

## **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.