

# PRACTICAL ISSUES ARISING FROM THE ARREST OF SHIPS

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## Costs and expenses arising from the arrest of ships

It is apparent that when ships are arrested the Marshal will incur costs. These costs are re-couped by the Marshal from the arresting party and/or their solicitors. Therefore, in addition to the filing fee that is payable in relation to a Writ in Rem (i.e. A\$1881.00 in case of a company and A\$785.00 in all other cases)<sup>1</sup> an arresting party is generally required to pay an initial upfront deposit of A\$5000.00 in lieu of the Marshal's costs and expenses associated with an arrest. Pursuant to Rule 78 of the *Admiralty Rules 1988* (Cth) the Marshal may make additional demands from time to time during an arrest for additional funds to be provided by the solicitors for the arresting party. The Marshal's entitlement to re-coup these costs is based on the arresting party or its solicitors providing an undertaking to the Court to pay these costs and expenses. The costs associated with an arrest may vary depending on factors like where the arrest is to be effected; whether the ship in question is at anchor or at berth; and the length of the arrest.

Some of the typical expenses that an arresting party may expect to incur are as follows:

- a) Insurance: Ships arrested by a Marshal are insured by the Court while under arrest. The insurance policy covers, amongst other things, loss or damage to the vessel and personal injury. Arresting parties are required to pay the applicable premium which varies depending on the value of the ship and length of time of the arrest. By way of example, a ship with an estimated valued of A\$35 million dollars and which is under arrest for 2 days will cost A\$3206.50. Should the same ship remain under arrest for 10 days then the cost will be A\$6649.72;
- b) Marshal's expenses reasonably incurred in the service or the execution of an arrest warrant as well as a charge calculated at the hourly rate of salary payable to the officer for the time involved in the service or execution (see Item 17 – Schedule 1 of the *Federal Court of Australia Regulations 2004*). These charges are generally less than a A\$1000.00;
- c) Helicopter hire (should arrest occur at anchor): This varies depending on the size of helicopter; flight time to ship; and region where arrest is to be effected. As a rough guide it costs approximately A\$3000.00 to A\$5000 to hire a helicopter for one return trip flight. Alternatively, pilot vessel hire costs approximately A\$2000.00 for one return trip;
- d) Flight, accommodation and vehicle hire costs incurred by the Marshal in the event that the arrest is effected at a regional port and no local police officer or federal agent has/can be appointed. These costs are approximately A\$1200.00 to A\$2000.00 and will vary depending on length of time that the Marshal stays at the regional port;
- e) Ship movement costs: The rates for hiring tugs vary from port to port and on the number of tugs required to move a ship. For example: one movement of a Bulk carrier within the Port of Fremantle with a net tonnage of 55 000 tonnes will cost approximately A\$4500.00. Should the arrest occur in the Port of Albany the rate for one movement will be approximately A\$6800.00). Also note that a bulk carrier of that size would probably need two tugs when it is moved; and

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<sup>1</sup> The filing fees are current as at the time of writing this paper. Please note that Court filing fees are subject to change from time to time and may no longer be current at the time of reading.

d) Bunkers: Depending on the length of an arrest it may become necessary to place additional bunker fuel on board the arrested ship. Fuel oil (used to drive the ship's engines) costs approximately US\$330.00 per ton and marine diesel oil (used to generate power on board the ship) costs approximately US\$450.00 per ton.

Should the arrest become protracted and/or proceed to a sale of the ship, additional costs will be incurred (e.g. repatriation costs, inventory and bunker survey costs, berthage/mooring charges, effluent and garbage waste removal charges, provisions for the crew costs etc).

No poundage<sup>2</sup> is payable when the Court proceeds to sell a ship under arrest.

## Procedure to be followed and the forms to be used when arresting a ship

### *Background*

The *Admiralty Rules 1988* (Cth) set out the procedure that parties are required to follow when seeking to arrest a ship. On 18 November 2006 the rules were amended (see the *Admiralty Amendment Rules 2006 (No 1)*).<sup>3</sup> Importantly, from a practical perspective, not only were the rules amended but some of the forms that are attached as a schedule to the rules were also amended. Even though the amendments occurred some time ago, some documents continue to be lodged in the old form or in an adapted form but not in accordance with the current rules. Practitioners should therefore take particular care to ensure that they are referring to the current rules and forms when dealing with a ship arrest.

The documents that are required to be lodged when seeking to arrest a ship are as follows:

- (1) An application for an arrest warrant (in accordance with Form 12 – see Rule 39(1));
- (2) A supporting affidavit (in accordance with Form 13 - see Rule 39(3)); and
- (3) An arrest warrant (in accordance with Form 14 – see Rule 40(2)).

Registrars have a discretion in deciding whether to issue an arrest warrant or not (see Rule 40(1) – A Registrar *may* issue an arrest warrant.)

### *The application for an arrest warrant and the undertaking to pay costs and expenses*

The paragraph relating to the undertaking to pay to the Court the Marshal's costs and expenses associated with an arrest of a ship ('the Undertaking Paragraph') is contained in Form 12. The Undertaking Paragraph is drafted in the first person (i.e. *I* undertake to the Court ...). Should the intention therefore be for the undertaking to be provided by a practitioner personally or the client personally then the *exact* wording set out in the form must be used. The form does not include a signature clause and one should therefore be inserted. It should include the name of the person signing the form and the name of the firm or organisation that the person comes from. However, should the intention be for the undertaking to be provided by a law practice and not a solicitor personally then footnote 1 to Form 12 applies, namely: The undertaking paragraph is to be deleted and an alternative undertaking paragraph should be inserted stating that it is the law practice that is providing the undertaking.

In order for a law practice to be bound, the undertaking must be signed by a principal authorised by the law practice to give such an undertaking. A principal is defined by the rules as follows:

- (a) In the case of a law firm – a partner;
- (b) In the case of a multi-disciplinary partnership – a legal practitioner partner;
- (c) In the case of an incorporated legal practice – a legal practitioner director (see 'Definitions Rule' – Rule 74AA).

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<sup>2</sup> A percentage commission payable for moneys recovered from the sale of a ship.

<sup>3</sup> (*SLI NO 287 OF 2006*) (Cth).

An example of a possible replacement undertaking paragraph and signature clause when the undertaking is given by a law practice is as follows:

*‘Pursuant to Rule 75A(2) of the Admiralty Rules 1988, Bloggs Legal undertake to the Court to pay the costs and expenses of the Marshal in complying with this application, including costs and expenses in relation to (the ship) while it is under arrest*

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*Joe Bloggs,  
Partner/Legal Practitioner Partner/Director  
Principal authorised by Bloggs Legal’*

### ***The supporting affidavit***

Pursuant to Rule 40(1) (3) of the *Admiralty Rules 1988* (Cth) an arrest warrant shall not, except with the leave of the Court, be issued if the Registrar is made aware that:

- a caveat against the arrest of the ship is in force;
- the proceeding is stayed because payment has been made into Court; or
- a bail bond in not less than the amount claimed has been filed (see Rule 40(1)(3)).

A statement to the effect that a search of the register of caveats against arrest has been undertaken and that no such caveat is in force in relation to the ship that is being sought to be arrested should therefore be included in the supporting affidavit. Similarly, any details in relation to any prior proceedings having been brought in this jurisdiction or in any foreign jurisdiction which have been stayed because of a payment having been made into Court or security having been put up in the form of a bail bond should be included in the supporting affidavit. Rule 39A of the *Admiralty Rules 1988* (Cth) imposes a duty of disclosure on parties to a proceeding commenced as an action *in rem*. Essentially the rule means that where a party is aware of a fact or matter that may affect the safety of the Marshal or any other person, or the ship or property, it must disclose this to the Marshal as soon as it becomes aware of it. Any such information should therefore be included in the supporting affidavit or brought to the attention of the Marshal when it becomes known.

### ***Arrest Warrant***

The arrest warrant should not be signed by the practitioner lodging it. The warrant should therefore be submitted unsigned and the signature clause should read ‘Deputy District Registrar’. It will be signed by the relevant Registrar once s/he is satisfied that the documentation is in order.

## **Practical issues associated with arresting a working ship**

### ***Loading and Unloading of cargo***

Loading or unloading may have commenced when the Marshal arrests a ship. In these circumstances the Marshal will give an instruction that the ship stop loading or unloading. Stopping these operations affects multiple parties including ship owners, charterers, port authorities (working berth not in operation and potentially creating a backlog), stevedores, cargo interests and other ships waiting to berth. This may mean that the ship needs to be moved on short notice and at considerable expense. It may also mean that the ship needs to join the ‘back of queue’ before being able to re-commence loading or unloading operations. Certain cargo may also not necessarily be able to be unloaded again once loaded (e.g. livestock or certain bulk cargoes where port infrastructure is such that only loading operations can be accommodated). Should the arrest therefore become protracted the issue of a partly laden ship will need to be addressed.

Sometimes the ship may be damaged and in need of urgent repairs. This will invariably be costly and will generally require a Court order.

## **Conclusion**

In summary, prior to arresting a ship, practitioners and arresting parties should therefore give due consideration to the type of ship they are about to arrest and what the likely practical and financial consequences of the arrest will be. In this regard, practitioners are welcome to contact local Marshals or Registrars should they have any queries in relation to a contemplated arrest of a ship.