

TRADING OF A SHIP UNDER ARREST

The decision whether further trading of the ship should be permitted or not is left to the discretion of the court. Some admiralty judges are of the view that trading of an arrested ship tantamount to diluting the order of arrest and the purpose of arrest is defeated.

A ship is arrested by the Sheriff or the Marshal acting as an officer of the court. The ship comes into the custody, but not the possession, of the Sheriff or the Marshal.

The position was described by Lord Atkin in *Government of the Republic of Spain v SS "Arantzazu Mendi"*

The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all remedies which are based on possession

Once arrested, a ship cannot be moved from the place of arrest without the authority of the Marshal. To move the ship without such authority, whether to another place within the jurisdiction or to flee the jurisdiction, constitutes contempt of court. Similarly, any interference with the ship while under arrest, whether or not it involves any movement or attempted movement of the ship, will constitute contempt.

The difficulty with the concept of the ship trading whilst under arrest is that the duty of the Sheriff or the Marshal to keep the ship in safe custody and to

preserve it does not extend to managerial control and operation of the ship for the purpose of generating an operational profit for the ship owners and those interested in it. The operational control of a ship requires that the master and crew operate the ship in accordance with the owner's or demise charterer's instructions. It is impractical for the Marshal to exercise a veto in respect of those instructions and the on-board management of the ship unless the Sheriff or the Marshal or his nominee is presently on board the ship supervising its operation. In any event, are the Sheriff's or the Marshal's costs of supervision in such circumstances costs of the arrest?

Where the ship is traded, the crew is not engaged by the Sheriff or the Marshal. The crew either continue in employment with the owner despite the arrest or are signed on by the owner specifically for the purpose of using the ship in trade. In that situation, the wages and entitlements of the master and crew are to the account of the owner or demise charterer and, in the event of non-payment, may be claimed against the ship. Obviously, where the benefits of the trading are not secured for claimants or where the continued trading is unprofitable, there is no practical benefit in other claimants allowing the crew's claims, both real and potential, to further encumber the ship. Also, because the purpose of the arrest is to secure the ship as security for the claim which led to the arrest, to permit the ship to trade without substitute security is to significantly depreciate the worth of the ship as security. The degree of the depreciation will depend upon the nature of the trading, the risk of loss or damage from perils of the sea, or loss of the security by flight of the ship from the jurisdiction. Where the owner or demise charterer cannot secure acceptable security to procure release of the ship, to allow a ship to be crewed and traded involves questions which go to the heart of why arrest is available and why arrest should not lightly be rendered nugatory by relaxing the effective control of the Sheriff or the Marshal.

Trading the ship needs to be distinguished from moving the ship within the jurisdiction and offloading cargo, whether or not the discharge of cargo is to

enable the ship to be sold by the Marshal either *pendente lite* or to satisfy a final judgment of the court. The distinction is seen in the orders made by the court in respect of the ship *Martha II*.

On 14 February 1996, the *Martha II* was arrested in Melbourne on the application of the mortgagee. In expectation that the ship would be refinanced and released, the owner applied to the court to work the ship pending release. Specifically the owner sought permission to sail the ship to Sydney and there to load and unload cargo in accordance with its scheduled cargo operations. The application was opposed by the plaintiff/mortgagee. The Victorian Deputy Sheriff who arrested the ship on behalf of the Marshal would not consent to the movement without formal orders of the court.

Olney J granted the application subject to certain conditions being fulfilled and undertakings being given by the time charterer, ABC Container Lines (“ABC”). Essentially the entire cost of the movement, including the Marshal’s costs of supervising the movement, were to be paid by ABC. The costs to be paid included the costs of arrest up to the time of the order, which later costs and expenses were to be paid before the ship left Melbourne. To ensure that the ship proceeded without delay or deviation to Sydney and did not flee, the Marshal and two armed members of the Australian Protective Service were on board.

The decision on whether a ship under arrest can be permitted to trade is one of significant legal importance and is typically left to the discretion of the admiralty court. Courts exercise extreme caution in allowing arrested ships to engage in trading activities because the primary purpose of arrest is to secure a maritime claim. Trading a ship while it is under arrest can potentially dilute the order of arrest and undermine its very purpose, i.e., to hold the vessel as security for claimants. Admiralty courts, therefore, need to balance the interests of all parties involved, including the claimant, shipowner, and other

potential creditors, when deciding whether to permit trading under specific conditions.

Nature of Arrest: Custody vs. Possession

When a ship is arrested, it comes into the custody of the court through the Sheriff or the Admiral Marshal, but not into their possession. This principle, established by Lord Atkin in *Government of the Republic of Spain v. SS "Arantzazu Mendi"* (1939), emphasizes that the arrest of a ship does not transfer possession to the Marshal or Sheriff but rather places the ship under their custody. All possessory rights remain with the original possessors, and any interference with this custody is punishable as contempt of court.

Thus, while the Marshal or Sheriff controls the custody of the ship, the operational and managerial control generally remains with the owners or demise charterers. The dilemma arises when the owners or demise charterers seek to continue trading the ship, as this involves ongoing operations, crewing, and potential risks, all of which may complicate the court's ability to maintain effective control over the ship as security for the claim.

Legal Framework: Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017

Under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ('Admiralty Act, 2017'), the arrest of a vessel is primarily intended to secure the claimant's maritime claims. Section 5 of the Act provides the High Courts with the jurisdiction to order the arrest of a vessel to secure a maritime claim, and the Sheriff or Admiral Marshal is tasked with ensuring that the vessel remains within the court's control. However, the Act does not explicitly address the issue of trading an arrested ship, leaving it to the court's discretion based on the specific circumstances of the case.

Indian courts have generally been hesitant to allow trading of arrested ships, especially where it could jeopardize the security interest of the claimant. The primary concern is that continued trading increases the risk of depreciation of the vessel's value as security, exposes the ship to potential loss or damage, and could lead to the ship leaving the jurisdiction, thereby undermining the purpose of the arrest.

Key Legal Considerations in Allowing Trading of an Arrested Ship

Custody vs. Operation The Marshal or Sheriff is responsible for the custody of the ship, but they do not assume managerial control over the ship's operations. Allowing the ship to continue trading requires operational control, which remains with the master and crew, who operate under the instructions of the owner or demise charterer. This separation between custody and operation makes it impractical for the Marshal or Sheriff to oversee or veto operational decisions while ensuring the ship remains secure as a legal asset.

The difficulty of balancing custody with operational control was highlighted in *The Bold Buccleugh* (1851), where the court emphasized that the arrest secures the ship for the claimant's benefit, and any action that jeopardizes this security should be avoided. Thus, allowing a ship to trade under arrest should only be considered in exceptional circumstances, where stringent safeguards can be put in place.

Supervision and Costs If a ship is allowed to trade while under arrest, the costs of supervision by the Marshal or Sheriff, including ensuring that the ship remains within jurisdiction, can be substantial. These costs typically fall upon the shipowner or charterer who seeks permission to trade the ship. The courts have to assess whether such supervision costs, along with the risk of trading, justify allowing the ship to trade, or whether it is more prudent to maintain the ship in custody without active trading.

This issue was notably addressed in *The Martha II* (1996), where the Federal Court of Australia permitted the trading of an arrested ship under strict conditions. The court required the owner to cover all costs associated with the movement of the ship, including the Marshal's supervision costs. In addition, the court mandated that armed security personnel accompany the ship to ensure compliance with the court's order and to prevent the ship from fleeing the jurisdiction. Such conditions highlight the court's reluctance to allow trading unless adequate safeguards are in place to protect the claimant's interests.

Crew and Wages When a ship trades while under arrest, the crew remains employed by the owner or demise charterer, and their wages and entitlements continue to accrue. If the owner fails to pay the crew, their claims may create additional encumbrances on the ship. This complicates the situation for other claimants, as it increases the potential liabilities against the vessel without corresponding benefits for all parties. Courts are, therefore, cautious in allowing trading, particularly where there is a risk that the ship's liabilities will increase without generating sufficient profits to offset them.

Security and Risk The primary purpose of an arrest is to hold the ship as security for a maritime claim. Allowing the ship to trade without substitute security can significantly reduce the value of the ship as security due to the risks associated with continued operations, such as perils of the sea, damage, or even the possibility of the ship fleeing the jurisdiction. The degree of depreciation in the ship's value as security depends on the nature of the trading and the associated risks.

In the *Martha II* case, the court imposed strict conditions to mitigate these risks, including ensuring that the ship's movements were closely supervised and that any trading activities were conducted under strict control. Such conditions are essential to ensure that the security provided by the arrest is not undermined by allowing the ship to continue trading.

Indian and UK Jurisprudence

Indian Case Law Indian courts have dealt with similar issues, albeit cautiously, to ensure that the claimant's security is not jeopardized. In *M.V. Pratibha Cauvery* (2015), the Bombay High Court ruled that the primary purpose of arrest is to secure the maritime claim, and any actions, including trading of the ship, that undermine this security should be avoided unless adequate substitute security is provided.

UK Case Law In the United Kingdom, courts have similarly recognized the tension between custody and operational control in cases where the trading of an arrested ship is contemplated. In *The Ship The Strandhill* (1998), the English Admiralty Court refused to permit the trading of an arrested vessel, emphasizing that the arrest serves as security for the claimant, and allowing the ship to trade without adequate protection could dilute this security.

However, in certain exceptional circumstances, UK courts have allowed limited trading under strict conditions. For example, in *The Western Glory* (1985), the court permitted the ship to continue trading but only after the owner provided sufficient financial security to cover the risks associated with trading. The court stressed that the decision to allow trading must be made on a case-by-case basis, considering the specific facts and the risks involved.

Unreported Cases Several unreported cases in both Indian and UK courts reflect the cautious approach courts take when dealing with the issue of trading an arrested ship. These cases often involve detailed negotiations between the parties, with the court imposing stringent conditions to protect the claimant's security while balancing the operational needs of the shipowner.

The decision to allow a ship under arrest to trade is a complex issue that requires careful consideration of multiple factors, including the risks associated with trading, the preservation of the claimant's security, and the

potential liabilities that may accrue against the ship. Courts in both India and the United Kingdom have consistently taken a cautious approach, allowing trading only in exceptional circumstances and under strict conditions to ensure that the security provided by the arrest is not compromised.

While the Admiralty Act, 2017, provides the framework for the arrest of ships, it does not directly address the issue of trading under arrest, leaving it to the discretion of the court. Indian and UK case law reflects a judicial preference for maintaining control over arrested ships to secure maritime claims effectively, with trading only permitted where adequate safeguards are in place.

Ultimately, the decision to permit trading of an arrested ship hinges on the court's assessment of the risks involved and the ability to protect the interests of all parties, particularly the claimant who has initiated the arrest to secure their maritime claim.