

Vessel Arrest and Custodianship: Current Issues and Cases of Interest

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Many readers of this publication have been involved in the arrest of a vessel at some time in their maritime career. The majority of arrests are quickly bonded out or otherwise settled, and the offending vessel is back sailing in a matter of days. In the current economic climate, we find that many middle market and tramp vessels remain under arrest for a longer time and some owners or charterers simply walk away, unable or unwilling to post the required security. The vessel is then left under court care, and the cost to sell or dispose of it is left to the plaintiff, namely your client. Depending on the location of the vessel, this can be very costly.

Arresting a vessel today takes organization and planning. Proper communication among your client, the custodian and other potential claimants is very important. Some steps to take prior to and during the arrest process should include:

Cost Estimate

There are two ways to determine the cost to arrest and hold a vessel under custody. Short-term custody can be as little as a few hundred dollars per day. The owner/defendant will normally settle and cover all costs such as dockage, fuel, crew costs, etc., for the short period of arrest, as they were paying these costs on an ongoing basis through their husbanding agent. If the case is not resolved within 5-7 days, start to operate under plan B. Request or prepare an estimate for a full 30 days of custody, and include all costs to operate the vessel dockside under normal circumstances. This estimate must include costs to maintain and repatriate the crew, as required by law. Crew visas normally expire within 29 days, and with Homeland Security now in place, immigration officials are not flexible. We recently handled a passenger cruise vessel that went to Marshals sale. The vessel had 425+ crew on board, all of whom had to be repatriated. Together with routine safekeeping and maintenance of vessel and crew, custodial costs

exceeded \$12,000 per day and totaled over \$700,000. Prepare your client for the worst case scenario.

Proper Evaluation of Value

In many arrest cases, the vessel is foreign flagged with a foreign mortgage. When claims reach or exceed the value of the vessel, claimants can no longer depend upon the mortgage holder intervening due to their low priority. This results in the loss of a major creditor, the deep pocket needed to cover custodial costs and an automatic bid at the Marshal's sale. As the initial arresting party, make certain that the vessel has enough value to cover the cost of arrest, as well as the majority of your claim. Don't forget to evaluate crew wages and tort claims, which will have priority over contract claims and mortgages. When estimating equity in the vessel, do not base this estimate on a purchase survey. Recent sales of comparable vessels can provide a much more accurate value on a specific vessel. We can provide this information on a confidential basis prior to considering an arrest. On older vessels, use the "scrap" value as a safe number.

Initial Filing and Action

Once you have decided to move forward with the arrest, meet with the custodian to determine any immediate decisions that can be made to reduce long-term financial commitments. If you decide that the vessel can be placed at anchorage, or at a less expensive docking facility, request permission to shift in the initial pleadings. Also, take into consideration commercial activity in ports. At the scheduled departure time of the arrested vessel, the port probably has a working berth scheduled to accommodate another vessel and will require you to shift. Even if the vessel is to remain in port, request the court's permission to shift to a lay berth. Make sure the costs of shifting the vessel are considered (tugs, linehandlers, pilot charges, etc.) in the

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initial estimate.

Representing the Custodian

It has been past practice that the lead plaintiff's attorney handle any requests, motions or orders on behalf of the custodian. As an arrest progresses and the custodial expenses climb, the custodian needs to look out for his best interest, and counsel for the claimants need to look out for the claimants' best interest. These are not always aligned. We find it in the best interest of all parties that the custodian has separate and neutral counsel to address the issue of custodial charges and expenses of administration. If the custodial charges exceed the value of the vessel, the custodian must seek contribution from all intervening claimants, and separate counsel is a necessity.

Efficient Preparation for Sale

Once it appears that the vessel owner does not intend to resolve the dispute or is having difficulty posting security, immediately request the court set a date for interlocutory sale. While you need enough time to properly market the vessel to potential buyers, we have never seen a circumstance where a sale is scheduled too

early. Proper broker representation can be brought in at very reasonable numbers (often 1% to 3% of the sales price) utilizing broadcast faxing, e-mail and the Internet to attract all potential buyers within a few days. Generally, minimum bids do more harm than good.

Case History Examples

A recent case held its first Marshals auction with a minimum bid. While 15 potential buyers attended the sale, no one bid. The vessel was rescheduled for sale 2 weeks later, attracting only 4 bidders. The vessel sold for within \$250,000 of the original minimum bid. Experience teaches us that the sale price at the first auction, with no minimum bid and more potential buyers, would have far exceeded the minimum bid if no minimum was set. Let the market dictate what the vessel is worth, and ensure that marketing efforts attract enough qualified buyers.

A small cargo vessel went to auction with a minimum bid of \$350,000. Estimated market value at the time was between \$200,000 to \$250,000. No one appeared at the auction. The vessel was finally surrendered to the custodian, yours truly, in lieu of the administrative expenses. It was sold about 9 months later for \$50,000.