SOME ISSUES THAT ARISE IN ARRESTS OF SHIPS

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1. The purpose of this paper is to discuss some practical issues that confront judges from time to time in managing ships under arrest and the arrest proceedings themselves. I will deal with some aspects of regulating the Marshal's custody, the operation of undertakings and the provision of security and bail under the *Admiralty Rules 1988* (Cth).

The context for arrests, security, custody of the ship and release

2. The right to commence proceedings *in rem* is a right to sue the "*res*" or, in most cases, the ship. (I will refer to the *res* and the ship interchangeably, although other maritime property such as cargo, can be arrested.) Thus, when a writ *in rem* is filed under Pt III of the *Admiralty Act 1988* (Cth) the defendant is the ship, not a relevant person such as her owner or a demise charterer in possession of her[1].

3. The writ must be served on the ship and she must be in the geographical jurisdiction of the Court when served[2]. If the plaintiff wishes the ship to be arrested, it must apply for an arrest warrant under r 39 of the *Rules* in accordance with Form 12.

4. Under r 41 an application for an arrest warrant constitutes an undertaking to the Court. That rule provides:

> "**41 Marshal's costs and expenses**
>
> (1) An application for an arrest warrant constitutes an undertaking to the court:

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1 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 74 [99] per Allsop J, with whom Finkelstein J agreed; Finn J reserved his opinion on this issue at 51 [3]

2 *Comandate* 157 FCR at 76 [108]

(a) if the application is made by the applicant personally — by the applicant; or

(b) if the application is made by an Australian legal practitioner on behalf of the applicant — by the Australian legal practitioner; or

(c) if the application is made by any other agent of the applicant — by the applicant;

to pay to the Marshal, on demand, an amount equal to the amount of the costs and expenses of the Marshal in relation to the arrest, including costs and expenses in relation to the ship or other property while it is under arrest.

(2) In addition to any undertaking, the Marshal may demand from the applicant payment of an amount of money that the Marshal considers necessary as a deposit to enable the Marshal to discharge his or her duties effectively in relation to the arrest, including duties while the ship or other property is under arrest."

5. When the Marshal arrests a ship, r 47(1) gives him or her custody of her. Rule 47 provides:

"**47 Custody of arrested ships and property**

(1) Subject to these Rules, a Marshal who arrests a ship or other property has the custody of the ship or property.

(2) The Marshal must, unless the court otherwise orders, take all appropriate steps to retain safe custody of, and to preserve, the ship or property, including:

(a) removing from the ship, or storing, cargo that is under arrest;

(b) removing cargo from a ship that is under arrest and storing it;

(c) removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest; and

(d) moving the ship that is under arrest.

(3) Subject to an order under paragraph 30 (2) (b) of the Act, if a ship or other property that is under arrest in a proceeding in a court is arrested in a proceeding in another court, subrule (1) only applies in relation to the later arrest after the ship or property has been lawfully released from the earlier arrest.

> (4) If, in relation to a proceeding commenced as an action in rem that is pending in a court (in this subrule called the first court):
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> (a) a Marshal of another court has the custody of the ship or other property; or
> (b) the proceeds of the sale under the Act of the ship or property are held by another court;
>
> the other court may make such orders as are necessary or convenient to transfer the custody of the ship or property to the Marshal of the first court or to transfer the proceeds to the first court."

6. If a Marshal has custody of a ship, the Marshal or a party can apply to the Court for directions with respect to the ship under r 48(1). In addition, if cargo is on a ship, whether the cargo is under arrest or not, the person entitled to immediate possession of either the ship or the cargo can apply to the Marshal to discharge the cargo and the Marshal and the Court can allow that to occur on such terms and conditions as are just (r 49). Importantly, r 50 provides that:

> "**50 Preservation, management and control powers**
>
> The court may, at any stage of a proceeding, make appropriate orders with respect to the preservation, management or control of a ship or other property that is under arrest in the proceeding."

7. Next, a relevant person may or may not file an appearance. Often the ship's owner will appear and seek her release from arrest. If a relevant person appears, he is liable to have judgment entered against him personally for the full amount of the claim and his liability is not limited to the value of the ship, which remains a party jointly and severally liable.

8. Rules 51-53 deal with release. First, r 51(1) provides:

> "**51 Release by Registrar**
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> (1) If a ship or other property is under arrest in a proceeding and the Registrar is satisfied that:
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> (a) an amount equal to:
>
> (i) the amount claimed; or
> (ii) the value of the ship or property;

whichever is the less, has been paid into court; or

(b) a bail bond for an amount equal to:

(i) the amount claimed; or
(ii) the value of the ship or property;

whichever is the less, has been filed;

in the proceeding the Registrar may, on application in accordance with Form 18, order the release from arrest of the ship or property."

9. A party may apply to the Court in accordance with Form 19 for the release of the ship or other property that is under arrest in the proceeding under r 52(1). The Court can order the release on such terms as are just (r 52(3)). The applicant for release must apply on reasonable notice, but the Court can hear the application if there are exceptional circumstances that justify hearing it without giving notice to the plaintiff (52(4)). Bail is dealt with in rr 54-60: *Navios International Inc v The Ship "Huang Shan Hai"* (2011) 194 FCR 468. Importantly, r 53 provides:

"**53 Marshal's costs and expenses**

(1) An application under rule 51 or 52 for the release from arrest of a ship or other property constitutes an undertaking to the court:

(a) if the application is made by the applicant personally — by the applicant; or

(b) if the application is made by an Australian legal practitioner on behalf of the applicant — by the Australian legal practitioner; or

(c) if the application is made by any other agent of the applicant — by the applicant;

to pay to the Marshal, on demand, an amount equal to the amount of the Marshal's costs and expenses in connection with the custody of the ship or property while it was under arrest, including the costs and expenses associated with the release from arrest of the ship or property.

(2) The Marshal may refuse to release a ship or other property from arrest unless arrangements satisfactory

to the Marshal have been made for the payment of the costs and expenses mentioned in subrule (1)."

10. If no-one appears, the plaintiff can only proceed against the ship and can recover no more than her value. The ship will be sold by force of an order of the Court. Ordinarily, the order will require that she be valued and sold under rr 69(1) and 70 [3]. Importantly, rr 69 and 70 provide:

> "**69 Orders for valuation and sale**
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> (1) The court may, on application by a party to a proceeding and either before or after final judgment in the proceeding, order that a ship or other property that is under arrest in the proceeding:
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> (a) be valued;
> (b) be valued and sold; or
> (c) be sold without valuation.
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> (2) An application for valuation or sale of a ship or other property must be in accordance with Form 26.
>
> (3) An order for valuation or sale of a ship or other property must be in accordance with Form 27.
>
> (4) An application under subrule (1) constitutes an undertaking by the party who made it to pay, on demand, to the Marshal an amount equal to the amount of the costs and expenses of the Marshal in complying with the order.
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> (5) If the ship or property is deteriorating in value, the court may, at any stage of the proceeding, either with or without application, order it to be sold.
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> **70 Sale**
>
> (1) The sale of a ship or other property ordered to be sold under rule 69 must be conducted by the Marshal.
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> (2) The court may direct that the sale be by auction, public tender or any other method."

Regulating the Marshal's custody

[3] *Norddeutsche Landesbank Girozentrale v The Ship "Beluga Notification" (No 2)* [2011] FCA 665

11. As the terms of rr 47 and 50 provide, the Marshal who arrests a ship has custody, but not possession, of her. He or she has a duty, unless the Court otherwise orders, to take all appropriate steps to retain safe custody of the ship and to preserve her (r 47(2)). In practice, the Marshal often will apply in chambers for orders or directions dealing with issues that can arise in relation to his or her custody.

12. Because plaintiffs do not want to forewarn a ship of an impending arrest, the Marshal usually executes the warrant only after she has berthed at a wharf or anchored in or near a port. The ship from that moment is in the Marshal's custody and she cannot be dealt with except with the Marshal's or Court's approval. There is a shortage of wharf space in many working ports. The harbourmaster and port authorities often seek to have an arrested ship moved. This can be expensive; for example, when a capesize was moved in 2009 within the Port of Newcastle it cost about $15,000 per move, and, when she had to be taken to Sydney, it cost about $70,000.

13. It is important to ensure that the Marshal will be able to recover any costs involved in his or her custody of the ship. This is a significant purpose of the deemed undertakings in rr 41, 53 and 69(4) to which I will come. The decision whether or not to order that a ship be moved while under arrest involves consideration of:

- the impact in terms of the cost of the move;
- the continuing security of the arrest itself;
- any flight risk (generally, this is unlikely to be significant if the ship or her owners are involved in regular trade with Australia);
- whether police should be on board when the ship moves;
- the amenity and conditions of the crew;

- the security of the Marshal's custody offered in the proposed place of relocation;
- the costs to be incurred in the new location;
- whether the ship's papers should be seized (and the need to have them on the ship for insurance, P&I Club or regulatory purposes while she is under way).

Undertakings

14. The *Rules* prescribe by whom a relevant undertaking will be given. Often the Marshal will ask for the person responsible under the undertaking to provide funds under r 41(2) on account of anticipated disbursements. These undertakings are necessary to ensure that the Marshal is protected in the performance of his or her office as a person appointed or authorised by the Court[4].

15. In the case of arrests, r 41(1) fixes the responsibility for the undertaking on the person who makes the application for arrest. If that person is the plaintiff personally, then it will give the undertaking. If the plaintiff is a foreigner, consideration needs to be given to whether the undertaking is sufficient, on its own, to protect the Marshal. He or she may need to ask for money on account, depending on the nature and anticipated exigencies of the arrest. Often a solicitor seeks the arrest and so gives the undertaking. The undertaking under r 41 extends to the costs and expenses of the Marshal in relation to:

- the arrest itself; and
- keeping the ship under arrest.

16. The latter will include the costs of port fees, fuel, victualling and paying the crew, and moving the ship. Often, the owners will continue paying the ordinary

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[4] The Marshal is usually an officer of the Court although he or she need not be: r 4(3)

expenses of maintaining the ship and her crew, but there will be a need for the Marshal to be satisfied about the arrangements.

17. The person who makes an application for release of the ship must give a new undertaking under r 53 to pay the Marshal's costs and expenses:

- in connection with the custody of the ship while she was under arrest; and
- associated with her release from arrest.

18. There is an overlap between the undertakings in rr 41 and 53 in respect of the costs and expenses of the Marshal in connection with the custody of the ship while she is under arrest. If different persons give those undertakings under the *Rules*, r 75C allows the Court to make a just and fair allocation of responsibilities between them.

19. Of course, while the ship is under arrest, if all else fails, the Marshal can sell her to pay the costs and expenses of the arrest. But, that position changes when the ship is released. In any event, the Marshal cannot use the overlap between undertakings to achieve more than an indemnity[5].

20. In a case where the owners of a ship paid security into Court to obtain her release under r 51, the plaintiff sought return to it of the money it had paid on account at the request of the Marshal under r 41. I held that the plaintiff was liable only for the costs and expenses of the Marshal in making the actual arrest and that the ship's owners should be responsible under r 53 for the Marshal's costs and expenses of keeping her under arrest and her release[6]. This was because, if the person seeking release of a ship were not *prima facie* liable to pay all of the costs of, and in connection with, her custody and release, as r 53(1) provides, plaintiffs seeking arrest would face a serious inhibition on the exercise of their right of

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5 *Patrick Stevedores No 2 Pty Ltd v Ship MV "Turakina" (No 2)* (1998) 84 FCR 506 at 509F-G per Tamberlin J; *EMAS Offshore Pte Ltd v The Ship "APC Aussie 1" (No 2)* (2009) 194 FCR 484 at 488-489 [20] per Rares J.

6 *EMAS (No 2)* 194 FCR at 489 at [21]-[24]

arrest. That would consist of them having to pay the costs and expenses of keeping the ship under arrest until the owners decided to provide security to obtain her release. This reflected the policy in s 34 of the Act that gives only a limited right to owners to claim damages for wrongful arrest (where a party unreasonably and without good cause either demands excessive security, obtains the arrest or fails to give the consent required under the Act for release).

21. Of course, under r 41, a party must pay or provide for the costs and expenses of keeping the ship under arrest if there is no application to release her. But, the *prima facie* allocation of responsibilities between rr 41 and 53 is that the party applying for release, whether it is the owner or another person with an economic interest in the ship, must undertake to meet the costs and expenses of keeping the ship under arrest in addition to the costs of release in exchange for obtaining her release.

22. The other important undertaking that the *Rules* impose is on a party so applying to pay the costs and expenses of the Marshal in complying with orders under r 69(1) for valuation, valuation and sale or sale without valuation[7]. That is an unexceptionable requirement to take account of any risk of a shortfall on sale, leaving the Marshal out of pocket.

Security and bail

23. As reflected in s 29 of the Act, a principal purpose of arresting a ship is to obtain security from the owner for the maritime claim made by the plaintiff either in the proceedings or in an arbitration. There are two means of providing security for release contemplated by r 51(1) – payment into Court of a sum equal to the lesser of the value of the claim or the ship or the provision of a bail bond in such a sum. In addition, often a plaintiff will accept a letter of undertaking by a P&I[8] Club or insurer for such a sum[9].

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7 r 69(4))

8 Protection & Indemnity

9 *Navios* 194 FCR at 475 [32] and 477 [41]

24. The reason that the upper limit that can be required as security is the value of the ship, even if it is much less than the claim, is deeply rooted in the law maritime. In the maritime law of the United States of America and Europe, where a ship was made the subject of an attachment, plaintiffs could recover no more than the value of the ship, even if she had been lost, and so was worthless, or damaged, and so of a diminished value[10].

25. The usual practice of Courts of Admiralty is that after a ship has been arrested, she will be released only after provision of sufficient security to cover the amount of the claim, plus interest and costs. The quantum is calculated on the basis of the plaintiff's reasonably arguable best case. This ensures that the requirement to provide security does not work oppression on the ship and those interested in obtaining her release from arrest[11].

26. Bail bonds are not regularly used, indeed, recent texts suggest that they have become obsolete[12]. The structure of rr 54-60 enables an owner to post bail to secure the release of a ship. Importantly, s 21(1) of the *Admiralty Act* provides that a ship arrested in a proceeding on a maritime claim may not be rearrested in the proceeding in relation to the claim unless the Court so orders:

> "… whether because default has been made in the performance of a guarantee or undertaking given to procure the release of the ship … from the earlier arrest or for some other sufficient reason."

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10 *Strong Wise Pty Ltd v Esso Australia Resources Pty Ltd* (2010) 185 FCR 149 at 157-160 [22]-[30]

11 *The "Moschanthy"* [1971] 1 Lloyd's Rep 37 at 44 per Brandon J; approved in *The "Bazias 3"* and *The "Bazias 4"* [1993] QB 673 at 682D-F per Lloyd LJ, with whom Ralph Gibson and Butler-Sloss LJJ agreed and the *The "Gulf Venture"* [1984] 2 Lloyds's Rep 445 at 449 per Sheen J. Sheppard J followed this principle in relation to fixing the quantum of security to obtain release of a ship under r 52 in *Freshpac Machinery Pty Limited v Ship "Joanna Bonita"* (1994) 125 ALR 683 at 686-687. He referred to the discussion of the principles in the report of the Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, (ALRC 33) at [300]; see also *Owners of the Ship "Carina" v Owners or Demise Charterers of Ship"MSC Samia"* (1997) 78 FCR 404 at 409-411 per Tamberlin J; *Navios* 194 FCR at 472 [16].

12 Sarah C Derrington and James M Turner, *The Law and Practice of Admiralty Matters*, (Oxford University Press, 2006) at [7.16]; see too the report of the Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, (ALRC 33) at [300] and *MSC Samia* 78 FCR at 409E-G per Tamberlin J

27. The purpose of r 54(2) requiring two sureties, unless the Court orders otherwise, is to ensure protection for the plaintiff, since the bail stands in place of the ship. Thus, if there is only one surety for a bail bond and it fails by becoming insolvent, the plaintiff may not be able to obtain a rearrest and be left without a means to recover a judgment in its favour.

28. This concern for protecting a plaintiff is also evidenced in rr 56 and 57(1). These allow the plaintiff 24 hours in which to object to bail, after it has received notice of bail and a copy of the bond under r 55. If the plaintiff files a notice of objection against the sufficiency of the proposed surety[13], the bond cannot be filed until the Registrar (or the Court) determines that the proposed surety is sufficient[14].

29. The surety must file and serve an affidavit regarding its financial circumstances and setting out a number of particular matters specified in r 56(3B). The Registrar can direct the proposed surety to file and serve a supplementary affidavit setting out additional information regarding its financial circumstances and other circumstances relating to its sufficiency[15]. The proposed surety must attend before the Registrar at the hearing of the objection until excused from further attendance[16]. If a material adverse change occurs in relation to a matter or circumstance mentioned in a surety's affidavit filed under r 56, the surety must file and serve an affidavit setting out the changed details within seven days after the change[17].

30. In deciding whether to dispense with the requirement that there be two sureties under r 54(2), the Court must consider the risk that the sole surety will default if called on to meet the bond, taking into account the development of modern

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13 r 56(1); Form 22
14 r 57
15 r 56(3C)
16 r 56(4)
17 r 56(4B)

commercial practice, such as the giving of guarantees by banks, P&I Clubs and insurers that parties in Admiralty cases regularly accept[18].

31. I considered these provisions in a recent decision involving an application to dispense with the requirement in r 45(2) that there be two sureties[19]. A bail bond consists of the surety (or sureties) submitting to the jurisdiction of the Court and consenting that, if the relevant person or other person said to be liable does not satisfy any judgment in the proceeding, execution may issue against the surety for any sum not exceeding the nominated amount of bail[20].

32. In *Navios*[21], the owners proposed that Bank of China be sole surety. It was a foreign authorised deposit taking institution under the *Banking Act 1959* (Cth), licensed under that Act to accept deposits in Australia in accordance with the requirements of the Australian Prudential Regulation Authority. Under s 11F of the *Banking Act*, if a foreign authorised deposit taking institution, whether in or outside Australia, suspends payment or becomes unable to meet its obligations, its assets in Australia are to be available to meet its liabilities in Australia in priority over all other liabilities of the institution. Moreover, the evidence established that the Bank's audited total equity was over USD100 billion and it had considerable unencumbered real estate in Australia worth greatly in excess of the USD8.8 million sought as security. Accordingly, I allowed Bank of China to be the sole surety for bail.

Conclusion

33. The Court will often need to address important practical questions about the regulation of the Marshal's conduct and the operation of the *Rules* in relation to undertakings, security and bail that arise out of the arrest of a ship. Hopefully, the recent cases explored in this paper have clarified a number of the less familiar provisions of the *Rules* in relation to these aspects of maritime law.

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18 *Navios* 194 FCR at 470-477 [4]-[42]
19 *Navios* 194 FCR 468
20 r 54(2); Form 20
21 194 FCR 468