

## **Arrest of Maritime Property – Mechanics and Emergencies**

A. William Moreira, Q.C.  
Stewart McKelvey, Halifax, NS

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*An arrest of maritime property, such as a ship or cargo, interrupts commerce. The modalities thereof should be dealt with on an urgent basis.*

- *FC Yachts Ltd. v. Vessel bearing Hull No. QFY10703E709*  
2007 FC 1257, per Harrington J at para 9

## **Introduction**

This paper is intended to identify kinds of motions which may be brought to the Court immediately following service of a warrant for the arrest of maritime property. A separate paper will deal with interlocutory issues typically arising in connection with sale of the property at some point in time which follows arrest.

It is the intention of this paper to identify remedies which may be sought on an interlocutory basis, the principles applicable to each (or where the principles are unclear or controversial, the competing jurisprudence or legal theories which may be applicable), and the practical considerations which may govern availability and when granted utility of remedies. The paper is necessarily somewhat disjointed, as not all issues will arise in every case, and a given remedy will not necessarily be appropriate or of assistance in any given set of circumstances.

### **1.0 Motions to Set Aside Arrest**

In general, a warrant for the arrest of property identified as an *in rem* defendant is available to the plaintiff as of right, and Registry officials in practice issue warrants in any case in which the Affidavit to Lead Warrant on its face appears to comply with the formal requirements of Rule 481(2).

A few preliminary observations may be made.

It is frequently the case that bail (or some consensual alternate) is provided immediately in order to secure release of the property, but under reservation of right to move the Court to set aside the underlying arrest and, if set aside, to order the return or cancellation of the bail. This practice is entirely appropriate and is supported in the jurisprudence. *Amican Navigation Inc. v. Necat A (The)*<sup>1</sup>.

Of course, defendants may challenge the validity of the *in rem* proceedings or otherwise the validity of the arrest in advance of provision of security. Sometimes the defendant does not have the resources to arrange sufficient bail; sometimes there is no particular urgency to have the arrested property released; sometimes the warrant may not yet have been served on the property.

### **1.1 Alleged Invalid Service of Warrant**

Rules 479 and 482 provide for service upon an *in rem* defendant:

479. (1) Subject to subsection (2), the statement of claim in an action *in rem* shall be served

(a) in respect of a ship or cargo or other property on board a ship, by attaching a certified copy of the statement of claim to some conspicuous part of the ship;

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<sup>1</sup> 1997 CanLII 5435 (FC)

482. (1) A warrant issued under subsection 481(1), the Affidavit to Lead Warrant and the statement of claim in the action shall be served together by a sheriff in the manner set out in rule 479, whereupon the property subject to the warrant is deemed to be arrested.

The Court's preponderant jurisprudence is that the requirements for service of the *in rem* defendant are mandatory: *Mona Lisa Inc. v. Carola Reith (The)*;<sup>2</sup> *Key Marine v. Glen Coe (The)*;<sup>3</sup> see however contrary authority *Elders Grain v. Ralph Misener (The)*<sup>4</sup> (personal delivery to master). In the context of validity of a sale order, the mandatory nature of these requirements was recently affirmed in *Keybank National Association v. Atchafalaya (The)*<sup>5</sup>.

It is noted that none of these decisions which consider validity of *in rem* service arose in the context of seeking release of the ship or otherwise challenging the arrest itself. No case was found in which the Court set aside a subsisting arrest on the basis of invalid service, or in which the Court was moved to do so. Although therefore an open question, it is submitted that if the ship remains under arrest at the time that a motion is made to set aside the arrest on grounds of insufficient service, it seems available to plaintiff to re-serve (seeking, if required, an extension of time within which service is permitted) assuming no identifiable prejudice to the defendant can be shown; and if bail has been provided such that the ship is no longer available to be re-served the argument could be made that by posting bail the defendant has waived objection to the validity of the service.

Substitutional service of *in rem* process, including the warrant, is generally not permitted except where specifically provided in Rule 479(2). It does appear clear that service of the *in rem* Statement of Claim, and of the warrant, outside the Court's territorial jurisdiction is not permitted and, if made, is invalid. See *458093 BC Ltd. v. Zomby Woof (The)*<sup>6</sup> and cases there referred to.

## 1.2 Validity of *In Rem* Proceedings

The substantive issue typically is, whether the *in rem* proceedings themselves are available as against the property which has been arrested.

It is typical that when validity of *in rem* proceedings is challenged following (or in anticipation of) arrest, the relief sought is all of a setting aside of the warrant, a release of the ship without bail, and a striking out of the *in rem* action. Rule 488 provides:

On motion, the Court may, at any time, order the release of arrested property.

In contrast, Rule 221(1)(a) and 221(2) read in part as follows:

(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out ... on the ground that it

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<sup>2</sup> [1979] 2 FC 259 (TD)

<sup>3</sup> (1995), 92 FTR 313

<sup>4</sup> (1997), 125 FTR 209

<sup>5</sup> 2010 FC 406

<sup>6</sup> 1998 CanLII 7231 (FC)

(a) discloses no reasonable cause of action ...

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a)

One observes immediately some tension between these Rules – as will appear below certain of the grounds on which challenge to the validity of an *in rem* action are made require presentation of some evidence (for example *in personam* liability of someone other than the owner or intervening transfer of title). In none of the reported decisions does it appear that objection was made to the reception of evidence on these issues, despite the seeking (and where successful the granting) of orders striking out the *in rem* claim. It is submitted that this is entirely appropriate where necessary, and is consistent with the broad discretion granted to the Court by Rule 488 to release the ship from arrest when doing so is appropriate.

Regarding substantive principles generally applied, and as will be seen below in many contexts, the Court hearing and deciding a challenge to the validity of proceedings applies, correctly it is submitted, the “plain and obvious” test for striking out of a pleading (*Hunt v. Carey Can. Inc.*<sup>7</sup>; *Norcan Electrical Systems Inc. v. BF XIX (The)*<sup>8</sup>). Where applicable one sees applied also the Court’s sensitivity to matters of disputed fact potentially requiring consideration at trial, which when present will mitigate against dismissal of an *in rem* proceeding on an early (or any) interlocutory motion (*Dragage Verreault Inc. v. Atchafalaya (The)*<sup>9</sup>).

The various substantive grounds on which *in rem* proceedings are typically challenged, and on which the Court may be satisfied to strike out or dismiss those proceedings with consequent release of the ship or property from the arrest, are separately summarized below.

### **1.2.1 Is the Arrested Property “the subject of the action”**

Subsection 43(2) of the *Federal Courts Act* provides in part:

(2) ... the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action ...

In many cases it will be apparent that the *in rem* defendant is property which is the “subject of the action” – the ship to which the supply was made or on which the damaged cargo or injured passenger was carried. In other cases, however, it is open to debate and that debate recently created schism in the Federal Court of Appeal which was finally resolved by the Supreme Court of Canada in 2007.

Two cases had involved arrest of cargo by plaintiff owners of ships for carriage upon which cargo owners had contracted, but which cargo for various reasons was eventually shipped on board other ships in alleged breach of the contract for carriage. In each case Plaintiffs sued, and arrested, the cargo seeking recovery of alleged losses on the unperformed contract.

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<sup>7</sup> [1990] 2 SCR 959

<sup>8</sup> [2003] 4 FC 938 (Proth)

<sup>9</sup> 2009 FC 273 (Proth)

In the earlier case, *Paramount Enterprises International Inc. v. An Xin Jiang (The)*<sup>10</sup>, the Federal Court of Appeal ultimately dismissed *in rem* action against the arrested cargo, holding s. 43(2) to require a “physical nexus” between the plaintiff and the arrested property: that “it is the use of this ship or the carriage of this cargo that justifies the action *in rem* brought against the property arrested”.

A differently-constituted panel of the Federal Court of Appeal considered the same issue in *Kremikovtzi Trade v. Cargo ex SWIFT FORTUNE*<sup>11</sup>. That panel felt itself bound to follow the Court’s earlier decision in *The An Xin Jiang* but expressed strong disagreement its reasoning and its result. Nadon, JA concluded his expression of disagreement with the following (para. 47)

I am therefore of the view that subsection 43(2) does not require a physical nexus between the cargo and the vessel in order to give rise to *in rem* rights. Rather, subsection 43(2) proposes identifiability of the property as the controlling factor so as to ensure that the scope of *in rem* proceedings is not unduly enlarged. In other words, the action *in rem* must relate to the specific property contemplated in the contract at issue.

The *SWIFT FORTUNE Cargo* case went on further appeal to the Supreme Court (*sub nom Phoenix Bulk Carriers v. Kremikovtzi Trade*<sup>12</sup>). In very brief reasons the Court allowed the appeal and upheld the arrest of the cargo, saying at para 4:

For the reasons given by Nadon JA, we agree that the narrow “physical nexus” interpretation of s. 43(2) should be rejected, in favour of an “identifiability” test that asks whether the cargo is the cargo designated in the contract of affreightment alleged to be breached. Applying this approach, we are satisfied that s. 43(2) has been satisfied in this case.

### **1.2.2 Liability of the Beneficial Owner of the Arrested Property**

It is well established that to initiate valid action *in rem* and to arrest the defendant property, there must exist corresponding *in personam* liability of the owners of that property to the plaintiff in the action: *Mount Royal/Walsh Inc. v. Jensen Star (The)*<sup>13</sup>; *Frisol Bunckering BV v. Alexandria (The)*<sup>14</sup>; *Feoso Oil v. Sarla (The)*<sup>15</sup>; *Translink France Outre Mer SA v. Pegasus Lines Ltd. SA*<sup>16</sup>. Query whether this requirement applies to actions seeking enforcement of true maritime liens (ie, alleged liability for crew wages, collision damage or salvage): although this is an open question in Canadian jurisprudence it is generally considered to follow from the nature of the maritime lien as a security interest in the property itself which arises without need for any intervention on the part of the property owner. Support for this proposition may be found in *Marlex Petroleum*

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<sup>10</sup> (1997) 146 FTR 161, rev’d in part (1997) 147 FTR 162, rev’d [2001] FC 551 (CA)

<sup>11</sup> 2006 FCA 1

<sup>12</sup> 2007 SCC 13

<sup>13</sup> (1989), 99 NR 42 (FCA)

<sup>14</sup> (1991), 47 FTR 3

<sup>15</sup> (1995), 184 NR 307 (FCA)

<sup>16</sup> (1996), 207 NR 293 (FCA)

*Ltd. v. Har Rai (The)*<sup>17</sup>, in which it was held that *in personam* liability of the shipowner was unnecessary to support an action *in rem* to enforce a supplier's maritime lien arising under US statute.

Recent authorities in which setting aside of arrest and striking of the *in rem* action were sought, in one case successfully and in one case not, illustrate the operation of this substantive rule in motions practice relatively immediately following the arrest.

In *Maritima Ecologica SA v. Maersk Defender (The)*<sup>18</sup> the ship was arrested at Vancouver in an *in rem* action said to have been commenced in order to obtain security in connection with a pending London arbitration in which plaintiff sought damages against IS Atlantic Corporation Inc. for alleged breach of charterparty. The ship, prior to initiation of the action, had been owned by AP Moller-Maersk A/S; title was transferred (coincidentally) on the same day as the arrest to IS Pacific Corporation Inc. The Federal Court and Federal Court of Appeal struck out the *in rem* action and released the ship from arrest. The Federal Court of Appeal summarized its reasons (para 36):

On the basis if these authorities, I must conclude that the Court could not exercise *in rem* jurisdiction against the vessel. The only claim asserted by the appellant is that which is being asserted in the London arbitration against Atlantic and in respect of which the appellant has commenced action in the Federal Court in order to obtain interim protection. As I have already made clear, Atlantic is not and has never been the owner of the MAERSK DEFENDER. Consequently, whatever the validity of the appellant's claim against Atlantic, the MAERSK DEFENDER cannot be arrested in support of that claim.

Contrary result was reached in *Dragage Verreault Inc. v. Atchafalaya (The)*<sup>19</sup>. The ship was sued *in rem* and arrested in an action in which it was alleged that a contract had been breached by B+B Dredging Ltd., in which contract and in some of the communications antecedent to which it was implied (if not exactly asserted) that B+B Dredging was owner of the ship. In fact, the registered owner of the ship was at all times Proteus Co., which had some degree of common share ownership with B+B. Defendants, having filed affidavits setting out actual ownership of the ship, moved to strike out the *in rem* action under Rule 221, which relief was denied by Prothonotary Morneau.

The Prothonotary expressly (and it is submitted correctly) applied the "clear and obvious" test applicable to striking pleadings (paras 19ff) to the question whether the claim was or may be supported by the *in personam* liability of the actual owner of the ship. The Prothonotary reviewed various of the pre-contract communications and concluded (para 34) it "cannot be ruled out that the [common shareholder] pledged the credit of the dredge through the same conduct and words". The resulting controversy of fact could only be resolved at trial, and so the interlocutory motion to strike the *in rem* action, and to release the ship, was denied.

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<sup>17</sup> [1982] 2 FC 617 (TD), rev'd [1984] 2 FC 345 (FCA), aff'd [1987] 1 SCR 57

<sup>18</sup> 2006 CanLII 43834 (FC), aff'd 2007 FCA 194

<sup>19</sup> *Supra*, footnote 9

### 1.2.3 Change of Beneficial Ownership of Arrested Property Prior to Commencement of Action

Section 43(3) of the *Federal Courts Act* provides as follows:

Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e)<sup>20</sup>, (f)<sup>21</sup>, (g)<sup>22</sup>, (h)<sup>23</sup>, (i)<sup>24</sup>, (k)<sup>25</sup>, (m)<sup>26</sup>, (n)<sup>27</sup>, (p)<sup>28</sup> or (r)<sup>29</sup> unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

That this section means exactly what it says was affirmed by the Court of Appeal in *The Jensen Star*<sup>30</sup> in which on the facts certain of the transactions giving rise to disputed invoices had occurred prior to, and some others following, the sale of the ship to a related, but nonetheless different, owner. Although the *in rem* proceedings in respect of the post-sale transactions were ordered to continue, that was because on the facts the new owner was found to have tacitly authorized the former owner to order work as agent, thus giving rise to the necessary *in personam* liability throughout.

It is submitted that a claim which is otherwise within the Court's subject-matter maritime jurisdiction under s. 22, but is not one of the kinds of claim enumerated in s-s 43(3), may proceed *in rem* (and subject to other elements of a valid cause of action *in rem*) despite the intervention of a change in ownership between accrual of the cause of action and the commencement of the action. In particular, it is noted that the s-s 22(2) subjects which are not dependent on continuing ownership include crew wages (cl (o)), collision(cl (d)) and salvage (cl (j)), claims traditionally secured maritime lien claim and generally considered to survive a sale: *The Heinrich Bjorn*<sup>31</sup>.

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<sup>20</sup> Damage sustained by a ship or loss of a ship. Note – this is to be contrasted with a claim for damage caused by a ship – presumably including collision – which falls under s. 43(3)(d) and therefore right to pursue which is preserved notwithstanding transfer of ownership, and which as discussed below ought to so survive because of the existence in such cases of a maritime lien. It is, in fact, improbable in most cases that the ship sustaining the damage would be the *in rem* defendant in the resulting action.

<sup>21</sup> Claims arising out of agreements relating to the carriage of goods

<sup>22</sup> Claims for loss of life or personal injury “occurring in connection with the operation of a ship”

<sup>23</sup> Claims for loss or damage of goods carried in or on a ship, including passengers' baggage

<sup>24</sup> Claims arising out of a contract for the carriage of goods or the use or hire of a ship

<sup>25</sup> Claims for towage

<sup>26</sup> Claims for goods or services supplied to a ship (ie, so-called “necessaries” claims)

<sup>27</sup> Claims relating to the construction, repair or equipping of a ship

<sup>28</sup> Claims for master's, agents' or charterers' disbursements

<sup>29</sup> Claims under marine insurance contracts (again, it is difficult to conceive an *in rem* defendant in such a case, except possibly for payment of premiums if a contract of this nature does not come within cl. (m))

<sup>30</sup> *Supra*, footnote 13

<sup>31</sup> (1886), 11 AC 120 (HL)

Note, finally, that in the case of “necessaries” supplied by a person in Canada to a foreign ship giving rise to a maritime lien pursuant to s.139(1) of the *Marine Liability Act*<sup>32</sup>, although not yet considered by the Court it appears that Act specifically preserves the right to sue *in rem* to enforce that lien following a transfer of title: see *Marine Liability Act* s. 139(4):

(4) Subsection 43(3) of the Federal Courts Act does not apply to a claim secured by a maritime lien under this section.

#### **1.2.4 Subject-Matter Jurisdiction of the Court**

*In rem* proceedings may only be brought when the claim, substantively, is made “under or by virtue of Canadian maritime law”: *Federal Courts Act*, ss. 43(2), 22. Accordingly, if on the face of the Statement of Claim an *in rem* action is not so based, an order should and will issue under Rule 221(1)(a) striking out the action for want of subject-matter jurisdiction. The action (or at least, its *in rem* portion) being struck out, the previously-issued warrant must be set aside. See 9049-7959 *Quebec Inc. v. Capitaine Duval (The)*<sup>33</sup>. It is noted, in particular, that in that case Prothonotary Morneau considered only the allegations made in the Statement of Claim – a “pure” application of Rule 221(1)(a).

#### **1.3 “Sister-Ship” Proceedings**

“Sister-ship” proceedings are those in which *in rem* action is commenced against not (or not only) the ship that is the subject of the action, but also some other ship (or ships) alleged to have a sufficient degree of common ownership with the “wrongdoing” ship, and usually in which one or more of those other ships is arrested.

Subsection 43(8)<sup>34</sup> of the *Federal Courts Act* reads:

(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.

Substantively, the nature and degree of common ownership between the ships which gives rise to “sister ship” rights remains controversial. That substantive controversy is not addressed in this paper.

Procedurally, however, Rule 488(2) allows interlocutory motion to assess whether those substantive rules are met in any given case, and if not, it is mandated that the remedy granted would include release of the arrested “sister-ship” without bail. The motion for that relief, and the mandatory remedy of release, would presumably be combined with setting aside of the *in rem* action as against that ship. Although neither the Rules nor the existing jurisprudence establish which party bears the burden of proof on a motion of this nature, it is presumed that the best evidence would be that of the owner of the arrested ship, who would be in a position so

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<sup>32</sup> as enacted by SC 2009 c. 21

<sup>33</sup> 2000 CanLII 14827 (FC)

<sup>34</sup> As amended (English text only) by SC 2009 c. 21 s. 18

show the ownership structure of that ship and the precise nature of the relationship, if any, between that ship and the ship that is the “subject of the action”.

Regardless the burden of proof, there is authority that the test to be applied on a motion under Rule 488(2) is that it must be “plain and obvious beyond doubt ... that the [sister ship] claim will not succeed”: *Norcan Electrical Systems Inc. v. FB XIX (The)*<sup>35</sup>.

## **1.4 Third Parties’ Property**

### **1.4.1 Property which is Not Arrested**

It is well-established that arrest of a ship includes arrest of all her equipment and machinery, including engines removed and sent for repair at the time of arrest, and electronics which had been removed and stored for safekeeping: *Pacific Tractor Rentals (VI) Ltd. v. Palaquin (The)*<sup>36</sup>. See, Prothonotary Hargrave at para. 16:

...the arrest ... extends to everything which makes a vessel an operating ship, of course subject to equipment owned by third parties.

Third parties’ property on board a ship at time of her arrest may include, especially, cargo recovery of which is a special problem discussed in section 2.5 below. Typically also, it may include charterers’ property, including particularly fuel on board, recovery of which presents special logistic problems. In practice, when ultimately the ship is judicially sold, it is customary that buyers are required to pay additionally for bunkers on board at time of sale, value of which is typically ordered paid to the party (usually the charterer) by which bunkers were originally purchased. See for example *Fraser Shipyard & Industrial Centre Ltd. v. Expedient Maritime Co (The Atlantis Two)*<sup>37</sup>.

### **1.4.2 Arrest of Charterers’ Property On Board**

When it is clear that charterers, and not shipowners, are the party liable *in personam* for the plaintiff’s claim, it is sometimes attempted to arrest charterer’s property on board the ship, such as bunkers, to effectively prevent employment of the vessel and so encourage payment of the claim. Such an attempt was made in *Dateline Navigation Company v. Global Container Lines (Bahamas) Ltd*<sup>38</sup>. Plaintiff and defendant were in arbitration at London arising out of an earlier dispute. Plaintiff, seeking to obtain security in the event that a favourable arbitration award were made, purported to arrest bunkers on board the vessel APJ KARAN, of which the defendant was time charterer. The court set aside the arrest warrant, holding that the bunkers which were defendant’s property at the time of commencement of the action were recently purchased and could not have been the property of defendant at the time that the cause of action, which was the subject of the pending arbitration, arose. Accordingly, the requirements of s-s. 43(3) were not met and the *in rem* proceedings could not stand.

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<sup>35</sup> *Supra*, footnote 8

<sup>36</sup> (1996) 115 FTR 224

<sup>37</sup> (1999), 170 FTR 1 at paras 52, 61

<sup>38</sup> (1992), 58 FTR 78

Query whether, in addition to time-of-ownership issues, the action *in rem* was defective also by reason that the bunkers were not the property which was “the subject of” the dispute between plaintiff and defendant in respect to which security was desired.

Those difficulties aside, however, these cases disclose no reason in principle why valid *in rem* proceedings commenced against property on board a ship, and the resulting arrest of that property, ought not to be permitted to stand pending bail and release, despite related interference with the movement (therefore, the use and employment) of the ship on which that property is arrested.

## **2.0 Motions Responding to Valid Arrest**

Oftentimes, of course, the *in rem* action and the arrest of the ship in it are unassailably valid. In those cases, early intervention of the Court is sought not to challenge the arrest itself, but to seek where needed the Court’s assistance in dealing with consequences, for the parties and for third parties, of the arrest itself. The more typical contexts in which motions are brought for that purpose are discussed below.

### **2.1 Motions to Support Release of the Ship from Arrest**

A ship may be released from arrest (and so, may resume her commercial service) either by agreement between the parties or by the filing with the Court of security, called “bail”, in one of the forms prescribed by the Rules.

Where the parties have agreed in respect of matters which permit the release of the ship, the only required filing, and the only filing typically made with the Court, is a Consent to Release signed by the Plaintiff, on receipt of which the Court (almost invariably acting through registry staff) will issue a Release. The parties’ agreement usually takes the form of a full (or sufficient partial) settlement of the underlying claim, or informal provision of security by the defendant to the plaintiff in agreed form and amount. In such cases, there is no requirement that the security, or even its form, terms and amount, be disclosed to the Court, and very frequently no such disclosure is made.

It is however often also the case that defendant will post security, privately or as formal “bail”, in an amount demanded by plaintiff but which defendant considers to be excessive. In those cases, the defendant will generally provide the security promptly in order to release the ship, reserving rights to later make motion to the Court seeking reduction in the amount of security (see for example, *Amican Navigation Inc. v. Necat A (The)*<sup>39</sup>).

#### **2.1.1 Form of Bail**

Despite the discretion for which Rule 487(1) provides (a designated officer “may” issue a release of arrested property) unless a caveat release is on file it is invariably the case that the ship (or other property) is released from arrest upon provision of bail as provided for in the Rules. In addition, and as stated above, security for the claim is frequently provided by agreement between the parties in some other form (typically, a letter of undertaking of the ship’s protection and

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<sup>39</sup> *Supra*, footnote 1

indemnity insurer or payment of money into a solicitor’s trust account) in which cases, the terms of the security remain a private matter between the parties, neither the security instrument nor its terms are filed with the Court, and one of those terms is that a consent to release is given by the plaintiff (Rule 487(1)(c)) which is, in turn, filed with the Court to enable the issuance of the Release by registry staff. In such cases of consensual security, and aside from occasional review of the amount of security, it is rare that a dispute requiring the Court’s consideration or intervention arises.

Absent some such consensual arrangement, however, bail may be and must be provided in accordance with the Rules.

Forms of bail prescribed by the Rules are few and precise: the guaranty of a bank (Rule 486(1)(a)); the bond of an authorized surety company (Rule 486(1)(b)); a bail bond in form 486A (Rule 486(1)(c)); or payment of cash into Court (Rule 487(1)(a)). Issues as to the amount in which bail must be provided are addressed under heading 2.1.2, immediately below.

Concerning terms of bank guarantees or insurance company bonds, when proposed these are frequently the subject of negotiation between the issuing entity and the plaintiff – concerning such matters as required presentations to support payment, timing of expiry, and similar non-monetary terms. Where such negotiations fail to produce agreement and result in filing of a Notice of Objection under Rule 486(3), issues as to form of bail “may” (Rule 486(4)) be determined at the registry staff level by a designated officer; that officer is permitted to, and very frequently those officers do, refer the question to the Court.

Form of a surety bond, other than that of an insurance company, is prescribed by Form 486A. A dispute in case of proposed bail of that nature (again, leaving aside here disputes as to amount) most typically involves the adequacy of the proposed sureties – either their financial strength, or their amenability to the Court’s process in the event that enforcement must be sought, or perhaps both. Rule 486(4) again permits issues as to the “sufficiency” of the proposed surety to be resolved by the designated officer, or to be referred by him or her to the Court for determination. Although no authority could be found, it is submitted that “sufficiency” is a broad enough concept to include not only creditworthiness, but also availability for enforcement or any other legitimate basis of specific objection to the proposed signatory of the surety bond. As to guidance concerning criteria governing the “sufficiency” test under former Rule 1005 (differently worded but submitted to be similar at least on this specific issue) see *Excel Metal Fab Ltd. v. Ogopogo I (The) et al*<sup>40</sup>.

As a matter of practice, consultations with registry staff, and resulting referrals to the Court, are initiated in an informal manner (correspondence, as opposed to motions) and although no doubt each party has opportunity to present its position on the issue, the Court on receipt of the materials may find the representations of the parties unclear or incomplete, or otherwise unhelpful. Although neither caselaw nor the author’s personal experience provide guidance, it is submitted that the Court, if unable to decide the matter on the basis of available materials, may and should either initiate communication with the parties soliciting additional representations, or require one or other of the parties to present a proper motion on the basis of which the issue may

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<sup>40</sup> (1987), 11 FTR 202

be decided. It is submitted that, in the interest of urgency, the former procedure should be preferred to the latter if at all possible.

It is most unlikely that a payment into Court of cash pursuant to Rule 487(1)(a) would give rise to any objection as to form; obviously, as in all cases, amount of bail may be very much in issue.

### **2.1.2 Amount of Bail**

In contrast to issues of form of bail and sufficiency of sureties, issues as to amount of bail are required to be resolved by the Court, on motion: Rule 485.

The Court’s long-standing jurisprudence appears to be clear: in an *in rem* action the plaintiff is entitled to security for its claim in amount representing its “reasonably arguable best case”, plus allowance for prejudgment interest and costs, limited to the value of the wrongdoing ship. This “best arguable case” amount may be reduced if there are “special circumstances” present in the case. See for example *Atlantic Shipping (London) Ltd. v. Captain Forever (The)*<sup>41</sup>; *Zhoushan Zhongchang Shipping Co. v. Handybulk Shipping Ltd.*<sup>42</sup>. That said, there is authority that setting amount of bail is in the discretion of the Court, which may release the ship on any terms which it considers appropriate: *Norcan Electrical Systems Inc. v. FB XIX (The)*<sup>43</sup>. In that decision at para 11, Prothonotary Hargrave noted that on a motion to determine amount of bail, it is “wholly inappropriate” to “embark on close examination of the merits of the plaintiff’s claim, both as regards liability and amount”.

Cases in which the amount of bail has been set at a lower amount than the face amount of the plaintiff’s claim, and which therefore may be considered to represent “exceptional circumstances” justifying reduction in security, include *Pan Ocean Shipping Co. Ltd. v Tuloma (The)*<sup>44</sup> and *Canadian Sub Sea Hydraulics Ltd. v. Cormorant (The)*<sup>45</sup>. In the former case, Prothonotary Morneau considered that demonstration of the amount in which plaintiff sought security for cargo damage was at the time incomplete and uncertain, no formal claims having yet been received. Being satisfied that the claims “would not succeed in full”, the Prothonotary ordered security in amount of one half of the claimed amount. In the latter case, the defendant offered affidavit evidence as to the basis of its counterclaim – asserting overcharging on the plaintiff’s part, lack of care taken by plaintiff in respect of the ship, missing property from the ship and what was described as plaintiff’s “illicit on-board drug laboratory”. None of these allegations were, on the motion to set bail, challenged by the plaintiff in contradictory affidavits. The Court held itself entitled to note that plaintiff elected not to confront these allegations, and to rely on defendant’s affidavits as “the only evidence I have for consideration”. In the result, the Court fixed the amount of bail at one half of the amount pleaded in plaintiff’s Statement of Claim.

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<sup>41</sup> (1995), 97 FTR 32

<sup>42</sup> 2004 FC 1135

<sup>43</sup> [2003] 4 FC 938 (Proth)

<sup>44</sup> 2003 FCT 56

<sup>45</sup> 2006 FC 1050

Regarding allowance for interest and costs, it is fair to say that the maritime bar's general practice varies between 25% and 33% of the face amount of the claim, the higher proportion tending to be limited to claims of relatively smaller face amount. Expressed as a proportion, there is little consistency in those relatively few reported cases in which this uplift has been set judicially. See for example:

- *Amican Navigation Inc. v. Necat A (The)*<sup>46</sup> – Best arguable case \$114,387; uplift for interest and costs \$10,000 or 8.7%
- *Cyber Sea Technologies v. Underwater Harvester Remotely Operated Vehicle*<sup>47</sup> – Best arguable case US\$206,535; uplift for interest and costs US\$28,465 or 13.8%
- *Norcan Electrical Systems Inc. v. FB XIX (The)*<sup>48</sup> – Primary claim best arguable case \$74,929; uplift for interest and costs \$29,721 or 40%; sister-ship claim best arguable case \$212,357; uplift for interest and cost \$77,443 or 36%
- *Zhoushan Zongchang Shipping Co. v. Handybulk Shipping Ltd.*<sup>49</sup> – Best arguable case USD8.33 million; uplift for interest and costs USD799,710 or 9.6%

## 2.2 Movement of Property Under Arrest

Rule 484 provides:

No property arrested under a warrant shall be moved without leave of the court or the consent of all parties and caveators

There frequently arise operational or practical needs for a ship to be moved following service of the warrant: that service will normally have occurred while the ship is in berth for routine commercial operations (loading or discharging cargo, taking on stores, undergoing repairs) and when those operations are completed the cost of keeping the ship on the berth may be unnecessary to incur on an ongoing basis or, more usually, the berth operator requires the space to be available for other ships.

Generally movement of the ship is achieved by and according to the parties' consent. No reported decision considering Rule 484 could be found. It is submitted however that in such cases, the concern of the parties, and also of the court, will be the safety of the ship during and following a proposed movement, and reasonable certainty that the ship will remain within the territorial jurisdiction of the Court (generally, within the limits of the same port at which the warrant was served) for so long as the arrest may continue. As a practical matter, these issues would normally be addressed (1) by ensuring the vessel is moved to some other berth or designated anchorage at which reasonable protection from perils of sea or weather is probable; and (2) by ensuring that place is within a port at which compulsory pilotage and/or outward

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<sup>46</sup> *Supra*, footnote 1

<sup>47</sup> 2002 FCT 794

<sup>48</sup> *Supra*, footnote 8

<sup>49</sup> *Supra*, footnote 42

customs clearance is required for this particular ship, because pilotage and border protection authorities generally are notified when a warrant for arrest is served, and as matters of policy will not attend the vessel for departure unless and until notified that the arrest has been released.

Again, no authority on point could be found, but among maritime practitioners it is accepted that the sanction for moving a ship under arrest without consent or an authorizing order is punishment for contempt of court.

### **2.3 Possession of/Responsibility for Property Under Arrest**

Rule 483 provides:

483. (1) Subject to subsection (2), possession of, and responsibility for, property arrested under subsection 482(1) does not vest in the sheriff but continues in the person in possession of the property immediately before the arrest.

(2) The Court may order a sheriff to take possession of arrested property on condition that a party assume responsibility for any costs or fees incurred or payable in carrying out the order and give security satisfactory to the Court for the payment thereof.

It is usually the case that the ship's owner (or demise charterer) is in possession of the ship at the moment of service of the warrant – usually through the human presence on board of their employee and representative the master. Sometimes the owner has, or soon will, become insolvent and ceases to carry on business – if the owner, and the master and crew, effectively abandon the vessel there might in truth be no-one in possession of it. As a matter of practice, in insolvency cases, the mortgagee may have a contractual right (but generally no obligation) to take possession of the ship – frequently requiring as little as a written notice to the owner/borrower to this effect. Where that notice has been given prior to arrest, Rule 483 appears to mandate continuation of possession by the mortgagee. Where however it post-dates the arrest, the situation appears to be unclear.

Rule 483(2) authorizes the Court only to place the sheriff in possession of an arrested ship. The sheriff may not be the most expert or the most cost-efficient person to take possession; he may be reluctant to take on the potential responsibility for the safety of the ship; he may not (probably will not) have the staff or resources to devote much attention to the ship on a day-to-day basis.

The only reported decision which was found concerning Rule 483 was *Striebel v. Chairman (The)*<sup>50</sup>, in which plaintiff was both mortgagee of a ship under construction, and its intended buyer on completion. The builder was in default and the plaintiff, as mortgagee, by proper notice took possession of the ship, and then commenced *in rem* proceedings against the ship and arrested it. The cited decision was on plaintiff's motion to have the sheriff take possession of the ship, which relief was granted. In the course of his decision, Prothonotary Hargrave said (para. 11):

I would observe also that the very nature of ships and shipping operations often makes it extremely difficult for an *in rem* claimant to know with any absolute certainty whether

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<sup>50</sup> 2002 FCT 545 (Proth), aff'd 2002 FCT 609

his or her security in a ship is in any absolute jeopardy. For these reasons I would set the test to be met, for putting a sheriff or marshal into possession of an arrested ship, at a low threshold. In my view an arresting party need only demonstrate, as a reasonable plausibility, in the sense of an acceptable reason with a fair expectation as to trustworthiness, that the vessel ought to be put in the protective care of the sheriff.

It is not clear from the reported *Striebel* decisions why the plaintiff, already in possession as mortgagee, preferred the ship to be in possession of the sheriff. It is said that his intention was to move the ship out of the shipyard for completion elsewhere, as appears to have been his contractual right. In any event, the ship there in question was incomplete, unmanned and presumably non-operational, which are not typical situations of ships under arrest.

As a practical matter, when a ship under arrest is not receiving financial or other support from its owner (including, ongoing employment and payment of necessary officers and crew) creditors will often desire the expenditure of money to protect the ship and preserve its value during the arrest. Orders authorizing such expenditures are frequently sought and granted, without need to have the sheriff placed in possession of the ship.

#### **2.4 Expenses of Preservation and Maintenance of Arrested Property**

Discussion of priorities in Admiralty is beyond the scope of this paper. Suffice, however, to say for purposes of this discussion that where a ship is judicially sold for the benefit of creditors, so-called marshal's expenses of arrest, including amounts expended for preservation of the *res* during the arrest (sometimes called *custodia legis* expenses), are reimbursed with very high priority – subordinate only to costs of the sale itself.

When it is apparent that the ship under arrest is probably doomed to eventual judicial sale – most often when the arrest has been caused by, or is soon followed by, insolvency or other financial failure of the shipowner, it becomes imperative for a certain minimum amount of preservative attention to be given to the ship, and for certain amounts of money to be expended for those purposes. Such expenditures might be, fuel, crew (or failing crew, shore-supplied watchmen services), insurance, berthage, water and/or victuals. Most usually, a creditor or a collective of creditors (often, although not always, the mortgagee) will be willing to fund preservative costs of that nature, conditional upon reasonable assurance that incremental amounts expended for this purpose post-arrest will be refunded regardless the recovery of the creditor(s)' underlying debt(s) – in short, that the expenditures will be treated, on the ultimate distribution of proceeds of sale of the ship, as marshal's expenses of arrest and so be reimbursed with very high priority.

It is generally accepted that expenses will only be treated as marshal's expenses and reimbursed accordingly if authorized in advance by order of the Court. See for example discussion in *The Atlantis Two*<sup>51</sup> at paras. 42, 46:

[42] Short of a Court Order and perhaps some limited exceptions, I do not accept the argument that fuel supplied and owned by charterers, but burned by owners, during the time the vessel was detained and under arrest at Vancouver, ought to have any substantial priority.

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<sup>51</sup> *Supra*, footnote 37

...

[46] ... Here, while Mermaid rendered a valuable service to the *Atlantis Two*, it was outside of either the framework of a marshal's supervision or of any court order.

Thus, the Court is frequently presented as a matter of urgency with motions seeking the Court's prior authorization for expenditures of this kind, and the Court's assurance that reimbursement will be on the basis of marshal's expenses of arrest. As a matter of practice, these motions are presented by the creditor willing to fund the expenses, generally supported by some measure of consensus among other creditors. Although disagreements do arise and are judicially resolved on those motions, they do not by their nature often give rise to reported reasons. Guidance may however be found in the resulting Orders, an example of which is attached as Appendix A to this paper and review of which, it is hoped, will give a sense of the kinds of expenditures typically at issue, and the terms by which the authorizations they grant are conditioned. The attached example was issued in the case of SEABEEZE I, a cruise vessel arrested at Halifax in fall, 2000 following the owner's insolvency, and which in the result remained under arrest at Halifax, in keeping of a skeleton crew, for a period of about three months pending her sale by the Court (which itself was expedited, partly on grounds that *custodia legis* cost of winterizing the ship, as would have been required to keep her at Halifax, was prohibitive).

## 2.5 Discharge/Recovery of Property of Third Persons

The property most frequently on board ship at time of arrest and requiring attention (typically, removal) if prolonged arrest is expected is cargo, particularly if that cargo was destined for discharge at a port other than the one at which the arrest occurs. Despite clear law (see section 1.4.1 above) that the arrest does not extend to the property of third parties on board the ship, discharge of cargo is costly and may be extraordinarily so; and following discharge there will be costs for storage and handling of the cargo and its eventual on-carriage to its destination. Even assuming that post-discharge expenses must be borne by the cargo owners, it is unsettled in this Court by whom the expense of discharge itself must be paid.

There is conflicting authority in other jurisdictions on this point. In England, it is said to be the case that cargo must bear the cost of its own discharge (*The Myrto (No 2)*<sup>52</sup>); in the United States, it is said that discharge of cargo is a *custodia legis* expense therefore presumably reimbursable to whomever has initially borne the cost with the utmost priority (*The Ponzam*<sup>53</sup>; *Associated Metals & Minerals Corp. v. Alexander's Unity (The)*<sup>54</sup>). There is Hong Kong authority to the effect that each case should be decided according to its own equities (*The Mingren Development*<sup>55</sup>). These authorities all were considered by Prothonotary Hargrave in this Court in *Royal Bank of Scotland v. Kimisis III (The)*<sup>56</sup>, in which case cargo did not seek its own discharge but rather plaintiff, the mortgagee, wished cargo removed on the basis that the ship would be more marketable if empty. Prothonotary Hargrave (para 14) found it in that case

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<sup>52</sup> [1984] 2 Lloyd's LR 341 (QB)

<sup>53</sup> 1927 AMC 723

<sup>54</sup> 41 F 3d 1007 (5 Cir., 1995)

<sup>55</sup> [1979] HKLR 159

<sup>56</sup> 1999 CanLII 7651 (FC)

premature and therefore unnecessary to decide the issue and to resolve the competing approaches of these other jurisdictions.

In a case in which cargo interests (perhaps unusually) were willing themselves to fund the costs of discharge, Justice MacKay was prepared to, and did, so order on somewhat complex terms in *Holt Cargo Systems Inc. v. Brussel (The) et al*, Court File T-738-96, Order granted April 24, 1996. A copy of that Order is attached as Appendix B to this paper – again, it is hoped that its review will offer guidance as to factors required to be considered in these kinds of circumstances.

Justice MacKay commented on that Order and the process by which it was granted in course of written reasons, issued later on other issues in that same Action<sup>57</sup>:

In April, by proceedings conducted mainly by telephone conferences with counsel located in Halifax and Montreal, the Court approved arrangements initiated by, and on application of certain cargo owners, to offload containers of their cargo. Ultimately, when the vessel was moved to dockside under order of the Court, it was ordered that all containers aboard the ship, some 1100, be unloaded from the *Brussel*.

For the record I commend the admiralty bar for the expeditious organization of arrangements to protect the interests of cargo owners as far as possible in the circumstances. Communications by telephone and fax resulted in arrangements intended to protect the interests of those anxious to arrange onward shipment of their cargo, while minimizing expense from abandoned cargo and protecting the interests of container owners. The admiralty bar, acting on behalf of those interested in cargo and containers, was most effective and efficient in developing arrangements for discharge of the cargo aboard the vessel. In my view those arrangements ultimately served the interests of the trustees and other creditors of the bankrupt companies.

What Justice MacKay omitted to note in the above review was the very prompt and continuing support counsel received from him and from Court staff to expedite hearings and dispositions of the various motions which led to the April, 1996 discharge Order. The ultimate benefits to which Justice MacKay refers were no less attributable to the initiatives of the Court than to those of counsel.

To close this paper where it opened, with the support of the Court and the collaboration of the parties and their lawyers here was a case in which these particular modalities of arrest were able to be resolved, and quite satisfactorily in the result, on an urgent basis.

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<sup>57</sup> *Holt Cargo Systems Inc. v. ABC Containerline NV (Trustee of)* [1997] 3 FC 187 (TD)