

Arrest of Vessels: Practical Considerations

Introduction

National Maritime Services and National Liquidators combine the experience of the global leader in the management of judicial and non-judicial vessel foreclosures and the world's largest seller of distressed commercial ships and pleasure yachts. National Maritime Services manages assignments of arrest cases against cargo ships, tankers, passenger vessels, support vessels, pleasure yachts, and other vessels around the world. The company performs its services on behalf of lien claimants, vessel lenders, and their counsel, offering a full-service commercial vessel program for arrested vessels, and the subsequent period of custody, on complicated matters throughout the world. National Liquidators is known for its work relating to the repossession and auction of pleasure vessels throughout the United States, Caribbean, Canada and Central America. The combined companies manage in excess of 2,000 assignments annually, having handled over 24,000 cases since their inception in 1988. National Maritime and National Liquidators also hold various government contracts, with agencies such as US Department of Justice and General Services Administration (GSA), relating to the seizure, storage and sale of vessels which result from criminal or government forfeiture.

National Liquidators operates *yachtauctions.com*, a well-known vessel auction web site which receives millions of monthly visits from sales prospects located around the world. Placement of boat, yacht and ship listings on this site is reserved exclusively for clients of National Maritime Services or National Liquidators. Further information on these corporate services can be accessed on the *natliquidators.com* or *vesselarrest.com* websites.

The companies also offer similar services for commercial and general aviation aircraft located in the United States.

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When to foreclose a mortgage through arrest

During good economic times, commercial ship lenders don't hesitate to arrest vessels when a particular ship owner is in default under the ship mortgage. Under these circumstances, the general feeling is that one could easily foreclose a mortgage, in almost any jurisdiction in the world, await the court sale, and watch multiple bidders run up the price to a point that covered most claims and the associated costs of arrest. In recent years the shipping market has changed, a result of weakened global economic conditions; so too has the expectations associated with vessel arrests. Demand for ocean-going cargo and corresponding rates have plummeted, reducing the value of cargo ships and creating a glut of commercial vessels. Additionally, many new builds are scheduled to enter the market over the next few years. The reduced collateral

values, when paired with the costs of custodianship and other charges incurred during the arrest period and subsequent sale, have forced budget-conscious lenders and other claimants to pause and consider their options prior to ordering a commercial ship arrest.

The primary concern becomes, will it cost more to arrest than what the sale of the ship will return, or are there other options that might make more economic sense? Is the claimant at risk that the arrested vessel will not sell to a third party at auction, and the claimant may end up owning the ship, expending additional resources that may exceed the proceeds that a future sale of the vessel will ultimately generate?¹

Despite these concerns, financial institutions cannot sit back and watch their assets deteriorate while borrowers are not performing according to the terms of their loans. Inaction is a poor business practice for a financial institution/lender, as an action against the vessel is often the best, if not only potential avenue for recovery of the debt. Also, in today's regulatory environment, there is generally more pressure from regulators to write down non-performing loans, forcing institutions to react more quickly.

Despite the previous contradictions, many vessel arrests are effectively managed, resulting in positive recoveries for lenders or other claimants. The important thing is to move cautiously and carefully, yet without unnecessary delay.

Issues to consider when evaluating a potential arrest

The amount of the claim (or mortgage). A key consideration for the claimant (or lender) is whether the amount of the outstanding claim (loan) makes an arrest economically feasible. The simple fact that a legal right exists doesn't necessarily mean that its exercise makes good business sense. Putting aside attorney fees and other expenses, the cost of holding a ship in an active port during the pendency of legal proceedings can be upwards of \$10,000 US daily. As a general rule, arrests of commercial vessels are not an economically-viable option if the outstanding claim are less than \$100,000 US.

Ship mortgages and considering other recorded liens against the vessel. The holder of a preferred mortgage should order an updated Abstract of Title or Transcript of Registry to ensure that their interests are properly perfected and to identify other potential liens that may be recorded against the vessel's title. If another maritime lien against the vessel is likely, consider the equity position of the claim in relation to the mortgage. (See discussion on claim rankings below.) The amount and relative priority of all liens must be considered in relation to the projected liquidation value of the vessel, prior to initiating an arrest.

Determine if other unrecorded liens are expected to be asserted. Unlike liens against real property, maritime liens do not have to be recorded or filed to be enforceable. *United States v. ZP Chandon*, 889 F.2d 233 (9th Cir. 1989). Some

¹ Lenders should always request in their Motion for Final Judgment and Sale (and proposed order), the right to bid up to the amount of their judgment at the Marshal's sale of the vessel in lieu of cash. This right is usually not available to a lender who seeks an interlocutory – or prejudgment – sale, an option often considered when the arrest procedure or litigation drags on in time.

maritime liens arise by operation of general maritime law, for example, upon the rendering of services to a vessel, while others are creatures of federal statute, such as the Maritime Lien Act, 46 U.S.C. §§ 31341-31343, or the Ship Mortgage Act, 46 U.S.C. §§ 31321-31330. Because of the unrecorded nature of liens, a review of the vessel's title document often does not give an accurate picture of the existing claims against a vessel, and more diligence is required. A vessel that has fallen on hard economic times usually leaves unpaid or disputed bills in its wake, many of which may constitute liens against the vessel.

For ships arrested in the United States, the following relative priority of competing claims can be used for guidance:

1. Expenses of justice. These are the claims associated with the administration of justice while the vessel is under arrest, or *custodia legis*. Such expenses include U.S. Marshal's fees, substitute custodian fees and other expenses necessary to preserve the ship while under arrest. See *The Poznan*, 274 U.S. 117 (1927); *Gen. Elec. Credit & Leasing Corp. v. Drill Ship Mission Exploration*, 668 F.2d 811 (5th Cir. 1982). Although not considered liens, as seizure terminates the owner's ability to contract for services, these expenses are granted top priority and are founded in the philosophy that the preservation of the vessel, while under arrest, inures to the benefit of all claimants.
2. Seaman's wage claims, maintenance and cure, including liens for wages of the master. *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547 (11th Cir. 1990); *Chung, Yong IL v. Overseas Nav. Co., Ltd.*, 774 F.2d 1043, 1049 (11th Cir. 1985); *Fredelos v. Merritt-Chapman & Scott Corp.*, 447 F.2d 435, 437 (5th Cir. 1971).
3. Salvage and general average contribution. As between competing salvors, the most recent services provided to the vessel outrank earlier efforts. *Complaint of Ta Chi Nav. Corp., S.A.*, 583 F. Supp. 1322 (S.D.N.Y. 1984).
4. Maritime tort claims, including collision, personal injury, wrongful death, liability for cargo loss, and property damage caused by negligence. *Oriente Commercial, Inc. v. American Flag Vessel, M/V Floridian*, 529 F.2d 221 (4th Cir. 1975); *European-American Banking Corp. v. M/S Rosaria*, 486 F. Supp. 245 (S.D. Miss. 1978). See also *Fredelos*, 447 F.2d at 437.
5. Pre-mortgage contract claims for necessities such as services, fuel, dockage and supplies provided to the vessel, 46 U.S.C. §§31301(4), 31341 and 31342;
6. A valid preferred mortgage on a U.S. flag ship or a preferred mortgage on a foreign vessel whose mortgage has been guaranteed under Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§30101-31343.

7. Maritime contract claims, including claims by suppliers for necessaries and repairs pursuant to the Maritime Lien Act.² *Fredelos*, 447 F.2d at 437; 46 U.S.C. §§ 31301(4), 31341, 31342.
8. A valid preferred mortgage on a foreign flag ship; 46 U.S.C. 31326(b)(2); *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204 (5th Cir. 1978).
9. State-created liens of a maritime nature. *The Diane*, 45 F. Supp. 510 (S.D. Fla. 1942).
10. Maritime liens for penalties and forfeitures for violation of federal statutes.
11. Preferred non-maritime liens including tax liens and judgment liens.
12. Maritime liens in bankruptcy.

Beware of crew claims.

Maritime law provides that all doubts as to the application of the rules relating to the provision of maintenance and cure benefits should be resolved in favor of the seamen. (Vaughn, 369 U.S. 527; Warren v. United States, 340 U.S. 523 (1951). There is a long history of showing concern and care for seamen. Justice Story articulated the basis for this policy in an 1832 opinion:

“The protection of seamen, who as a class are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; and maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service”.

Typically, when a crew wage claim is filed, this is a sign that there are other underlying financial issues with the ship owner or charter operator. Any party carrying a necessaries claim or other lower ranking lien should carefully evaluate the value of the vessel and the cost to enforce before intervening. Depending on the jurisdiction, wage claims typically are ranked first and carry very aggressive penalty clauses and associated legal fees that can also rank in line with, or even ahead of, the ship’s necessaries.

The current location of the vessel and the corresponding jurisdiction’s recognition of particular claims. Determine the route the vessel is likely to travel and determine whether there are options to choose a “friendly” jurisdiction for the arrest. Even if considering arresting a vessel in the United States, be aware of the variances between judicial jurisdictions, as well as the local rules which apply. Determine whether the claim has the necessary recognition and rank in the jurisdiction where filing. For example, the existence of a lien for supplies or necessaries depends on the law of the jurisdiction where the supplies or labor were furnished. *Banco de Crédito Indus., S.A. v.*

² It is important to note that many countries outside the United States do not recognize a maritime lien for necessaries, a critical issue for consideration when determining whether to arrest a vessel in a foreign jurisdiction.

Tesorería General, 990 F.2d 827 (5th Cir. 1993); *Lión de Mer S.A. v. M/V Loretta D*, 1998 WL 307077, 1998 AMC 1410 (D. Md. 1998); *Metron Communications, Inc. v. M/V Tropicana*, 1992 WL 532637, 1993 AMC 1264 (S.D. Fla. 1992). A choice of law or forum selection clause in the controlling agreement might well determine whether or not a lien claim will be valid. Explore future routes to determine if another upcoming port of call will provide more favorable standing. Don't forget to explore with local maritime counsel in the jurisdiction, the time frames normally operative in their courts from the time a vessel is arrested through sale, as time in an arrest case is the biggest cost variable.

Determine the ultimate sales value of the vessel. How much is the vessel worth in a forced-sale environment? One must consider the volatility of the market, as values are experiencing extreme market variations. There may be a substantial downward adjustment in value between the time of arrest and the time sale. It is possible that there will be no market for the vessel. The market has also experiences significant adjustments in scrap values, adversely affecting that option of last resort in many instances.

The issue of valuation is important not only in the beginning of the process – in making the initial determination of whether it makes sense to foreclose from a business perspective, but also at the end - when arriving at the amount of the judgment one will be bidding at auction, should the action proceed to judicial foreclosure.

The amount bid must withstand a potential challenge from the vessel owner or debt guarantor(s), at either the time of sale confirmation or when obtaining a deficiency judgment (loan P&I, costs, expenses and possibly fees minus the amount realized at the marshal's sale).

In response to vessel owners' motions to set aside such sales, based on a disparity between the winning bid and what they consider to be the market value of the vessel, US courts have historically considered the price bid at a properly-conducted sale as the fair market value, and confirmed the Marshal's sale, unless there is evidence of fraud, collusion or gross inadequacy of price such that it "shocks the conscience." *Walter Heller and Co. v. O/S Sonny V*, 595 F.2d 968, 971 (5th Cir. 1979); *Bank of America v. PENGWIN*, 175 F.3d 1109 (9th Cir. 1999); *Wachovia Bank v. M/V SUNDOWNER*, 272 F. Supp. 2d 1322 (M.D. Fla. 2003). While vessel owners will often attempt to use the lender's prior market value survey in an effort to obtain a greater setoff against the balance of their indebtedness, the courts generally reject the validity of the survey for purposes of determining the vessel's value at sale. See *BFP v. Res. Trust Corp.*, 511 U.S. 531, 537-538 (1994) ("[M]arket value ... has no applicability in the forced-sale context; indeed it is the very *antithesis* of forced-sale value ... fair market value presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.")

In arriving at an initial valuation determination, there are commonly three different values surveyors attribute to commercial vessels (this does not take into account "Replacement Value," which is usually reserved for insurance purposes.)

1. **Market Value:** of a piece of property is generally defined by BLACK'S LAW DICTIONARY (6th ed. 1990) as "[t]he price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at a public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desire to buy but is not compelled to take the particular article or piece of property." In the marine context, this assumes the vessel has a good sound hull, properly maintained and running machinery, and all parts of the vessel in good working order. This value also takes into consideration the business side of the vessel and how much she earns under normal day-to-day operations.

2. **Quick Sale Value:** The surveyor will establish a second value based on a sound hull, properly maintained and running machinery, and ensuring all parts of the vessel are in good working order. However, under this appraisal, the surveyor takes into account that the vessel must be sold in a more timely fashion; therefore, whether or not the vessel constitutes an ongoing business cannot be as much of a factor.

3. **Scrap Value:** This is the very lowest number used, considering the worst case scenario: the vessel does not run or the machinery is considered too old or too inefficient under current market conditions, and the cost of repairs outweighs any future potential return. If one reaches a conclusion that the costs of arrest will far exceed any potential return at the Marshal's sale based on scrap value, one may want to consider whether and under what conditions one can seek recovery against the debtor or other collateral in the first instance, without having to arrest the vessel.

Other issues for consideration:

- Carefully evaluate technical default issues, particularly those defaults unrelated to past due payments or other financial terms. Some events for default can be cured or amended. This approach can often improve the borrower's circumstances, possibly eliminating the need for arrest altogether. Alternatively, do not take lightly default on obligations that can indicate other underlying problems. Placing insurance coverage at risk, permitting other liens against the vessel or ANY adverse change in financial condition of the borrower should be carefully addressed and evaluated.
- Monitor all insurance coverage and changes in policy conditions. Keep in mind that in the event there are unpaid policy premiums, the insurer may, depending on applicable law, be entitled to a "necessaries" lien, which is superior to a mortgage lien if the policy is issued prior to the date the mortgage was recorded. *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986); *Liverpool & London SS Protection & Indem. Ass'n Ltd. v. QUEEN OF LEMAN MV*, 296 F.3d 350 (5th Cir. 2002) ("[a]fter nearly 20 years, it is axiomatic that insurance is a 'necessary' under 46 U.S.C. §1342 and that unpaid insurance premiums give rise to a statutory maritime lien."). Review the owner's policy to determine whether and how the arrest action may affect coverage. Is it more efficient for the lender to obtain lay up status coverage on its own, rather than expensive coverage through the P and I clubs? Utilization of the custodian's coverage should also be considered.

- Determine the value of the underlying business/holding corporation or shareholders compared with the value of the vessel. Evaluate the corporate structure of the owner. What are the strengths or challenges with the parent entity or its affiliates? Can one leverage inter-corporate and personal guarantees to structure an amicable workout arrangement?
- Cooperation of ship's owner. With the extreme fluctuation in shipping revenue rates, even the most sophisticated, well-intentioned and well-structured owners can experience financial setbacks. Some ship owners will offer creative, viable solutions to their current problems. Cooperative workout arrangements, with otherwise strong buyers, can often provide a better return than costly arrest.
- Research comparable revenue rates for similar vessels. Determine the significance of the owner's cash flow problem and make sure there are no other issues affecting the survival of the borrower. Re-assigning the assets to another fleet or owner may be a more profitable approach than an arrest and subsequent sale. If the vessel operates under a charter agreement, can it be restructured or continued under a new owner? These solutions will likely require the cooperation of the current borrower/owner.

Alternatives to Arrest, Foreclosure and Prolonged Custody

Non-Judicial self help. In the United States, when the loan documents specifically provide for a self-help remedy, this action is an alternative to arrest, provided that the right is recognized by the state or jurisdiction in which the action is brought. In *Dietrich v. Key Bank, N.A.*, 72 F.3d 1509 (11th Cir. 1996), the court held that the parties to a ship's mortgage in Florida could agree to incorporate into their agreement, state self-help provisions. See also *In re 54 Foot Trawler Pegasus*, 2008 WL 4938345 (M.D. Fla. 2008). In all instances, if exercised, the self-help actions must not result in a breach of the peace, a standard that differs among jurisdictions. One negative aspect of self-help is that the private sale of the vessel through this process will not extinguish other valid maritime liens against the vessel, in essence converting the lender into a title insurer against future claims after the vessel is sold. The federal rules governing judicial approval of private sales can be found at 28 U.S.C. §2001(b). In addition, the right to a deficiency following a private sale will also be subject to applicable state law. Negotiations with numerous and/or unreasonable lien claimants could offset any savings in arrest costs. As a general rule, most non-US jurisdictions do not recognize a right of self-help repossession.

Hire the crew. Under the non-judicial scenario outlined above, the ideal solution would be for the claimant to hire the crew. Typically, when financial obligations are not being met, however, crew wages and benefits also are in arrears. Paying the crew now gives the lienholder/mortgage holder the crew's loyalty should any problems with the owner arise. Bear in mind that if they are owed past wages, the crew may have maritime liens against the vessel. To obtain a release of lien from the crew upon payment of their past-due wages, a financial obligation of the shipowner, one may want to consider taking assignment of the crew's liens thus providing one with the ability to recover these sums if the vessel is ever arrested. *Ryan-Walsh, Inc. v. M/V Margaret John*, 1996 AMC 504 (E.D. La. 1995).

Initial Filing and Action

Once the decision is made to arrest, additional issues need to be considered. [Note that this section primarily focuses on a US based action.]

Determine the local rules and customs relating to utilization of a substitute custodian or keeper. In the US, most judicial districts require a custodian as a condition to issuing a warrant of arrest, as the Marshal will not act as custodian. This is important to know so one can arrange to hire a custodian beforehand, prepare the documents appointing the custodian properly, avoiding delays caused by submission of improper or incomplete paperwork.

Forms used for a U.S. arrest can be found in certain district court's local rules, or are available through the Maritime Law Association, Practice and Procedure Committee. Make sure that the forms being utilized are acceptable in the district of arrest. Local rules and arrest procedures can vary from district to district. If one's attorney is not admitted to practice in the applicable district, counsel will need to apply for admission, and most probably hire local counsel in the jurisdiction where the arrest is to occur, if different. It is advisable not to wait to get admitted until one is ready to arrest, as the court's approval to practice in the jurisdiction is often a pre-requisite to the lawyer's ability to file the complaint.

Arrest Documents and Procedures. A complaint in an "*in rem*" action, *ie.*, against the vessel, must be verified "on oath or solemn affirmation," and must advise the court that the vessel is or will be in the district during the pending of the action, a requirement essential to the court's exercise of subject matter jurisdiction over the vessel and action in admiralty. *Supplemental Admiralty Rule C(2); Platoro Ltd. V. Unidentified Remains of a Vessel*, 508 F.2d 1113 (5th Cir. 1975).

The *in rem prayer for relief*, which is a component of the complaint, ostensibly asks the United States Marshal to arrest and take possession of the vessel. In practice, however, as previously mentioned, the Marshal normally will not serve the warrant unless a qualified substitute custodian – who stands in the shoes of the Marshal - has previously been appointed by the court to take possession and control of the vessel during the pendency of the litigation. See *Chantier Naval Voisin v. M/Y Daybreak*, 677 F. Supp. 1563 (S.D. Fla. 1988); *New River Yachting Center, Inc. v. M/V Little Eagle II*, 401 F. Supp. 132 (S.D. Fla. 1975).

The plaintiff(s)/claimant(s) will need to deposit with the Marshal a predetermined amount to cover the Marshal's costs, as well as a release and agreement to indemnify the Marshal from liability and responsibility for the vessel while under the care of the substitute custodian. See *Donald D. Forsht Assoc., Inc. v. Transamerica ICS, Inc.*, 821 F.2d 1556 (11th Cir. 1987). One will need to confirm with the local rules of the jurisdiction, and verify with the Marshal, the amount of fees required to be deposited.

The Marshal posts a notice of the arrest on the vessel at the time the warrant is served. One is responsible for providing actual notice of the arrest, by providing a copy of the complaint to the vessel's master, the owner, and all lien claimants of record, as well as

publishing notice of the arrest in a publication acceptable to the courts in the particular jurisdiction. *Supplemental Admiralty Rule C(4)*; 46 U.S.C. §31325(d); *MacDougall's Cape Cod Marine Serv. Inc. v. One Christiana 40' Vessel*, 900 F.2d 408 (1st Cir. 1990).

Following an arrest³, admiralty procedures provide for the release of the vessel upon the posting of security into the court registry. The cash security, bond, or letter of undertaking is substituted for the vessel as *the res*, subject to the court's jurisdiction. *Supplemental Admiralty Rule E(5)*. The moving party's lien is then transferred to the substituted security, and the vessel is no longer subject to the jurisdiction of the court. *Gregory Boat Co. v. Vessel Big Beaut*, 938 F. Supp. 414 (E.D. Mich. 1996). The parties may either agree on the amount of the security to be posted, or if no agreement can be reached, the bond amount is set at the court's discretion, if for an amount not liquidated. If the claim is liquidated, the amount of the bond will either be determined by the provisions of 28 U.S.C. § 2464 (the bond must be double the amount claimed by the plaintiff), or by provisions in the governing local rules, such as Local Admiralty rule E(8) of the Southern District of Florida (the bond must be equal to the amount of the claim plus interest at 6% per annum for 24 months after the complaint is filed).

Once the vessel is arrested (provided it has not been released) one will continually need to assess certain circumstances regarding its care and custody. As an example, will the vessel need to be moved from its active berth? If so, permission from the court will be required to shift or operate the vessel. Although the claimant(s) may be paying the custodian (albeit with the expectation of reimbursement out of the sale proceeds), the custodian is appointed by the court, with the same duties and responsibilities as the United States Marshal.

Confirm that the custodian has the required insurance coverage as outlined by the US Marshal. 2001 AMC 2705. US courts typically require a minimal amount of liability coverage, when compared to the potential exposure of ship-related claims. National Maritime recommends that the liability limit equals no less than the value of the ship and should be much higher when crew remain involved in the arrest. Arresting parties should be careful not to allow a vessel to remain uninsured or underinsured and unnecessarily exposed to risk of loss and liability. Obtain court approval and place proper coverage immediately. If the vessel is to be shifted under its own power, confirm that the custodian has proper insurance to cover this activity too. Determine if the vessel is still covered under the P&I or port risk coverage that the owner placed before arrest. If not, consider the necessity of these additional coverages. Finally, take steps to ensure that the Certificate of Financial Responsibility (Pollution Certificate) for the vessel is in force.

When arresting a working vessel, passenger vessel or other vessel in trade, outline in the arrest order what to do with cargo, passenger transportation, and passenger property (luggage). Address any idiosyncrasies that may relate to the specific vessel.

³ *Supplemental Admiralty Rule E(4)(f)* sets forth the procedure by which any claimant may file a post-arrest motion asking for a prompt post-seizure hearing, which places the burden on the arresting party burden of proving its entitlement to a maritime lien and why the arrest should not be vacated. *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528 (11th Cir. 1985).

This helps the Marshal determine how he should handle the case, as well as clearly protects the claimant's interest in the vessel and/or appurtenances.

The plaintiff(s)/claimant(s), either on their own or through their respective attorney(s), will generally enter into a written agreement with the custodian to spell out any issues that are not covered in the court order. ***[See attached Exhibit 1-A, the contract with the plaintiff that National Maritime Services traditionally requires when arresting a commercial vessel.]*** Although the contract ensures payment for services, it also provides a mutual understanding of other issues, such as responsibility for insurance coverage, which should be discussed prior to the arrest.

Evaluation of the Crew upon Arrest

Immediately upon taking possession of the arrested vessel, there are many items that must be evaluated within a relatively short period of time. One of the most important tasks is a proper evaluation of the crew and resolution of crew-related issues.

- Identify all of the crew members and their position/job description. Obtain the crew manifest and pay records as soon as possible, as these documents provide an immediate head count as well as the basis for preparing a budget for payroll costs.
- Determine the Master's attitude, intentions and loyalties. Is he likely to promote a problematic environment that is inappropriately sympathetic towards the owner of the arrested vessel? The likelihood of this risk can generally be determined in a very short period of time, based on the initial conversations and requests of the individual. Most ship officers are professional, loyal men of the sea that work diligently and honestly for the vessel, regardless of whose hands it is in. In the majority of cases, National Maritime retains the existing crew to operate the vessel during the period of custody, however, on occasion an uncooperative Master will be replaced as soon as practical under the circumstances.
- Determine the immigration status of all crew members aboard. Confirm that each crew member has proper identification, immigration documents, and a valid visa. This procedure will reduce time, cost, and frustration in the event that the ship becomes the subject of a customs or immigration service inspection. In the event that repatriation becomes part of the ship's custodial plan, the country of origin for each crewmember will be an important practical and budgetary consideration.
- Confirm that the crew is being fed and that there are sufficient provisions aboard. It is common for a vessel that is experiencing financial problems to overlook the need for such basics as provisions and water.
- Determine if the crew requires medical attention. This should include follow-up visits or prescription refills for individuals that have previously received medical attention. Documenting the actual timing of a crew member's injury is significant in that it establishes which party is responsible for the injury-related claim. National Maritime Services' experience is that the necessity to resolve crew medical issues is a relatively-common scenario.

- Positive interaction and good communications with the Master and crew are keys to creating a positive working relationship for the term of custody. If necessary, hire an interpreter who can properly communicate critical information to all crew.
- If the vessel is a passenger vessel, there could be significant numbers of crewmembers whose long-term presence is no longer necessary as their services are not related to the care of the vessel. Examples of these types of workers are chefs, waiters, bartenders, maids, cabin stewards, and casino workers. It must be determined if it is no longer cost effective to keep these crew members aboard and on the payroll. Even if they are not being paid wages, they still consume provisions and use other services of the vessel, which could unnecessarily increase to the cost of the action. Many passenger vessel employment agreements include or guarantee the cost of transportation home for the crew member at the time of expiration or termination date. These repatriation expenses become a cost of the administration of the arrest, and are senior to most other claims or liens.
- Consider the registry of the vessel. If crew replacement becomes necessary, it may be required that alternate workers are properly licensed in the country that the vessel is flagged.
- During an arrest that is a result of a crew claim, the surprise element is removed because the crew themselves are the arresting party. The claim filed is typically for unpaid wages, although employment contract dispute claims, whereby the terms of employment have been misstated or misinterpreted, are also common.

Long term vs. short term arrest (security posted)

If the posts security in lieu of the vessel, pursuant to *Supplemental Admiralty Rule E(5)*, the vessel will be released. This generally occurs within a relatively short period of time, generally within a few hours to one week from the actual arrest, and depends upon the owner's financial status, the arrest jurisdiction, size of the claim, value of the vessel and other pertinent factors. The likelihood of a quick release will likely become apparent soon after the initial arrest. Should the owner not post security for the vessel, the length of time under arrest will become more significant (perhaps as long as one year), and the ultimate sale of the vessel in order to satisfy the claim(s), becomes more likely.

Other practical, logistic and financial considerations

- Evaluate whether the should be shifted or relocated to anchorage or a less expensive berth. Are future shifts likely due to weather-related issues such as hurricanes or typhoons? See *Triton Container International Ltd. V. Compania Anonima Venezolana de Vaegacion*, 1995 AMC 162 (D. Gu. 1994) (in view of impending typhoon, court ordered vessel released from attachment and custody returned to the master). In order to shift or move a vessel in compliance with the USCG and CBP intervention requirements, minimum safe manning of full crew is required.
- Determine the number of crew members and related qualifications that must remain on board through the time the vessel is released (or sold).

- Establish and implement a plan to monitor and secure entry and exit to and from the vessel. Many ports, particularly US ports post 9/11, require that arrested or detained vessels provide for security at all entrance points to the vessel.
- A further review of insurance coverage is imperative as changes in location and crew can affect the viability of previously-established insurance coverage. Evaluate this very important issue before releasing what was originally interpreted as non-essential crew.

Crew repatriation

There are many financial and practical issues relating to crew repatriation. Typically, repatriation expenses are recognized as a high-ranking administrative cost of the arrest. The cost to repatriate varies depending the transportation and security charges involved. Arrangements are generally made to return each crew member to their country of origin. The crew must be continually supervised until placed on board their international flight. As a general rule, the ratio of security staff assigned to repatriating crew is one for every five crew members. In instances where international service is not available from a local airport, the security staff must accompany the repatriating crew through to the international airport.

Passenger ships

In instances where an arrest action filed against a passenger vessel while passengers are aboard, crew management and organizational skills will be severely tested. During the preparation phase of a passenger vessel arrest, try to arrange with the Marshal to execute the warrant of arrest after the ship has come into port and the passengers have disembarked. As one can imagine, arresting a ship with passengers aboard can be a logistical nightmare. See *Motor-Services Hugo Stamp vs. Regal Empress*, 165 Fed. Appx. 837 (11th Cir. 2006). If passengers are aboard, there will be the added burden of arranging to transport the passengers back to their port of embarkation, unloading and returning luggage to the rightful owners, and relying on crew members to perform, despite knowing that they are about to lose their jobs. In addition to the logistical challenges, there are increased liability issues relating to passenger injuries, and the difficulties associated with handling angry passengers that are disappointed and unlikely to recoup the cost of their cruise.

Cargo issues

Upon arrest, potential complications may arise relating to ship's cargo, as the owner is no longer in control, and can not direct the disposition of cargo. At the onset of the arrest, it may be unclear who actually owns the cargo, as the ship owner or charterer may be unwilling to the cargo owner's identity.

The cargo can not be loaded or discharged without court approval, which will require several issues to be addressed, such as: cargo ownership, locations of current and future storage, financially-responsible parties, and parties responsible for cargo-related liabilities that may arise during the loading/unloading process, including injuries to crew and/or stevedores. The responsible parties will also enter into an indemnification agreement. Unless the cargo issues are addressed in advance, as a practical matter, it

becomes necessary to cease loading or discharging cargo at the time the warrant of arrest is served on the vessel.

The nature of the cargo must also be considered. As an example, care for perishable cargo, such as providing for refrigeration or offloading to prevent spoilage, must be addressed.

Cost to arrest

It is difficult to use a general rule regarding the cost of a commercial ship arrest because every case contains its own set of unique circumstances. For comparison purposes, two varying full-term arrest file billing statements are included in the appendix hereto (**see Attachments 1-B & 1-C**). When first contacted to act as custodian, National obtains the vessel particulars, the port in which the arrest will occur, and certain details of the case that will serve as an indication of how long the vessel will likely be under arrest. For example, because of the relatively-substantial sums owed, mortgage foreclosure actions tend to present the lowest likelihood of settlement and correspondingly longer periods of arrest. The preliminary arrest budget in this scenario would be projected out over several weeks, perhaps months. On the other hand, if the claim suggests that security will be posted within a day or so, a budget that is based on 5 days care (likely the worst case scenario) would be utilized.

The attached billing statements also serve as a good resource to determine potential types of ship arrest-related costs.

Yacht foreclosure

There has been a significant upturn in the foreclosure rate of “ship like” yachts since 2008. This is a result of the global economic downturn paired with the growth of yacht purchases over the past 20 years. The average size and value of arrested yachts has increased steadily over the past two years. Arrest of these larger vessels presents the same challenges as commercial vessels arrests: large crew, costly storage and maintenance, international travel between multiple maritime jurisdictions, and foreign flags of convenience. While pleasure boat lenders may be accustomed to utilizing self-help repossession methods to repossess smaller vessels, they are utilizing the more complicated procedure of vessel arrest for the larger pleasure yachts. This procedures, rules, and practices for arresting pleasure yachts are the same ones that govern commercial ship arrests.

Preparation for court sale

In instances where the ship owner is unlikely to post the security necessary for a release, and it becomes increasingly likely that the vessel will be sold at auction, preparation for court sale should start early on. Exhaustive effort should be made to reduce costs, and maximize the corresponding amounts received by claimant(s), by moving the arrest action along quickly, as particular deadlines have been met. Once all notice requirements have been met, file with the courts for approval to sell the vessel. (**Refer to *arrest checklist exhibit 1-C***)

If one is moving quickly for a court sale prior to obtaining final judgment, make sure a minimum bid is set by the courts to protect the collateral value. Consider bidding to take ownership in the case where no serious bidders attend the court sale. While a minimum

bid can protect one from “bottom feeders,” placing the minimum too high can scare off all bidders resulting in no attendees at the sale. The greater the number of serious bidders at an auction, the higher the bids, and the less-likely the minimum bid comes into play.

In order to increase the likelihood of a third party purchase at auction (who is likely to pay an amount more than the sum of the claims), it is recommended that one retain the services of a broker or auction company to solicit a significant amount of potential buyers. In many instances, the custodian may be best qualified to handle the sale, as it may have been in contact with potential buyers who learned of the arrest “through the grapevine”. National Maritime Services has been successful marketing the sale of vessels in conjunction with its custodial duties; the efficiencies typically allow National to sell the vessel at a reduced commission rate.

After winning a credit bid

In some instances the claimant may ultimately credit bid its unpaid claim and become the winning bidder (and resulting ship owner) at the Marshal’s auction. In this instance, the claimant (now owner) must decide whether to sell the vessel or operate it as a business. If the vessel is to be sold, consideration should be paid to attracting the best price possible, in the shortest period of time as, in general, the costs involved in holding the vessel for an extended period of time far outweighs the benefit of waiting for a high-priced buyer.

Using an experienced ship broker is historically the most common and accepted way to sell a ship, as they have the best contacts and leads, know the ins and outs of the business, know who is capable of a purchase in the price range, and can properly negotiate the best end result. The downside is that a traditional brokerage sale of a ship may take a longer period of time. Some ships that have a special or limited use could potentially be on the market for years.

Another method of sale is an auction. One can market, advertise, provide surveys, inspections, and sea trial results in as little as 60 days. All qualified buyers come to the sale with the same required deposit and can purchase under the same contingencies. All financing must be in place before bidding, avoiding unnecessary delays in closing. The downside to an auction is that it limits the market to buyers that are presently in the market for a vessel of particular specifications and are qualified to purchase it. National Maritime Services’ affiliate, National Liquidators, has proven successful in marketing vessels in an on-line auction format.

Another option of sale, that can save the cost of commission or an auction fee, is for the claimant (now owner) to sell the vessel on their own. If the plaintiff (now owner) or their counsel has enough familiarity with the shipping business, they may have the best knowledge of the most qualified buyer(s). The downside to this method is that a buyer may sense that the seller is desperate, or that he is the only buyer, as opposed to an auction environment or brokerage sale where the vessel is presented to more prospective buyers.

Another alternative that has become utilized more recently by institutions which have a large investment in the shipping industry is to retain the ship and operate it as a going concern. This approach, which essentially hinges upon increases in shipping market

rates, could ultimately produce a very outcome. Many experts, including the author, have not embraced this alternative in the past, however they are taking a second look in light of the current market circumstances.



G. Robert Toney, President



Case Examples

M/T Yarmouth

- 601' Bulk carrier, Built 1985, Liberian flag
- Ship mortgage foreclosure
- Immediate repatriation of non-essential crew
- Arranged hull insurance and P&I coverage
- Completed Bureau Veritas class certifications
- Ship sale yielded 25% more than appraisal
- Managed crew swap after sale

M/T Fase

- 453' Chemical Tanker, Built 2004, Liberian flag
- Ship mortgage foreclosure
- Required bio-diesel cargo offload
- Hired additional AMO crew for cargo offload
- Completed life raft certification
- Sold \$26+ million – lender credit bid

M/T Hedda

- 433' Chemical Tanker, Built 1987, Liberian flag
- Ship mortgage foreclosure - subsequent crew claim
- Initially arrested with no custodian – security guard only
- Crew member with serious medical condition
- No food or water for crew
- Repatriation required guard service through to international airport departure

M/V Midnight Gambler II

- 160' Gaming Ship, Built 1998, U.S. flag
- Ship mortgage foreclosure
- Vessel relocated to dry dock for haul out & hull examination
- Corrected USCG vessel COI discrepancies
- Significant USCG communications
- Under arrest for 6+ months (debtor-created delays)

M/V Island Adventure

- 515' Casino Vessel, Built 1976, Bahamas flag
- Crew claim
- Repatriated 122 non-essential crew members (Philippines, India, Malaysia)
- CBP required repatriation within 48 hour deadline
- Obtained court-permission to retain essential crew
- Implemented layup plan to include generator and reduced manning
- Created hurricane mobilization plan

Case Examples Continued

M/T Anasazi

- 780' Chemical/Oil Tanker, Built 1958, U.S. flag
- Bunkers claim
- Jones Act ship requiring US crew
- Significant costs to keep ship's plants running
- Created plan to reduce costs – in-district relocation from JAX to Tampa for layup
- Judge ordered sale in 7 days
- Aggressive marketing produced several viable bidders

M/V Casino Royale

- 433' Gambling Ship, Built 1975, Bahamas flag
- Crew claim
- Contingency case
- Located in Bahamas
- Retained by Bahamian Admiralty Marshal
- Alternate claims to gaming equipment

M/V Stella Maris

- 266' Dry Cargo Ship, Built 2008, Antigua & Barbuda flag
- Crew claim
- Relocated to Miami River to reduce dockage costs
- Reduced crew of 7 to single watchman
- Repatriation difficult as some crew could not get home (Funafuti, Tuvalu)

M/V Yosemite

- 584' Bulk carrier, Built 1985, Liberian flag
- Ship mortgage foreclosure – Eastwind fleet
- Vessel arrested in Canada
- Replaced Chief Officer & 3rd Officer
- Maintained Nippon Kaiji Kyokai (“NK”) class certification

Ikaria Maritime Bankers Attachment

- Claim resulted from CCNI Antartico accident in Ecuador
- Simultaneous attachment at 4 US ports
- Determined port arrival details of each ship
- Confirmed recent bunker purchases
- Plan to offload and store bunkers
- Claimant received alternate collateral