

**Real World Challenges:
A Practical Guide to Maritime Arrest, Attachment and Judicial Sales
Maritime Law Association of the United States
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There are numerous practical challenges encountered in the arrest and subsequent custody period, particularly for vessels that are detained for a significant period of time. Most commercial ship arrest actions are intended for the claimant to obtain immediate payment or security and characteristically last only a few days. Today's challenging and uncertain global economy, lack of available credit, unstable freight rates and corresponding ship values have adversely-affected ship owners and charterers, increasing the potential for long-term arrests because owners do not have the resources or desire to satisfy the claim or post alternate security.

The arrest period may also be affected when additional parties intervene in the action, complicating the circumstances and the related court proceedings. Claimants and their respective advisors must acknowledge the risks associated with a vessel remaining under arrest for a significant period of time, assessing the potential costs before executing against a ship and considering how they will react to various scenarios as the custody period unfolds.

INITIAL ARREST AND EVALUATION

Claimants generally over-value target vessels, underestimate the likelihood of an arrest going long-term and the cost associated with keeping the vessel under arrest. This is particularly dangerous, as the arresting party(ies) are generally responsible for the costs of keeping an arrested ship. Arrest actions can potentially extend beyond a full

year with costs exceeding \$1 million. It is critical that claimants make a proper assessment of the risks and likelihoods in advance of effecting the arrest action. Simply put, some claims do not warrant the financial exposure associated with an arrest.

The claim amount is the first item to consider. This amount should be evaluated in relation to the value and market demand for the target vessel. One should also evaluate the likelihood that other claimants will intervene, and whether those claims would prime the evaluator's claim due to their respective priority. The combined value of the priming claims may exceed the ship's value, eliminating any potential recovery. The complications associated with multiple claimants also reduces the likelihood of negotiated resolutions, and may cause court delays and increasing costs. One particular claimant may be willing to settle at 50 percent while another may demand their full claim plus costs.

Claimants should also consider the effect of the arrest, both negative and positive, on its business reputation. The arrest action might adversely impact other relationships; it may cause harm to strategic partners and customers. On the other hand, the arrest may accelerate cash inflows from other past-due accounts, as the market recognizes that the claimant takes a hard line with collection activity.

Security

Supplemental Admiralty Rule (E)(5)(a) states the court shall fix the security in an amount sufficient to cover the amount of plaintiff's claim fairly stated, with interest (usually at 6% for two years) or the value of the vessel, whichever is less. Pursuant to Supplemental Admiralty Rule E(4)(f), the vessel owner is entitled to a prompt post-arrest hearing at which the plaintiff will be required to show why the arrest or attachment should not be vacated. The hearing is not intended to resolve the dispute

between the parties, but only make a preliminary determination whether there were reasonable grounds for the arrest and, if so, fix the appropriate amount of security.

Long-term vs. Short-term Arrest

In most instances, claims for ship necessities or crew wages are easily resolved with relatively-minimal financial consequences, thus releasing the vessel from arrest and returning it to service fairly quickly. On the other hand, high-value claims such as mortgage foreclosures, unpaid bunkers and charter disputes, can represent a substantial percentage or exceed the value of the vessel.

It is important to consider the ship owner's likely action (or inaction) after arrest. The following examples depict the ends of the spectrum for both short-term and long-term arrests:

- The vessel is enrolled with an International Group P&I Club, the type of claim is routinely covered, and a letter of undertaking is presented immediately, resulting in a timely vessel release.
- The owner (or charter) has experienced substantial financial difficulties, hasn't funded your claim, there are other unpaid creditors (such as crew or fuel suppliers), the owner is behind on mortgage payments and has put off critical maintenance. If the ship has no equity, the owner may choose to walk away, forcing the arresting parties to pay for significant custodial expenses such as wharfage, maintenance, bunkers, crew wages and repatriation charges. Meanwhile, the value of the vessel is likely depreciating while numerous claimants begin competing for limited funds.

Economic & Regulatory Climate

The effect of fluctuations in the global economy and volatility in cargo values (such as petroleum-based products) requires consideration. In addition, significant overbuilding of new ships (in relation to retiring ships) has resulted in world-wide excess tonnage, creating depressed charter rates and declining values. For many owners, cash flow is currently negative; as charter revenue is eclipsed by required operational, maintenance and debt payments. Additionally, the market value of a distressed ship may be far less than the sum of its liabilities. These owners are likely to view an arrest of their ship as taking a problem off their hands and placing the burden on the claimant(s). Accordingly, they are unlikely to bond their ship out of arrest, preferring to see it sold at a court sale, no longer burdening them with negative cash flow and adverse balance sheet impact.

The current regulatory environment imposed on financial institutions is also a consideration, as both domestic and international banks are under heavy scrutiny to build capital and/or exit non-performing relationships. Current vessel financings require more equity, putting pressure on both owners and claimants; it has become nearly-impossible for owners to refinance their way out of trouble by raising additional debt.

Some mortgagees may ultimately opt to take possession of a defaulted ship and return it to active service rather than going to sale. The revenue generated by operating the ship, although paltry and generally insufficient to cover the debt service, will likely exceed operating charges, allowing the lender to hedge that the ships value will increase

in time. Due to regulatory pressure, troubled lenders may not have this flexibility; they may be forced to proceed with a sale post-arrest, despite minimal returns.

Jurisdiction & Districts

One challenge within the commercial shipping sector is that the primary assets travel around the globe. Arrest and foreclosure rules and procedures vary dramatically between international jurisdictions, affecting such factors as the speed at which arrest actions are resolved, priority of lien claims, countersecurity requirements and the predictability of outcome. In less legally-sophisticated parts of the world, vessel custody periods can linger several years and otherwise-routine decisions become prolonged. Partiality may favor local ship owners while inexperienced jurists can cause costly delays and/or unpredictable decisions.

Domestically, there are inconsistencies in the process between different federal court districts. There are variances in local rules, deposit and substitute custodian requirements, time challenges and the overall familiarity with vessel arrest. Due to a lack of arrest frequency in a district, the judges and Marshal personnel may be inexperienced. If the arrest involves complicated legal issues, multiple claimants or the likelihood of significant custody costs, one might explore waiting to arrest in a more-experienced district.

Another difficulty is the potential lack of availability of U.S. Marshal personnel to execute the arrest. Vessels that call on major ports are generally turned around very quickly, often within a day. Good rapport and communication with the local Marshal's staff ensures their availability during the short window of arrest opportunity. Be cautious not to earn a reputation of "crying wolf" or telling the Marshal or the courts that an arrest is an emergency when it is not. Save favors for when really needed. In

instances where one might miss the ship while in port, research the target vessel's future routes in case you have to file quickly in another district.

The availability required ship services, inexpensive berthing or safe anchorage or particularly-stringent (and expensive) local security requirements in a particular arrest location should also be considered.

Cost vs. Return

In today's market, many ships have little or no value. Actions against older builds may not make economic sense. Consider a \$75,000 necessities claim against an older ship worth \$500,000. While the claim only equals 15% of value, there are several concerns: The ship's value may decrease, particularly because scrap rates can fluctuate dramatically. Low-value cases can result in "panic interveners" with other small claimants making last-ditch efforts to collect on an otherwise valueless receivable. A multitude of delays may prolong the action, increasing custodial costs to several hundred thousand dollars over a short period of time.

In the US, claimant(s) generally share in the arrest costs such as crew wages, fuel, dockage, provisions, insurance, vessel shifting, maintenance and repairs, repatriation charges, marketing costs and sales commission. In certain scenarios, the sum of these costs can exceed one million dollars.

Environmental Issues

Government authorities throughout the world are conscious of potential environmental damage and their long-term effects. Whether pier side or at anchorage, there is an underlying risk of a vessel causing pollution or other environmental damage. The liability associated with fuel spills or reef damage may prove to offset any possible gain from the arrest. While other insurances will be covered later in this paper, it is

important that a proper insurance certificate of financial responsibility (COFR) be written for the vessel.

Counter security/wrongful arrest

Domestically, Supplemental Admiralty Rule E(7) provides for security for a counterclaim that arises out of the same transaction or occurrence as the original action. While the language of the Rule is mandatory, courts are reluctant to require counter-security where the counter claim would unfairly burden a maritime lien claimant or unreasonably inhibit a claimant's prosecution of its case. *Expert Diesel, Inc., v. Yacht Fishin Fool*, 1986 AMC 2110 (S.D.Fla. 1986). Certain foreign jurisdictions have onerous requirements for counter-security, which must be posted in advance and may be difficult or time-consuming to have released.

There is additional exposure for wrongful arrest when the action is found to be in bad faith.

SHIP CUSTODIAN GOALS & EVALUATION

The substitute custodian should provide professional communication and transparency to all parties and a good understanding of the strategic and legal aspects of vessel arrest. This ensures commonality of custody assignment goals and will help result in an efficient outcome. There are several critical custodial goals that are common to all applicable assignments: ensure the safety of vessel and crew, control costs and preserve value.

Discreet worldwide vessel tracking and investigation

Using electronic monitoring, it is easy to arrange real-time, online vessel tracking. When these automated methods are ineffective or unavailable, manual charting of trade routes, discreet discussions with agency relationships, other

inconspicuous telephone verifications and confirmation of port schedules are performed.

On-board licensed watchman

National Maritime Services utilizes professional, on-board watchman, licensed ship captains who possess vessel operations experience, specifically in the custody environment. General one watchman is placed onboard for the pendency of an arrest. The watchman serves as the custodian's and claimant's eyes and ears, providing frequent reports from the ship and communicating with master and crew; living amongst them and interacting on their level.

As opposed to security guard services, which likely require routine personnel shift changes (and have no shipboard experience), utilization of a watchman results in potential cost savings, as they don't require expensive launches or port security escorts, as do guard services for each shift change.

Crew assessment, pay, immigration, reduction and medical concerns

Upon taking custody of a crewed vessel, several vital assessments are made. It is essential to immediately meet with the vessel's master, describe the procedural protocol and implication of the arrest, the purpose and responsibilities of the substitute custodian, and assess whether the captain will be a positive on-board influence relative to the arrest.

The majority of senior officers are qualified and committed men of the sea, possessing both good communication skills and a commitment to the vessel and crew. While there may eventually be potential conflicts with the vessel owner, operator or charterer of the vessel, it is important to get the point across that the court is ultimately in control of the vessel. Communicating with and taking instructions from an

experienced watchman as the court/custodian representative also helps solidify the relationship with the captain and to move it in a positive direction.

Compile a crew list with payroll records and crew contracts, when available, as they are vital tools in determining repatriation strategies during the custody period. Since crew compensation scales are frequently broken down into several categories, proper documentation ensures that unnecessary compensation is not paid. During most long-term arrest assignments, it is best to retain the existing crew. Obtain court permission for payment of crew services provided during the arrest period. These wages are considered a cost of administration.

When foreign crewmen are on-board, immediately confirm the immigration status of each crewmember. If the arrest is executed upon arrival in port, the crew may not have been cleared by immigration authorities. If the crew has been cleared, the physical location of their passports/visas is confirmed with the boarding agent. If the crew wants to leave the ship during a long-term arrest, ascertain that the documentation is appropriate based on the immigration requirements.

One effective way to save costs is to eliminate unnecessary, underutilized crew, as crew pay generally represents a significant portion of the custodial expenses. Retaining unnecessary crew also increases exposure to both injury and illness. Review safe manning documents to determine the appropriate level of crew personnel necessary to safely keep the ship. The minimum headcount must also be observed so as to keep insurance coverages in place. If it is determined that unnecessary crew can be eliminated and create savings, make arrangements for repatriation.

Immigration department protocol typically dictates that foreign crew must be escorted to the airport gate of an international flight. Repatriation expenses can be

substantial, especially with a passenger vessel where the number of non-maritime staff can be in the hundreds. When the vessel location is not proximate to an international airport and connecting flights are required, security escorts must accompany foreign crew onboard each domestic leg of the trip.

Clearing crew medical issues is of the utmost significance and becomes an issue in more instances than one might expect. At time of arrest, an immediate verification of any pending medical conditions can avoid major cost and P&I coverage issues at a later date. Document if any crew is ill, being treated or is currently injured. Crew medical issues, including expensive maintenance and cure requirements which last throughout the term of the illness, which arise during the arrest period could become administrative costs of the arrest.

Insurance issues

In order to minimize claimant risk and to preserve the value of the collateral, hull & machinery, port risk, P&I, crew and pollution coverages should be in effect during the pendency of the arrest. Immediately after taking possession of an arrested ship, it is important to evaluate which coverages are in place and the effect the arrest has on coverage. Unfortunately, this may prove challenging in that the insurer has no obligation to provide this information. The arrest could have an adverse-impact because many policies contain provisions that suspend coverage if the owner no longer controls the vessel. Claimants should refer to counsel experienced in marine insurance so as to understand the status of specific coverages. If placing coverage becomes necessary, one should obtain court approval.

It is recommended that the vessel custodian and the Marshals Service be named as an additional insured. This will ultimately serve to confirm underwriter's knowledge

of the arrest and verify that coverage is not affected. In general, if there is a substitute custodian, they must have sufficient coverage to indemnify the U.S. Marshal against claims.

In some instances, the U.S. Marshal may charge for insurance coverage which may not provide coverage for hull and machinery, port risk, P&I, crew or pollution claims. Identify the specific Marshals' coverage so as to avoid uninsured risks or duplicate coverage.

Lapses in coverage often forces claimants to scramble to place insurance coverage at less-favorable terms. National provides access to fixed premium, limited term policies that are better alternatives for a custodial scenario, in comparison to annual policies or a P&I club environment. Due to the shorter term and the fact normal vessel operations are not ongoing, rates are substantially discounted.

Vessel berths & shifting, cargo operations, provisions and bunkers

These items are all significant cost components of a ship custody assignment. So as to avoid unnecessary delay, counsel should consider whether initial arrest filings should contain provisions permitting vessel shifting and/or cargo discharge. Court orders should clearly define the financially-responsibility and legal liable for stevedoring operations.

Many complications can occur when a ship is arrested in an active berth. It is likely that another ship will be scheduled to utilize the berth for loading or discharge of cargo or passengers. If the arrested ship causes delays to the port's schedule, it could create a cause of action. Accordingly, it is common for the ship to be shifted to a lay berth or to anchorage, which generally requires tugs, pilots and line handlers.

Cargo unloading must typically be accommodated when the cargo was originally scheduled for discharge at the port of arrest. Contingency plans for time-sensitive, perishable or volatile cargo or paying passengers must be made well in advance and can be very costly.

For obvious reasons, on-board cruise ship passengers tend to be uncooperative. Avoid arresting vessels containing a large number of passengers aboard. Removing passengers is particularly-challenging, as it involves returning luggage, providing meals, attending to potential medical issues and providing return transportation.

Once the decision is made to arrest a crewed vessel, it is recommended that advance ordering of a short-term supply of provisions and bunkers is coordinated. Providing adequate provisions and fuel is essential to the proper functioning of the vessel. It is fairly common on arrested ships that the crew has not been paid and provisions are scarce. Immediately providing proper provisions can go a long way towards securing the crew's cooperation. This will also eliminate any potential for the global media to take an (unreasonable and sensational) interest in the arrest

In the long-term custody scenario, adequate planning includes consideration of consumption factors. Older, inefficient vessels can consume as much as \$10,000 per day in bunkers dockside, perhaps significantly more at anchorage. Utilization of a shore side generator may result in reduced fuel costs and a reduction in crew (if the engine room does not require manning).

Making arrangements for most of the above-described services requires an established relationship with a local port agent. Under normal (non-arrest) circumstances, the owner's agent would have sufficient instructions and funds to accomplish required services. However, the arrest action has likely ended that

relationship and a new agent must be utilized. The vessel custodian should have established agency relationships to assist providing services safely and efficiently.

Interaction with authorities

In the United States, once the order to arrest is executed by a federal judge, the U.S. Marshals Service becomes a vital part of the equation, as this agency is required to execute the arrest. Unfortunately, the Marshals Service has many other challenging duties and is not solely-dedicated to vessel arrest. Having prior arrest experience and the staff required to support the arrest operation enables the Marshals Service to easily schedule an arrest.

Other governmental authority issues may become involved with the ship. Customs and Border Protection regularly reviews crew immigration matters, while the United States Coast Guard is concerned with vessel manning and safety issues. The custodian should have experience dealing with the idiosyncrasies of government agencies and possess a track record of communicating on their terms.

One significant safety requirement is compiling heavy weather or hurricane evacuation plans for the arrested ship. This could run afoul of the judicial requirement that the ship remain “within the district”. Other considerations such as minimum safe manning, fuel and supply sufficiency, tug availability and insurance ramifications must be properly planned for.

VESSEL MARKETING & SALE

Monitoring inquiries

Prior to arrest, claimants should be considering a plan of action and begin assessing its final sales strategy. When vessel arrest documents are filed, it is common to receive inquiries from interested vessel purchasers. Compiling the details of these

inquiries ensures proper follow up should the vessel ultimately go to sale. If possible, qualify potential bidders early and communicate frequently to ensure they know the timeline for sale.

Keep an ear to the street - listen to what the marketplace is saying about the ship and its value. While some parties may have dishonorable intentions, weighing and comparing opinions can be enlightening as to the level of interest there will be at the time of sale. Determine the geographical location of potential buyers; it is good insight as to where the vessel will trade.

Vessel Valuation & Survey

Obtain an independent ship valuation and survey, in advance of filing motions for sale, particularly when there are multiple claimants. In general, the valuation should be based upon orderly liquidation value or scrap value for older, undesirable ships, as is, where is. The valuation is the basis to resolve pre-sale minimum acceptable bid arguments raised by lower-priority claimants and assists with the court's ultimate confirmation of sale (in instances where other claimants or the owner express doubt about the sales price in relation to value). Because ships values and condition fluctuate rapidly, older valuations and surveys delivered to mortgagees at time of loan advance may be inaccurate.

The survey also becomes a valuable sales tool, as it contains a substantial amount of technical information such as vessel specifications, onboard equipment, identified deficiencies, maintenance requirements and class-related issues. Ensure that the survey is prepared in a format suitable for widespread distribution thereby eliminating potential claimant liability.

Court ordered sale

Domestically, court-ordered, judicial sales are generally administered by live auction format overseen by the U.S. Marshal Service. The judicial sale has the benefit of cleansing title, eliminating all prior-existing maritime liens which may have attached to the vessel. Judicial sales can be timed as both pre-judgement and post-judgement.

A pre-judgment, interlocutory sale is warranted when (1) the vessel is exposed to deterioration, decay or injury; or (2) the expense of keeping the vessel is excessive or disproportionate to its value; or (3) there is an unreasonable delay in securing the release of the property. Because interlocutory sales transpire in advance of the known outcome of a case, vessel proceeds are held by the court until each claim's status is decided, which could take several years. In general, the claimants cannot credit bid their claim amount.

On the other hand, in a post-judgement sale, the proceeds of the sale are quickly disbursed to the judgement creditors to settle the outstanding charges. In this instance, judgement creditors are permitted the right to credit bid up to their relative lien position. This eliminates the need for creditors to double-down their investment when making protective bids.

It is the claimant's responsibility to file motions for sale, which should consider (as appropriate) hiring a competent S&P broker to promote the sale, pre-sale marketing expenditures and advertising, written vessel valuation and survey, minimum bid and credit bid conditions and requirements, and the opportunity to perform physical inspections by potential bidders. In general, the costs of sale are considered an administrative cost.

Promotion of the court ordered sale is an essential tool that improves the likelihood of a successful sale. Although the U.S. Marshal is required to publish a legal advertising “notice of sale”, it is generally inadequate to aggressively promote the sale without assistance. A competent S&P broker will place electronic and print trade advertising, target potential buyers, distribute survey reports and technical materials, explain the sales process and buyer qualifications. These services are generally performed for a fee that is a percentage of selling price, which is generally court-approved as an administrative expense.

Minimum Bid

A court-ordered minimum bid is established to protect the interests of non-priority lienholders and vessel owners from the vessel being sold substantially below value. It is generally recommended that the court direct minimum bids to be on the low end of the value range, so as to encourage auction attendance and spirited bidding. If the vessel does not ultimately sell at auction, it can take a minimum of 15 additional days to arrange a new sale date. Meanwhile, carrying costs continue. Repeat sales generally attach the “didn’t sell last time” stigma to a vessel, further reducing bidder interest.

Bidding

The Marshal’s office handles the administrative aspects of the sale; the Marshal’s deputy serves as auctioneer. Their involvement is vital to the success of the auction. Before the bidding begins, confirm that the Marshal is aware of any conditions of the auction (citizenship, minimum bids and the right of party(ies) to credit bid) and ascertain that each bidder is properly-qualified. Generally there will be a minimum deposit requirement for bidders.

Protective Bidding

Depending on the actual bidding, it may be in the claimant's best interest to acquire the vessel at auction. The court auction process is typically bidder unfriendly; vessels are sold on short notice, "as is, where is", and financing contingencies aren't allowed. This may yield lower, under-market bids. Creditors who establish a realistic understanding of the vessel's value, in relation to the priority of their claim (in the case of interlocutory sales), may opt to purchase the vessel at auction, so as to protect their claim equity against successful under-market bids. Because of the value of the underlying claim, in practice, protective bidding is generally limited to the mortgagee lenders. Although these buyers generally remarket the vessel immediately after the auction (in a more buyer-friendly environment) in some instances they continue to trade the vessel until such time that they can realize an increase in value.

YACHT FORECLOSURE & ARREST

Domestic yacht lenders generally utilize self-help recovery in most delinquency scenarios. Mortgagee-initiated judicial arrests are limited to instances where there are excessive storage or yard bills outstanding (which do not trump a U.S. mortgagee's claim in federal foreclosure actions) or when the lender desires to have title cleansed so as to reduce its own liabilities relating to guaranty of title at time of sale. *le.*

Over the past 10 years or so, there has been an increase in lien-related yacht arrest assignments, a result of increases in the magnitude of yacht values, complexity of operations and third party chartering.

There are some basic practical differences between commercial ship and yacht arrest and remarketing:

- Yacht owners and crew tend to be naïve about arrest and foreclosure procedures, and crew's loyalty towards defaulting owners may be very strong, resulting in difficulty gaining control of the vessel without changing crew.
- Yacht valuations tend to be more predictable, as they are not tied to business concerns such as shipping demand or cargo rates, although recent economic challenges have reduced yacht values considerably.
- Prospective yacht purchasers tend to emphasize a vessel's physical appearance, placing additional financial pressure on claimants to carefully maintain vessels during the arrest custody period.

ARREST ALTERNATIVES

In many circumstances, judicial arrest is not-necessarily the most prudent or cost-effective means to obtain the desired result. In a loan foreclosure scenario, the note may provide for self-help recovery or voluntary surrender. This alternative may require consent from local authorities and/or vessel crew. Although self-help repossession does not cleanse title, the lender can sell the vessel within a few weeks, freeing up capital, reducing carrying costs and eliminating exposure to fluctuations in values. Self-help recovery can also be utilized to relocate vessels to claimant-friendly jurisdictions for future arrest, post relocation. Negotiating a voluntary surrender with the vessel owner also provides benefits similar to self-help recovery.

PERTINENT CASE EXAMPLES

M/V Cape Viewer (2:13-cv-00658; E.D. VA)

- 169,381 dwt bulk carrier, 1992 build, Singapore registry
- Rule B attachment – alter ego claim - ICI collapse (Ukraine)
- Norfolk, Virginia, USA, shift to anchorage
- 11 month custody period
- Cargo-laden vessel
- Consumed significant fuel water
- Loss of port anchor
- Custody costs \$1.6 million+
- Court-approved sale required cargo delivery

M/V Blue Emerald (4:11-cv-00622; S.D. TX)

- 51,332 dwt product tanker, 2009 build, Singapore registry
- Ship mortgage foreclosure - Korea Line (Singapore)
- 80 day custody period
- Reduced crew to minimum safe manning
- Arranged short-term port risk insurance and P&I coverage
- Negotiated less-expensive berth
- Resolved complicated crew pay issues - diverse group of claimants
- Managed crew injury claim – maintenance & cure
- Assisted in vessel transfer to subsequent owner

Ikaria Maritime Attachment (Filed in Multiple Districts) (3:10-cv-03600-EMC; N.D. CA) (2:10-cv-02155-MBS; District of SC) (0:10-cv-61531-JIC; S.D. FL)

- Claim resulted from CCNI Antartico accident in Ecuador
- Simultaneous bunkers & container attachments in 4 ports
- Determined port arrival details of each ship
- Confirmed recent bunker purchases
- Developed plan to offload and store bunkers
- Claimant received alternate collateral quickly

Hannah Marine Fleet
(Filed in Multiple Districts)
(1:09-cv-03905; N.D. IL)
(5:09-cv-00772-GTS-DEP; N.D. NY)

- Fleet of 12 tugs & 9 barges
- Retained by mortgagee bank
- Cooperative owner surrendered vessels
- Collateral located in 4 different jurisdictions
- Provided security, dockage, maintenance, port risk & COFR
- Substantial interaction with US Coast Guard
- Other liens necessitated subsequent arrest and judicial sale

F/V Lady Elizabeth

- 35 meter commercial fishing vessel, 2000 build, US flag
- Retained by mortgagee bank
- Self-help recovery, located in Costa Rica
- Negotiated release from other Costa Rican claimants
- Relocated to favorable jurisdiction for arrest & judicial sale

M/T Fase

(4:08-cv-03406; S.D. TX)

- 16,750 dwt combined oil & chemical tanker, 2004 build, Liberia flag
- Ship mortgage foreclosure
- Located in Houston, Texas, USA
- 121 day custody period
- Required bio-diesel cargo offload/hired additional AMO crew
- Completed life raft certification to enhance value
- Mortgagee acquired at auction (credit bid) & continued trading

M/S Regal Empress

(8:03-cv-00703-MSS; M.D. FL)

- 1,475 passenger cruise ship, 900 crew, 1953 build, 1983 refit
- Necessaries claim
- 57 day custody period
- Significant communication to ensure ship officer's assistance
- Offload of 1,000+ passengers & luggage, return transportation
- Repatriated 260 crew, provided escorts for immigration purposes
- Considerable interaction with INS (immigration officials)

**M/V Casino Royale Arrest
(2007-00030; Supreme Court of the Bahamas)**

- **178 cabin gaming cruise ship, 1975 build, Bahamas flag**
- **Located in Bahamas/retained by Bahamian Admiralty Marshal**
- **Required significant interaction with Bahamian government**
- **Alternative claims to gaming equipment**
- **Repatriated unnecessary crew**
- **Vessel ultimately sold as scrap**

Getting Arrested:
The “Geico Moments” in preparing

Arrested: The Complete Guide to Vessel Arrest, Custody, and
Sale in Admiralty in Federal Court

Committee on Practice and Procedure
Maritime Law Association of the United States
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Why the Book?

After thirty years of filing or appearing in lawsuits involving the foreclosure of preferred marine mortgages or maritime liens and the all-too-often related bankruptcy proceedings, and after receiving hundreds of telephone calls from lawyers with questions about preferred marine mortgage foreclosures and other vessel arrest cases, I have become convinced that there is a need for a practice guide for these cases. That is the purpose of the book.

My intention is that the Practice Guide is not a form book. By Crutcher's West's Federal Forms, *Admiralty*, although published almost 40 years ago, is nearly as useful today as it was when it was published. My intention is also that the Practice Guide is not a learned treatise. Benedict and Moore's fill that need. And, the Practice Guide is not intended to be a desk book. Chuck Davis's Maritime Law Deskbook should be on every admiralty lawyer's bookshelf. The book is a Practice Guide. It contains everything that a lawyer reasonably familiar with the Federal Rules of Civil Procedure would need to file, prosecute and complete a preferred marine mortgage or maritime lien foreclosure case in admiralty in United States District Court.

The Practice Guide is made up of twenty-four chapters arranged in seven parts: The "Why" of Vessel Arrest, Getting the Vessel Arrested, Getting the Vessel Out of Arrest, Custody of the Vessel, Judicial Sale of the Vessel, Completing the Case, and Other Matters. Eighteen of the chapters include figures that are forms of pleadings or documents. Every one of the 87 figures is based directly on a pleading or document that was actually used in an actual federal vessel arrest case. The figures have blanks followed by numbers in brackets, such as: _____ [6], and every chapter that has figures ends with a list of Notes that explain what is to be put into the numbered blanks in the figures in that chapter.

Over the years of putting the Practice Guide together, time and again something has come up which led to what I have called a "Geico Moment." Everybody knows that . . . well, did you know?

Everybody Knows That . . .

Admiralty Jurisdiction *In Rem*

We all learned in the first year of law school, if not earlier, that ours is a government of laws and that there is a hierarchy to our legal system: We have a Constitution that is superior to statutes which in turn are superior to regulations and so forth.

Everybody Knows That . . .

We also learned in the first Civil Procedure course that every court has Court Rules that govern the practices and procedures in that court

Everybody Knows That . . .

Well did you know that . . .

There is a statute, The Rules Enabling Act, codified at 18 U.S.C. §§ 2071 to 2077, that sets out the requirements for rules for the federal courts. 18 U.S.C. § 2072(b) states that the rules of the federal courts : “shall not abridge, enlarge or modify any substantive right.”

We also all learned early in law school that the federal courts are courts of limited jurisdiction and that without a constitutional or statutory grant of jurisdiction to the federal courts, those courts will not accept a case.

Everybody Knows That . . .

Supplemental Rule E(3)(a) states that “[i]n admiralty and maritime proceedings process in rem or of maritime attachment may be served only within the district.”

Everybody Knows That . . .

Well did you know that . . .

Rule E(3)(a) has been held to be jurisdictional. *The Merchants National Bank v. The Dredge General G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981).

Venue for the Arrest Case

Just as there are statutory bases for federal jurisdiction, there is a basic statute for the venue of a federal civil case. 18 U.S.C. § 1391 is entitled “Venue generally,” and sets out that a civil lawsuit can be brought where the defendant resides or where the action that gives rise to the lawsuit happened.

Everybody Knows That . . .

Since the unification of the civil and admiralty procedures in 1966, admiralty lawsuits have been governed by the Federal Rules of Civil Procedure and the local civil rules for the district.

Everybody Knows That . . .

Well did you know that . . .

FRCP 82 is a two sentence rule. The first sentence says: “[t]hese rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.” The second sentence says: “[a]n admiralty or maritime claim under rule 9(h) is not a civil action for purposes of 18 U.S.C. §§ 1391 - 1392.”

The vast majority of preferred marine mortgage foreclosure cases and many, many of the suits to foreclose maritime liens are filed as consolidated cases under FRCP 20(a)(2) with the vessel named as a defendant *in rem* and the borrower or vessel owner named as a defendant *in personam*. The suit is filed in the district where the vessel is or will be and the court assumes jurisdiction over the *in personam* defendants without regard residence or where the loan was made or the lien action took place.

But wait, there’s more.

Standing in the Foreclosure Lawsuit

FRCP 19(a)(1)(B) requires that a person must be joined as a party if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the party’s absence may as a practical matter impair or impede the person’s ability to protect the interest.

Everybody Knows That . . .

Well did you know that . . .

In a lawsuit brought to foreclose a preferred marine mortgage if the owner of the arrested vessel does not file a Verified Statement of Right or Interest as required by Supplemental Rule C(6) the owner does not have standing in the *in rem* part of the case

even if the owner is named as an *in personam* defendant and served with the Complaint and a Summons. *United States v. Real Property*, 135 F.3d 1312 (9th Cir. 1998) citing *United States v. Beechcraft Queen Airplane*, 789 F.2d 627 (8th Cir. 1986). Although these two cases involved forfeitures for violation of drug laws the same principal is well established in Admiralty Law. See, e.g., *Bank of New Orleans and Trust Company v. Marine Credit Corp*, 583 F.2d 1063 (8th Cir. 1978).

Bankruptcy

So you get your arrest lawsuit filed, the Warrant for Arrest issued, the substitute custodian appointed and the vessel arrested. The next thing that happens is that the owner of the vessel files a petition in bankruptcy. That means that your arrest comes to a halt.

Everybody Knows That . . .

Well did you know that . . .

If the petition is for a liquidation, i.e., under Chapter 7 of the Bankruptcy Code, then the case law would support the position that the vessel under arrest is not property of the bankruptcy estate and the arrest, custody, and sale can proceed. But, if the bankruptcy is a reorganization, i.e., filed under Chapters 11 or 13, then the Automatic Stay of Bankruptcy applies. See, e.g., *Morgan Guarantee Trust Company v. Hellenic Lines. Ltd.*, 38 B.R. 987, 1984 A.M.C. 1073 (S.D. N.Y. 1984), cited with approval in *In re: Millenium Seacarriers, Inc. et al.*, 419 F.3d 83 (2nd Cir. 2005).

So, if the automatic stay of bankruptcy applies, you either have to get an Order from the Bankruptcy Court granting relief from automatic stay or get an order from the District Court withdrawing the reference to the Bankruptcy Court.

Everybody Knows That . . .

Well did you know that . . .

There is a provision in the Bankruptcy Code for what can be called “Automatic Relief from Automatic Stay.” If the situation is a preferred marine mortgage on a pleasure vessel which secures a promissory note for the money used to purchase the vessel, a very common situation, and if the borrower files a petition under Chapter 7, then the borrower, the debtor in the bankruptcy, has 45 days from the First Meeting of Creditors to either reaffirm the debt under 11 U.S.C. § 524 or redeem the property under 11 U.S.C. § 722. Reaffirmation is a complicated procedure requiring court approval and, interestingly, requiring a certification by the debtor’s attorney. Redemption basically means paying off the loan. If the debtor does not reaffirm or redeem within the 45 day period, then, by statute, the automatic stay is terminated and the creditor may proceed with the vessel arrest, custody, and sale.

ARRESTED

THE COMPLETE GUIDE TO
**ARREST, CUSTODY, AND
SALE OF VESSELS**
IN ADMIRALTY IN FEDERAL COURT

STAN LOOSMORE



Ancient Mariner Press

About the Author

Stan Loosmore filed his first Preferred Marine Mortgage foreclosure case in April, 1981 and since then he has represented parties in more than 300 federal vessel arrest cases involving the full range of commercial and pleasure vessels in Washington, Alaska, Oregon, California, Hawaii, Idaho and Florida.

Mr. Loosmore is a graduate of the United States Coast Guard Academy with honors as a Distinguish Cadet and Honors Cadet, earned a Masters Degree in Mechanical Engineering and the degree of Naval Engineer from the Massachusetts Institute of Technology and was elected to Tau Beta Pi and Sigma Xi, and earned the degree of Jurist Doctor from Georgetown University Law Center where he served as an editor of the Georgetown Law Journal. He has been admitted to the practice of law in Washington and California and in the federal district courts in those states and has been designated a Proctor in Admiralty since 1981.

After graduating from the Academy he served more than 20 years on active duty in the U. S. Coast Guard. During that time he spent five years at sea, with one tour as Engineer Officer on the icebreaker Burton Island and a trip to Antarctica, and served in both legal and engineering capacities ashore, including assignment as the Secretary of the interagency Ship Structure Committee. During that assignment he wrote SSC-200 which summarized and catalogued all of the publications of the Ship Structure Committee from its founding in 1944. He was appointed as the technical and legal specialist as well as Recorder for the Marine Board of Investigation for the sinking of the Great Lakes Ore Carrier Edmund Fitzgerald and he wrote the report of the Marine Board. And yes, he did get to meet Gordon Lightfoot.

Mr. Loosmore has been a regular speaker on federal vessel foreclosure and arrest cases at seminars presented by the Washington State Bar

Association and the Federal Bar Association for the Western District of Washington. He served on the committee that revised the Local Admiralty Rules for the Western District of Washington and in 2011 prepared a proposal for the complete revision of those Local Admirably Rules which remains under consideration.

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CHAPTER 6

Other Filings to Start the Lawsuit

As in so many of the aspects of these foreclosure lawsuits, local practice varies, but in general, besides the Complaint and whatever initial motions and supporting documents are filed, it is necessary to prepare and file a Civil Cover Sheet, the Summons(es) and a Disclosure Statement Pursuant to FRCP 7.1. In addition, while in some districts the rules for filing a new case electronically may call for including the proposed Summons or Summonses as an attachment to the Complaint, in other districts it may be necessary to prepare and file a Praeceptum for Process. In some federal districts, a preferred mortgage foreclosure lawsuit is initially assigned to a Magistrate Judge who conducts pretrial matters and hearings and then submits proposed findings of fact and recommendations.¹ Other districts request whether counsel will consent to the assignment of the foreclosure case to a Magistrate Judge.

Civil Cover Sheet

The Judicial Conference has prescribed form JS 44 as the Civil Cover Sheet to be used in federal courts. The form is a two-page document but the second page is a full page of instructions. The form is typically available on a court's web site and, although it varies depending upon local practice, can usually be filled out online and saved or converted into a form satisfactory for filing. In section II, Basis of Jurisdiction, a suit to

1. 28 U.S.C. § 636

foreclose a Preferred Marine Mortgage or a maritime lien is a Federal Question suit, so box 3 is checked. See Chapter 2 for the discussion of the jurisdiction of a Federal Court over such suits. In section IV, Nature of Suit, a suit to foreclose a Mortgage Preferred Marine or a Maritime Lien is a suit under a Marine Contract, Class 120. In section VI, Cause of Action, even though the form says that jurisdictional statutes are not to be cited except in diversity cases, local practice frequently requires citation to 28 U.S.C. § 1333 and 46 U.S.C. § 31325. In section VII, Requested in Complaint, Instructions VII, page 2, requires entry of the dollar amount demanded in the Complaint in thousands of dollars. This entry does not include pre- and post-judgment interest or attorneys' fees or costs. With very few exceptions, admiralty cases are tried to the Court rather than to a jury so the No box is checked after the Jury Demand question..

Summons in a Civil Action

The form of the Summons in a Civil Action is also a form prescribed by the Judicial Conference and, like the Civil Cover Sheet, is typically available on a court's web site. The Summons or Summonses can usually be filled out online and filed electronically or converted into a form satisfactory for filing. A separate Summons is prepared for and served on each of the *in personam* defendants. Insert the name of each defendant and the address where service of the Summons and the Complaint is to be made. In accordance with FRCP 12(a)(1)(A), a defendant must serve an answer within 21 days after being served with the Summons. The form also requires entry of the name and the address of the office of the attorney representing the plaintiff.

Praeipe for Process.

A Praeipe for Process is nothing more than a request that the Clerk of the Court issue a Summons or Summonses in the form provided.

Many of the federal districts have implemented programs that require attorneys to open cases and file complaints and other initial pleadings electronically online. The local rules for the electronic case opening in these districts typically call for a Summons or the Summonses to be attached to the Complaint and, as a result, no Praecipe for Process is required.

Disclosure Statement Pursuant to FRCP 7.1

Federal Rule of Civil Procedures 7.1 requires that any nongovernmental corporate party must file a disclosure statement that identifies any parent corporation or any publicly held corporation owning 10 percent or more of its stock or that states that there is no such corporation. This disclosure statement is to be filed with the party's first appearance, pleading, petition, motion, response or other request addressed to the court and must be supplemented if the required information changes.

Consent to Jurisdiction of Magistrate Judge

Some federal districts have local rules governing the assignment of cases to Federal Magistrate Judges. Depending upon local practice, counsel for the plaintiff may be required to prepare or complete and file a notice of consent or declination to consent to the assignment of the foreclosure case to a Magistrate Judge.

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IN THE UNITED STATES DISTRICT COURT
FOR THE _____ [1]

_____[2])
)
Plaintiff,)
)
v.)
)
_____[3], Official Number)
_____, [3] her engines, tackle,)
apparel, furniture, appurtenances, and)
equipment, *In Rem*, and _____ and)
_____, [4], [7], *In Personam*,)
)
Defendants.)
_____)

IN ADMIRALTY [5]
NO. [6]
DISCLOSURE STATEMENT
PURSUANT TO FRCP 7.1

_____, [2] plaintiff, in accordance with FRCP 7.1, states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED this _____ day of _____, _____.

Attorney for Plaintiff

Figure 6-4

Notes to Chapter 6

Other Filings to Start the Lawsuit

1. Designation of Court as required by Local Rules.
2. Name of plaintiff or plaintiffs and description, e. g., a (state) Corporation, as required by Local Rules.
3. Name and Official Number of defendant vessel.
4. Name or names of *in personam* defendants.
5. Designation that case is within the admiralty or maritime jurisdiction of the court.
6. Case number, as supplied by the Court after filing.
7. In community property states, actions by one member of the marital community are deemed to be actions on behalf of the other member and the marital community. See, e.g., Wash. Rev. Code Chapter 26; Cal. Fam. Code §§ 760 – 1; Alaska Stat. Chapter 34.77.
8. Some federal districts have Local Civil Rules governing the assignment of cases to Federal Magistrate judges.