for the costs incurred by an owner in putting up security to avoid arrest as recoverable on the basis of being costs incidental to the proceedings. Therefore, if this precedent is followed ship owners under threat of arrest who put up a guarantee to avoid arrest may be able to recover the costs incurred in procuring that guarantee should the arrestor be unsuccessful in obtaining the arrest of the vessel.

If, however he fails to put up a guarantee, due to financial or other limitations and the vessel is then arrested there is no prospect of being awarded damages or any other recompense unless he is able to prove *mala fide*s or *crassa negligentia*. According to the argument put forward by Sir Eder this is an unjustifiable anomaly, and this raises the question

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[214] Mandaraka-Sheppard vol 1 at 163.
[215] Mandaraka-Sheppard 44.
[216] *ENE 1 Kos Ltd v Petroleo Brasileiro SA(The Kos)* [2010] 2 Lloyds Rep 409 EWCA Civ at 420-21

therefore as to why should the ship owner be in a worse position purely due to financial constraints preventing him putting up security.[217]

While appreciating that should a ship owner be entitled by right to claim damages for wrongful arrest due to substantive reasons put forward by the court or in the event of the claim being abandoned may be taking the position too far, he proposes that a court may require a 'cross undertaking in damages from the claimant as a precondition of lending its assistance to the arrest of the relevant ship'.[218]

The cross-undertaking to provide security for damages is a standard requirement in any application for any injunction, and equity therefore requires an undertaking, bond or other safeguard.

The practice of the English Admiralty Court has never been to require a cross-undertaking in damages from the party seeking the arrest.[219] Furthermore, neither can it be conclusively argued that the authorities prohibit the Admiralty court from seeking a cross undertaking for the claimant as a precondition of the court acceding to the claimants request for the issuance and execution of the warrant of arrest. 'It is because the law does not permit a claim for damages to lie absent *mala fide*s or *crassa negligentia* that I would suggest that a cross undertaking in damages should be required.'[220]

In response to an argument that cross-undertakings would potentially be impracticable, he is of the view that he can see no reason at present why there should be any practical difficulty in a procedure which requires a cross-undertaking in damages from the claimant.[221]

Further to the allusion to forum shopping referred to in the beginning of this dissertation, it stands to reason that a requirement for a cross-undertaking will clearly operate to discourage potential litigants from selecting a particular jurisdiction where this is a requirement. But at worst it is an economic reason and not a legal reason.

(d) Access to courts

The inordinately high threshold founded by the component criteria of *mala fide*s or *crassa negligentia* has functioned as a deterrent to accessing or approaching the courts by any party and its vessel that has been the victim of wrongful arrest. The dearth of judgements emanating from United Kingdom courts, referred to in Chapter 4, stands as proof sufficient of

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[217] Eder 128.
[218] Eder 130.
[219] Eder 130.
[220] Eder 130.
[221] Eder 130.

the reluctance to approach a United Kingdom court, or any court known for its rigid application of the test in *The Evangelismos*, for the adjudication of such matters, and the award of damages.

Thus, apart from the economic loss, and loss of profit and commercial viability that stand as the risks facing ship owners, or disponent charterers, in the event of wrongful arrest the ship owner or disponent charterer in its pursuit of justice is then faced with the challenge that the somewhat insurmountable test for wrongful arrest in respect of which it bears the onus also means that its access to court is limited or curtailed.

Unlike any other litigant who approaches the court knowing full well his prospects of success may be at best a 50/50 chance of success, a ship owner who has had his vessel wrongfully arrested is deterred from approaching a court at all, thus not even able to avail himself of the right of access to justice, never mind what the outcome of exposure to that justice might be.

The right to access to courts may also be interpreted as the right of a claimant seeking to arrest a vessel to secure or satisfy his claim being discouraged from approaching a court by being labelled malicious in seeking to arrest a ship, despite having a valid claim.

> 'The arrest of ships is a recognised feature of international maritime commerce and international maritime jurisdiction. Very often legitimate claims will go unsatisfied unless there is recourse to an effective and efficient system of maritime arrest.'[222]

Furthermore, any potential applicant seeking recompense for wrongful arrest may be discouraged by the potential for damages due should they be unable to prove either the *mala fide*s or *crassa negligentia* in the conduct of the other party in order for their claim to be successful.

Another facet of this argument is that if damages were to be awarded for the wrongful arrest of a ship or cargo without having to fulfil the requirements of fault or gross negligence would this then discourage plaintiffs from bringing 'bona fide actions in rem'.[223]

The response to this view is in the affirmative as strict liability for wrongful arrest would provide a disincentive to initiate the arrest procedure.[224] This does not, however, take

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[222] *Tisand Pty Ltd v the Owners of the Ship MV 'Cape Moreton' (Ex Freya)* [2004] FCS 1191 (FCA) at paras 32-33.
[223] Michell 489.
[224] Michell 489.

into consideration that courts must balance the interests of the plaintiff against those of the defendants, and not simply maximise opportunities for plaintiffs to bring claims.[225]

Whilst damages may be minimised by the defendant agreeing to post security there should be no actual requirement that compels it to do so and such security then only serves to reduce the quantum of damage suffered.[226]

If the changes to the test being lobbied for are successful it would establish and equitable and reasonable test, and create certainty and uniformity in the law, curtail forum shopping, improve access to courts [specifically for the ship interests] without having a dual burden of overcoming the onus established by a stringent test and the possibility of damages should the application for wrongful arrest be unsuccessful, and allow for a cross undertaking in damages.

III **Argument(s) against change**

The sentiments expressed in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd*,[227] by the presiding officer are that:

> 'Clearly it cannot be open to every successful defendant to round upon his unsuccessful claimant or prosecutor, no matter how great the collateral damage. Defining the circumstances in which he can do so is fraught with difficulty…'.[228]

These words appear to be quite sensible and logical. The consideration of awarding damages would become a reality if it is plainly evident that the plaintiffs claim would not be successful on the merits, and any form of legal proceedings would be apparent as vexatious in nature. It appears to be a fine line between this position and awarding damages whenever a plaintiff's claim is unsuccessful.

In the matter of *Compania Financiera v Hamoor Tanker Corporation (The Borag)*,[229] the managers of a vessel had undertaken the management of a ship; in the course of a dispute the managers had the ship arrested in Cape Town. The owners obtained a bank guarantee to secure its release and sought the return of the interest payments on the overdraft it incurred in order to provide the security of a guarantee. This was granted by the trial court. On appeal, the court held that the expenditure was damages, not the mitigation of damages. It was therefore too remote to be accepted as foreseeable. The court in upholding the appeal held: 'It

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[225] Michell 489.
[226] Michell 489.
[227] Michell 489.
[228] [2013] UKPC 17.
[229] [1981] 1 WLR 274, [1981] 1 All ER 856.

is not every consequence of a wrongful act which is the subject of compensation. The law has to draw a line somewhere.'[230]

The significance of this comment is that a court will not blindly grant damages in respect of expenses incurred in the event of wrongful arrest, and implies, rightly so, that every situation will be weighed up and considered on the basis of the facts, the law and the competing interests of the parties before the court.

IV **To reform or to delay**

In addressing the Mareva injunction analogy used by Sir Eder in relation to wrongful arrest, the argument against this is that if no security is provided by the ship owner, a ship arrest affects only one of the ship owner's assets only until security is provided. The argument is that the remainder of the ship owners business continues as normal.[231]

This would be appropriate of course where the ship owner is the owner of more than one asset, and the arrest of one vessel may not necessarily give rise to any prejudice to the remainder of the business, and furthermore any possible economic loss may be offset or absorbed by the use of other ships or assets.

Unification of the law and the test for the wrongful arrest of ships and cargo will leave an unscrupulous individual without the option of forum shopping. Harmony and certainty in the law will ensure that any party with a hidden agenda will be unable to effect any nefarious motives.

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[230] [1981] 1 WLR 274 at 281, [1981] 1 All ER 856 at 861.
[231] Davies 139.

CHAPTER 7 THE CMI AND THE INTERNATIONAL WORKING GROUP

I **CMI**

The study into the issue of liability for wrongful arrest was initiated following a presentation at the CMI Conference in Hamburg, 2013, by Dr Aleka Mandaraka-Sheppard entitled 'Wrongful Arrest of Ships: A Case for Reform'.[232] The position in English law as established by the decision in *The Evangelismos* was outlined and compared with common and civil law jurisdictions and a proposition was made for the reform of the English law position and also the international reform of the law in this area.[233]

II **The International Working Group**

(a) Constitution of working group

The Comite Maritime Internationale (CMI) constituted an International Working Group[234] (IWG) following the presentation of Mandaraka- Sheppard, to prepare a Questionnaire into how the subject of wrongful arrest was dealt with in both civil and common law jurisdictions, with Mandaraka-Sheppard as Rapporteur and Georgio Berlingieri as Chair.

(b) Questionnaire

The contents of the Questionnaire were drafted, debated and thereafter finalised and circulated to the various National Maritime Law Associations, (NMLAs).[235] The purpose of the study was to identify the similarities and differences among the various legal systems so that the CMI-IWG can develop a draft set of rules with the objective of harmonisation of the laws on wrongful arrest.[236] The CMI website included a new section containing the relevant and supporting documents in relation to the study.

The IWG was joined by Sir Bernard Eder whose stance in respect of advocating a chatnge to the law in this area spanned 30 years. His position in relation to this subject is that the English Courts should revise the test established by *The Evangelismos* or that the arresting party be compelled to provide a cross undertaking in damages as a precondition of any arrest as one would ordinarily do in the instance of applying for an injunction.[237]

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[232] Based on her article in (2013) 19(1) *JIML* 41-59.
[233] Berlingieri CMI Yearbook 2016 296.
[234] Berlingieri CMI Yearbook 2016 297.
[235] Berlingieri CMI Yearbook 2016 297.
[236]Amended short summary of facts- Liability for wrongful arrest of ships, available at http://www.comitemaritime.org/Study-Relating-to-Liability-for-Wrongful-Arrest/0,27147,114732,00.html accessed 10 July 2017.
[237] Berlingieri CMI Yearbook 2016 298.

(c) International Arrest Conventions

The Chair of the International Working Group of the Comite Maritime International acknowledges in the CMI Yearbook 2015 that the 1952 and 1999 Arrest Conventions do not provide uniform rules on the test for wrongful arrest and the award of damages consequent upon such wrongful arrest.[238]

Article 6 of the 1952 Convention makes a general reference to the law of the State where the arrest occurred; i.e. the *lex fori*.[239] The equivalent clause in the 1999 Convention adds very little to the provisions of the 1952 Convention by way of allocating powers to the Court to impose security and jurisdiction in order to establish the liability that may exist if any, for losses or damages that may have been incurred which are wrongful or unjustified or even in instances of excessive security being demanded and given.[240]

(d) Responses to questionnaire

Following the receipt of the responses received as at the time of the publication of the 2015 CMI Yearbook, some preliminary observations included that although there was much variation at national levels, there were also a large number of States with a certain degree of uniformity and amongst whom there could not be said to be a significant variance in rules.

Subject to the receipt of further outstanding responses from other NMLAs, as at 2015, and the development of the debate regarding the subject at later conferences the CMI anticipated that the IWG may evolve into an International Sub-Committee to enable all NMLAs to contribute significantly to the issues and thereafter the IWG would draft a uniform set of rules on liability for wrongful arrest.[241]

These draft rules would then be incorporated into a protocol to the 1999 Arrest Convention or in to a model law or other instrument for its ratification, promulgation and implementation into national legislation of the various member countries.

Responses were eventually received from 36 NMLAs.[242]

(e) Analysis of Responses by CMI

(i) Application of specific conventions or national law

The analysis revealed that 17 of the 38 respondent countries apply the 1952 Arrest Convention- these are Belgium, Croatia, Finland, France, Germany, Greece, Hong Kong,

[238] Berlingieri CMI Yearbook 2015 296.
[239] Berlingieri CMI Yearbook 2015 296.
[240] Berlingieri CMI Yearbook 2015 296.
[241] Berlingieri CMI Yearbook 2015 299.
[242] Berlingieri CMI Yearbook 2016 338.

Ireland, Italy, Netherlands, Norway, Poland, Romania, Russia, Senegal, Ukraine and United Kingdom; 2 of the 38 responding countries apply the 1999 Arrest Convention- these are Spain and Norway; 10 of the 38 countries apply one or the other of the adopted conventions in conjunction with their national laws- these are Brazil, Croatia, Finland, France, Germany, Greece, Poland, Romania, Russia, Spain and Turkey; 16 of the 38 countries apply only their domestic legislation- Australia, Canada, Chile, Columbia, DPRK, Equador, Japan, Israel, Korea, Malta, Mexico, New Zealand, Nigeria, Panama, Peru, USA.

(ii) Security for arrest

According to the questionnaire counter security for arrest was provided for in 11 of the 38 countries which require the arrestor to provide counter security in order to obtain an order for the arrest or to maintain the arrest- these are Croatia, Finland, Japan, Korea, Mexico, Netherlands, Romania, Russia, Senegal, Spain and Turkey.

No security is required in13 of the 38 countries, viz. Australia, Brazil, Canada, Ecuador, France, Greece, Hong Kong, Ireland, Israel, New Zealand, Panama, United Kingdom and the USA.

The provision of security is subject to the discretion of the court in 13 countries; these countries are Belgium, Chile, Colombia, Germany, Italy, Malta, Nigeria, Norway, Peru, Poland, Portugal, South Africa, and Ukraine.

(iii) Test for liability in the event of wrongful arrest:

Strict Liability is applied in 9 of the 38 countries. These are Croatia, Finland, Germany, Mexico, Netherlands, Norway, Poland, Russia, Spain.

In requiring proof of negligence, 10 of the 38 countries generally apply tort rules, in respect of negligence for wrongful arrest- these are Belgium, Brazil, Chile, DPRK, Japan, Korea, Panama, Portugal, Senegal, Ukraine

Proof of gross negligence, bad faith, malice is required in Canada, Chile, Colombia, Hong Kong, Ireland, Israel, Korea, Malta, New Zealand, Panama, Senegal, South Africa, UK, USA.

(iv) Differences in formulations of test

The CMI Yearbook also makes reference to other phrases used to describe the test for wrongful arrest, which may not be expressed in strict legal terms. Furthermore, while the terminology differs between each country, it is subject to the explanation or lack of explanation specified in the responses.

It could mean that the owner of the arrested vessel has to prove negligence on the part of the arrestor or even that gross negligence or malice has to be proved, and if so this would involve an objective and subjective element of the test.

These phrases are: illicit or unjustified arrest in Ecuador and Turkey; unreasonable or without good cause arrest in Australia and Nigeria; without reasonable and probable cause in South Africa; frivolous or vexatious arrest in Malta; abuse of rights such as vexatious arrest in Romania and France; without ordinary prudence in Italy; wrongful behaviour in Ukraine; wrongful or unjustified in North Korea; and, arrest obtained by false evidence on the application for arrest where the arrestor was aware or due to gross negligence he ignored that the claim did not exist as applied in Greece.

(v) Conclusions

The Rapporteur concluded her analysis by noting an evident disparity and lack of alignment in the answers received to the Questionnaire. The differences were not only between civil and common law jurisdictions but also within civil law countries.

III **The way forward?**

The role of the CMI is a significant and crucial one in that it seeks to unify laws and establish harmonisation, and it is within the scope of this aim that the IWG continues to canvass the views of the NMLAs, in order to proceed toward the achieving of unification and harmonisation of laws.

In the context of international shipping and the various competing interests, economic, financial and commercial that characterise the shipping industry, the IWG may be the best hope for progress in modifying and improving this area of the law, at the very least by providing a forum for dialogue and discourse of the issues.

CHAPTER 8 CONCLUSION

According to Woodford,[243] the 1895 decision of *The Village Bell* was the last of the nineteenth century cases where the issue of damages for wrongful arrest arose. The next case involving this issue arose in the 1971 matter of the *Astro Vencedor Compania Naviera SA v Mabanaft GmbH*.[244]

The implication of this comment is that the development of the law relating to the issue of damages for the wrongful arrest of vessels was firmly established and not in dispute.[245] The position thus remained static for seventy six years, which implies that there were also very few matters involving wrongful arrest that were reported which perhaps raises the question as to whether potential litigants were discouraged from approaching a court for relief knowing the severity of the threshold they would be required to overcome was somewhat daunting.

The test as established in *The Evangelismos* has been used in various common law states but not necessarily uniformly applied, with differing interpretations, both narrow and broad being evident from the case law referred to in previous chapters. South Africa and Australia have statutorily established tests for wrongful arrest, which do not involve malice or *crassa negligentia*, as established in *The Evangelismos*

The mechanism of ship arrest in Admiralty and the maritime industry is a unique and powerful remedy. The concept of wrongful arrest has been regarded as a means of preventing the misuse and abuse of the right of arrest. Wrongful arrest, if proven, enables a court to award damages against the plaintiff in favour of the ship owner. The effectiveness of the concept of ship arrest is to a large extent if not entirely dependent on the courts to balance the interests of the ship owner and the interests of the arresting party.[246]

> 'If the principle of "wrongful arrest" is too widely defined it may undermine the claimant's right of arrest by exposing him to damages for wrongful arrest, should his decision to arrest turn out to be wrongful. However, the right of arrest should not be made so onerous that claimants are afraid to make use of the legitimate right of arrest because of the potential exposure to damages for wrongful arrest. On the other hand if the

[243] Woodford 125.
[244] [1971] 1 Lloyds Rep 502 (CA).
[245] Woodford 125.
[246] Chia Song Yeow https://rajahtann.co./eOASIS/II/pdf/wrongfularrest.pdf, accessed12 August 2017.

principle is defined too narrowly ship owners may not be adequately protected against abuse of the right of arrest.'[247]

How then is this reform of the law governing wrongful arrest to be resolved? As commented on above, there are risks attendant on whether the test is too widely defined and if too onerous. The test survives over a large part of the world as a relic of colonialism and therefore means that it remains as part of established law via judicial precedent in numerous countries. The application of the *lex fori* means that variations of the test differ from jurisdiction to jurisdiction.

There are arguments in favour of and against change. Should the test be revised and what is the mechanism to achieve this?

The first suggested solution is via judicial initiative whereby it has been suggested that the English courts should revise the test. This could happen in the following ways:

The first is that, while there are two Privy Council decisions in *The Borag*,[248] and the *Gulf Azov v Idisi*,[249] which are of strong persuasive value while not binding precedent, a Supreme Court decision in the United Kingdom would create the necessary precedent to change the test. A judge would have to take a bold approach in finding *The Evangelismos* test no longer pertinent or applicable and by distinguishing such a future case from *The Evangelismos* depart from the test.[250]

Secondly, by requiring a cross-undertaking in damages as a pre-requisite for an arrest. The cross-undertaking in damages was suggested by Sir Eder as early as 1996 in promoting a change in English law by suggesting an undertaking in damages should be ordered by the court as a condition of arrest in the wrongful arrest of ships, as is the situation in interim injunctions.[251] The use of this possible solution would be practical in compensating the owner for the loss caused by the arrest, for expenses incurred to put up security or where excessive security is demanded or where the claimant, as in the case of *The Vasiliy Golovnin,* uses duress in its tactics to compel the owner to agree to his preferred terms.

Thirdly, Judges should consider adopting a test which is based on the negligence of the arrestor or alternately if the test of no reasonable or probable cause is fully defined so that it may be applied as an objective standard test which in effect means that there are no

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[247] Chia Song Yeow https://rajahtann.co./eOASIS/II/pdf/wrongfularrest.pdf, accessed 12 August 2017.
[248] *Compania Financiera v Hamoor Tanker Corporation* [1981] 1 All ER 856 (CA).
[249] [2001] 1 Lloyd's Rep 727.
[250] Mandaraka-Sheppard 55.
[251] Mandaraka-Sheppard 55.

reasonable grounds of arrest or that the case was more likely than not to fail, upon an objective assessment without consideration of what the arrestor believed his case to have been.[252]

> 'Endorsing an old test on historical grounds is less than satisfactory, less than just and obstructs uniformity. The reform should aim for a test which must facilitate the balance of justice and enable uniformity in its application.'[253]

Fifthly, by way of internal reform to the Civil Procedure Rules applicable in English law and introducing a cross undertaking in damages is a feasible option for the English jurisdiction. Combined with lowering the threshold for the test and providing clear definitions of the terms used will likely provide a balance between the interests of ship owners and claimants. Should none of these suggested changes reach fruition, accession to the 1999 Convention and its ratification into domestic law may then provide the solution.[254]

There is a prevalence of confusion and no uniformity in the application of the test for the wrongful arrest of ships.[255] The English decisions which upheld wrongful arrest, are characterised by actual wrongful arrest on the facts of the matter, and there appeared to be no difficulty in meeting the higher standard test. Although it appears that this is the exception to the rule, and given the dearth of wrongful arrest cases for seventy six years, and the effluxion of time from one century to the next, the real problems arise in the application of the outdated existing harsh test to everyday cases.

The test established in *The Evangelismos* serves to discourage ship owners with valid claims from pursuing wrongful arrest claims. 'The fact that the test was formulated in very different conditions and has not been critically examined in the context of modern commercial litigation is itself a reason for its reassessment.'[256]

Professor Mandaraka-Sheppard proposes that in achieving uniformity and harmonisation, the quickest and most effective method would be to accede to the 1999 Arrest Convention, or adopt it into their national law. In so doing, it would be appropriate and necessary to define the meaning of the words 'wrongful' and 'unjustified'.[257] An agreed definition of these words would certainly serve to improve clarity and create a common

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[252] Mandaraka Sheppard 59.
[253] Mandaraka Sheppard 59.
[254] Mandaraka-Sheppard 59.
[255] Mandaraka-Sheppard vol 1 at 171.
[256] Mandaraka-Sheppard vol 1 at 171.
[257] Mandaraka-Sheppard vol 1 at 171.

understanding and this would ultimately lead to uniformity and harmonisation in the law to be applied.

The search for uniformity in the establishment of international conventions and the promulgation and adherence thereto is not an entirely elusive one. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is considered the most successful attempt to unify a broad area of commercial law internationally.[258] Part of the appeal of this convention, which as at 2009 had attracted more than 70 contracting states accounting for over two thirds of the international trade in goods, is that contracting states may by agreement derogate from any rule of the Convention or exclude the Convention entirely in favour of another law. The CISG is a pertinent example of how international uniformity may be achieved.

The international shipping trade environment and its associated practises, such as the test for wrongful arrest, can only benefit from some level of uniformity of interpretation or application by all states whether following a civil law or common law tradition. The CISG has proven that international conventions that promote uniform practises are not the Holy Grail, and a Protocol to the 1999 Arrest Convention may be the most appropriate solution in the circumstances in striving to breach the divide in the varied applications of the test for wrongful arrest of vessels.

However, there seems to be little or no desire in the international shipping community to take the matter forward, and it appears that the work of the CMI may have consequently lost momentum. Bearing in mind that only 11 countries have acceded to the 1999 Convention - the last of which was in 2011 – then perhaps guidelines or a model law may be more effective.[259] This apparent reluctance or perhaps frustration is echoed in the title of the report in the CMI Yearbook 2016: 'Towards Uniform Rules on Wrongful Arrest or Still With The Law of the Jurisdiction Where the Arrest is made'.[260]

The CMI chartered the way forward and has established the IWG to find possible solutions by co-operating with the NMLAs. An International Sub Committee is regarded as the vehicle to move forward by providing NMLAs with a platform or forum to contribute

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[258] Fletchner 1 http://legal.un.org/avl/ls/Flechtner_IEL.html
[259] Berlingieri CMI *Yearbook* 2016 338.
[260] Berlingieri CMI *Yearbook* 2016 338.

meaningfully to this project and to 'hopefully find uniformity, dictating general principles which may be valid in any law system.'[261]

Regrettably, the reform of the test for the wrongful arrest of vessels, which is a commendable and much required objective, has been met with reluctance not only from industry members but also hesitancy from various jurisdictions in implementing any level of reform. The recent case law and judicial comment while recognising that the test requires reform, continues to be entrenched in supporting the relevance of and applying the test for wrongful arrest, and relinquishing the role of creating change to their respective legislatures.

The need for change exists, it is simply consensus as to wording and interpretation, and most importantly commitment from both civil law and common law jurisdictions to find a common point of agreement for the change to become a reality, whether by way of a Protocol or model law. The International Working Group of the CMI is dedicated to the reform of the test, and appears to provide the best impetus in the circumstances to achieve an integrated solution with contributions solicited from NMLAs, which can be mutually acceptable to most, if not all parties, in the search for harmonisation and uniformity in reforming the test for the wrongful arrest of vessels. One can only hope that it will not be a search in vain.

[261] Berlingieri CMI *Yearbook* 2016 339.

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