

# Real World Challenges: Practical Maritime Arrest Considerations

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*There are numerous practical challenges encountered during the custody period of arrested commercial ships — particularly when the vessel is detained for a considerable time period. Generally, arrest actions are intended for the claimant to obtain immediate payment or security, and last only a few days. However, with the uncertain global economy, lack of available credit, volatile charter rates and overall diminished ship values, the potential for long-term arrests has increased; ship owners are having difficulty raising the funds necessary to obtain a timely vessel release.*

The arrest period can also become prolonged if additional parties intervene in the action, complicating the circumstances and the related court proceedings. Claimants and their respective advisors must consider

the risk associated with a subject vessel remaining under arrest for a significant period of time, by 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 can easily over-value target vessels or underestimate the likelihood of an arrest going long-term. This is particularly dangerous, as the arresting party is most often responsible for the costs of keeping an arrested ship. Arrest actions can potentially extend beyond a year's time with costs exceeding US\$1 million. It is critical that claimants make a proper assessment of the risks and likelihoods in advance of effecting the arrest action because some actions do not warrant the financial exposure.

In relation to the ship's value, a potential arresting party must consider their claim amount, the likelihood of additional intervening claims and whether those claims have priority over the evaluator's claim. The combined value of priming claims may exceed the ship's value, eliminating any potential recovery. Complications associated with multiple claimants generally reduce the likelihood of negotiated resolutions, and may also cause court delays and increasing costs.

Claimants should contemplate the effect of the arrest, both negative and positive, on its reputation. The action might adversely impact other relationships by causing harm to strategic partners or customers. Alternatively, the arrest may benefit cash flow, as the market acknowledges the claimant's hard line approach to collection of delinquent accounts.

## Long-term vs. Short-term Arrest

Generally, the minimal claims for ship necessities or crew wages are resolved quickly. On the other hand, high-value claims, such as mortgage foreclosures, unpaid

bunkers and charter disputes, represent a substantial percentage of ship value. Consider the ship owner's likely action (or inaction). The following scenarios 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, this 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 simply choose to walk away, forcing the arresting parties to pay for significant custodial expenses such as wharfage, maintenance, bunkers, crew wages and repatriation.

## Economic & Regulatory Climate

Consider the effect of fluctuations in the global economy and volatility in cargo values (such as petroleum-based products). Significant new ship builds (in relation to retiring ships) has resulted in world-wide excess tonnage, depressed charter rates and declining values.

The owner may be experiencing negative cash flow from operations; as revenue is eclipsed by operational expenses and debt service. The market value of a distressed ship may be far less than the sum of its liabilities. These particular owners may view the arrest ship as taking a problem off their hands and placing the burden on the claimant(s), and

are unlikely to bond their ship out of arrest, preferring to see it sold at a court sale.

The current financial regulatory environment requires banks to build capital and exit non-performing relationships. Current vessel financings require significant cash equity; it is nearly-impossible for distressed owners to refinance their way out of trouble. Some mortgagees ultimately take possession of a defaulted ship and return it to active service, rather than going to immediate sale.

The revenue generated by operating the ship — although generally insufficient to cover the debt service — will likely exceed operating charges, and in turn allow the lender to speculate that the ship's value will increase in time. Due to regulatory pressure, troubled lenders may not have this flexibility. They are forced to proceed to sale, despite lackluster financial returns.

## Jurisdiction

Maritime arrest rules and procedures vary dramatically between international jurisdictions, affecting such factors as the speed at which actions are resolved, the priority of various claims, and the overall predictability of the outcome. In legally-unsophisticated parts of the world, custody periods can linger several years as otherwise-routine decisions become prolonged. Partiality may favor local parties and inexperienced jurists can cause costly delays or unpredictable decisions.

Certain jurisdictions have onerous counter-security requirements, which must be posted at time of arrest and may be difficult or time-consuming to have released. Jurisdictional differences in "wrongful arrest" exposure should be considered.

Finally, consider the availability of required

services. Confirm that critical items such as inexpensive moorage, fresh water and reliable local security are available at the arrest location.

## Use of a ship custodian

Many jurisdictions allow for the naming of an independent ship custodian or keeper during the arrest period. The custodian ensures crew and vessel safety, controls costs and preserves value. This requires them to possess expertise in ship operations and a practical understanding of the strategic and legal aspects of vessel arrest. Generally, the utilization of an independent custodian will ensure transparency and commonality of custody assignment goals, resulting in an efficient outcome for all parties.

## On-board licensed watchman

National Maritime Services utilizes an on-board watchman during its crewed arrest assignments; a professional, licensed ship captain who possesses operational experience in the custody environment. The watchman serves as the custodian's eyes and ears, providing frequent reports from the ship and communicating with master and crew; living amongst them and interacting on their level.

Utilization of a watchman provides better decision making and significant cost savings in comparison to security guard services (which require routine shift changes and have minimal shipboard experience). While a watchman remains on-board the vessel at all times, security guards require routine launches or port security escorts to and from the vessel during 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 most effective to retain the existing crew during the custody period as they are most-familiar with the vessel. Immediately meet with the vessel's master, describe the arrest implications and procedural protocol, the role of the ship custodian, and assess whether the captain will be a positive on-board influence.

The majority of senior officers are qualified and committed men of the sea, possessing both good communication skills and a commitment to both 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.

Compile payroll records and crew contracts as they are vital tools in determining repatriation strategies during the custody period. Because crew compensation scales are stratified into different categories, proper documentation ensures that unnecessary compensation is not paid.

Immediately confirm the immigration status of each foreign crewmember (as applicable). 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, confirm the physical location of their passports/visas with the local boarding agent. For potential crew leave during a long-term arrest, ascertain that the documentation is in accordance with immigration requirements.

Since crew pay generally represents a significant portion of the custodial expenses, repatriate unnecessary, underutilized crew. Repatriation also reduces potential financial

exposure to both injury and illness. Review safe manning and insurance documents to determine the appropriate number of crew personnel necessary to safely keep the ship.

Identify and treat any existing medical issues pertaining to crew. This will avoid major cost and P&I coverage issues at a later date. Crew medical issues, including expensive maintenance and cure requirements which last throughout the term of the illness, may arise during the arrest period and could become administrative costs of the arrest.

## Insurance

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. Arresting parties should refer to legal counsel, experienced in marine insurance, so as to understand the status of specific coverages. 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. Attempting to name the vessel custodian as an additional insured will ultimately serve to confirm underwriter's knowledge of the arrest and determine whether owner's coverage is affected.

In some jurisdictions, the courts or local authorities may require and charge for insurance coverages. These charges may not provide coverage for hull and machinery, port risk, P&I, crew or pollution claims. Identify

the specific coverage details so as to avoid uninsured risks or duplicate coverage.

Lapses in coverage often force claimants to scramble for last minute insurance coverage at less-favorable terms. National Maritime Services provides the parties with access to fixed premium, limited term policies suited for custodial scenarios, in comparison to annual policies or P&I club cover. Due to shorter time frame and discontinued vessel trading operations, 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, initial arrest filings should contain provisions permitting vessel shifting, cargo discharge, and vessel release conditions. Court orders should clearly define the financially-responsibility of each of the parties.

Many complications can occur when a ship is arrested in an active berth. Other ships may require its utilization for loading or discharge. Should the arrested ship causes delays, it could be subject to a cause of action or fines. 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 in advance.

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, involving return of luggage, providing meals, attending to medical issues and return transportation.

When arresting a crewed vessel, an immediate count of provisions and bunkers is undertaken. Because of the owner's potentially-ominous financial situation, it is common that provisions are scarce or the crew has not been paid or cared for. Immediately providing satisfactory provisions helps ensure the crew's cooperation and reduces 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 consume as much as \$10,000 per day in bunkers while dockside, 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). Alternatively, shifting to anchorage reduces berthing charges.

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 custodian should possess established agency relationships necessary to provide required services safely and efficiently.

## Interaction with authorities

During the arrest period, a myriad of governmental authorities may become interested in ship activities. For example, customs and immigration authorities may perform reviews of crew entry-related matters, while the Coast Guard may require comfort pertaining to manning and safety, necessitating written crew security procedures or heavy weather plans.

The arrest team should have experience dealing with the idiosyncrasies of government agencies and possess a track record of communicating on their terms.

## Conclusion

The decision to affect an arrest requires careful analysis and deliberation. Consideration should be given to the likely and extraordinary outcomes and related costs. In the event that the custody period covers an extended period of time, utilization of a professional custodian will help to achieve both cost reduction and preservation of collateral value — resulting in a better financial return.



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G. Robert Toney created the innovative National model, offering a complete range of marine and aircraft-related services, such as collateral seizure, arrest and recovery, custodianship, commercial ship, aircraft and pleasure boat sales, vessel transportation, marine service and yacht financing. Under Toney's leadership, National Maritime Services and its affiliated company, National Liquidators, have become global businesses.

Toney shares his enthusiasm, knowledge and passion for the business at speaking engagements and educational workshops for bankers, attorneys and law enforcement personnel at conferences around the world. He is one of a few active non-lawyer members of the South East Admiralty Law Association and the Maritime Law Association of the United States, where he now co-chairs the association's Yacht Finance Committee. In 2007, Toney was named "South Florida Business Leader of the Year."



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Alan Swimmer is a finance industry veteran with over 25 years of experience. He is responsible for oversight of operations, long-term planning, and relationship management. Swimmer also serves as President of Maritime Capital Group, an affiliated company which provides vessel financing and related services.

Prior to employment with National, Swimmer successfully operated and sold two well-known specialty finance loan platforms, having managed the origination of over \$4 billion in aircraft, yacht, and recreational vehicle loans and the acquisition of several specialty loan portfolios. Originally a Certified Public Accountant, he draws on his varied business experience to advise law firms, lenders, and government agencies.