

NATIONAL ADMIRALTY SEMINAR

Practical Aspects of a Judicial Sale

by

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The process of a Judicial Sale in the Federal Court is quite settled.

General information about Judicial Sales in the Court is to be found in the Marshals' Manual on the Court's website.

THE ARREST

At the time when an order for the arrest of a ship is issued, an Admiralty Marshal is assigned to the ship under the guidance of a Registrar who will in turn report to the Admiralty Registry co-ordinating Judge in the Registry where the ship is located. That team would usually continue throughout the sale process.

At the time that the arrest warrant is executed, while still on the ship, the Marshal speaks to the master of the vessel and explains the consequences of the arrest of his ship. The Marshal will also seek an inventory from the master of the quantity of water, provisions, medical supplies and fuel aboard the ship and enquires are made as to the condition of the crew and if they are being paid. The Marshal thus understands the status and condition of the ship and crew that he has custody of. This information will become important if the arrest is a long one and if the Marshal is required to sell the ship.

Recognising that every sale throws up different problems what follows is the usual process by way of a time line of a Judicial Sale.

Generally, following the execution of the arrest warrant, a week or so is allowed for settlement of the dispute to occur.

WEEK 2 FROM ARREST

By the second week, if the ship is still under arrest the matter is listed for a case management conference before the Admiralty Registry co-ordinating

Judge. If there is no appearance filed on behalf of the ship, unless there is good reason not to do so, the Court would expect an application for summary judgment and for sale to be filed and to be heard in the week or two after the case management conference.

In the meantime the Court would usually order the Marshal to have the defendant ship valued in writing (this valuation is not to be disclosed) and to seek advice from a ship broker generally and as to the appropriate method of sale.

WEEK 4 FROM ARREST

After the hearing of the interlocutory application, obviously if the Court accepts the evidence of the plaintiff, the Court orders that judgment be entered for the plaintiff. The following orders would be made (See Form 27):

- The Marshal sell the ship under the Admiralty Rules 1988.
- The Marshal shall retain the named broker to act as broker and to assist the Marshal in the Sale.
- The method of sale be determined by the Court.
- The Marshal retain a solicitor experienced in the sale of commercial ships to act for the Marshal on the sale of the ship.
- The Marshal to move the ship to a large commercial port (for provisioning the ship, supplying light diesel for the generators, crew amenities and easy access for purchaser inspections).
- The Marshal (or plaintiff) be at liberty to repatriate the crew to a level not lower than the ship's minimum manning requirements.
- The Marshal be at liberty to pay crew wages and any repatriation costs as and when they fall due.
- Marshal to open a US currency account entitled "Admiralty Marshal-sale of the ship X" in United States currency. No amount is to be drawn from the account without further order of the Court.
- The persons authorised to draw on the account shall be any two of XXX. (audit requirement)

WEEK 5 FROM ARREST

In the meantime the Marshal has sought advice from a broker as to the method of sale and has engaged a solicitor. The Marshal returns to Court for the following orders:

- The sale of the ship X be effected by closed bid tender in accordance with attached terms and conditions.
- The bids close at noon on a date in 4 weeks time.
- The Marshal to cause advertisements to be published in a form that the Marshal considers appropriate in the following publications:
- Lloyds List (daily publication) once a weeks over 3 weeks and in Tradewinds (weekly paper) over 3 weeks.

WEEK 9 FROM ARREST

After the time allocated for the bids to close, they are opened:

The Court orders that:

- The Admiralty Marshal accept the tender of the highest bidder. *
- The highest bidder immediately execute the Marshal's conditions of sale.
- The highest bidder to pay the purchase price plus an adjustment for bunker fuel, lubricants and any other consumables.

*If the highest bid is not over the valuation then Marshal approaches the Court to either sell to the highest bidder or to readvertise.

Date is set for the Court to hear priority claims in 3 weeks.

On payment of the purchase price the ship is released from arrest.

At this point the Marshal would seek an order to repatriate the crew and would be working with the shipping agent for a smooth transition.

WEEK 10 FROM ARREST

The Court orders that:

- The Marshal to pay final wages to crew, solicitor's fees for acting for the marshal and broker fees.

WEEK 12 FROM ARREST

Court hears priority claims and:

- makes orders as to payments out to creditors
- plaintiff be paid balance of the purchase price.

SOME ISSUES WITH JUDICIAL SALES

Custody of the ship

Rule 47 of the Admiralty Rules 1988 (the Rules) provides:

(1) 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.

(2A) The Marshal may, when considering moving a ship under arrest, take into consideration the operational requirements of the port authority where the ship is to be held in custody.

(2B) The Marshal may, at any time after a ship has been arrested, demand and take possession of the original certification documents of the ship.

Rule 48(1) of the Admiralty Rules provides that if a Marshal has custody of a ship or other property, the Marshal or a party may at any time apply to the court for directions with respect to the ship or property.

Rule 47 gives extensive powers to the Marshal to manage a ship and its cargo. However, unless it was an emergency the Marshal would rely on Rule 48 and refer the issues to the Court for an order to act.

In relation to the power under subrule 47(2A) allowing the Marshal to take into account the operational requirements of the port where the ship is to be held in custody, almost from time of arrest the Marshal is under pressure where to hold the ship.

There are virtually no lay berths to be found in any commercial port in Australia. Marshals are required to work with harbour masters and port authorities with every arrest and cannot tie up a loading berth and will try to arrest at anchor prior to the ship coming to berth.

As the arrest progresses the problem is where to keep the ship for a number of weeks pending the sale. Leaving at anchor off-shore creates a risk that the ship may flee the jurisdiction. Keeping it inside a harbour has its own problems such as cost to have a ship to lie alongside a berth and sometimes requiring moves from berth to berth. If the Marshal is lucky a ship will be allowed to anchor inside a harbour.

Ships Certificates

Subrule 47(2B) give the Marshal power to remove the ships certificates. Removal of the ships certificates may give the Marshal some comfort that the ship will not flee the jurisdiction while under arrest.

A large commercial ship should have on board the following certificates:

1. Certificate of Class – Hull
2. Certificate of Class – Machinery
3. International Tonnage Certificate
4. Certificate of Bareboat Charter Registry
 - i. Load Line Annual Survey Certificate*
 - ii. Safety Equipment Annual Survey Certificate*
 - iii. Radio Certificate* and
 - iv. Radio Renewal Survey Certificate*
5. Statutory Survey notices including:
 - i. Tank Statement
 - ii. Safe Manning Certificate
 - iii. Copy of ship's plans.

* These certificates may all be part of one certificate

Conditions of Sale

It is relevant for today's discussions that clause 5 of the standard Admiralty Marshals' conditions of sale provides that:

Although the effect under Australian law of this judicial sale is to free the vessel from all liens and encumbrances and debts up to the date of the sale, no warranties are made by the Admiralty Marshal as to the effect of this sale under any foreign laws and/or foreign jurisdictions. The buyer shall not be entitled to reject the vessel, nor to any damages or diminution of price by reason of any refusal by the courts or registry of a foreign country to recognise this sale and/or to recognise its effect under Australian law.

Tenders

Individual tenders are received by the Marshal and placed in the Registry safe. Electronic bids are accepted. They are opened after the bids close. In attendance at the time of opening the bids are:

- the Marshal
- the solicitor for the Marshal
- a Registrar
- a senior registry officer as an independent person

Repatriation

Luckily in recent times we have not had to repatriate the crew as in the last two judicial sales ships have been sold with the purchaser keeping the existing crews and continuing the original planned voyage of the ship.

Personal Effects

In the collapse of the Baltic Shipping Company in the mid 1990's and the sale of the *The Ship "Skulptor Vuchetich"* and *The Ship "Skulptor Konenkov"* issues arose as to what were personal effects of the crew. Some crew members in what was a very early form of eBay were taking orders and acquiring goods from overseas ports for customers back home in Russia. When the Marshal commenced work to repatriate the crew some had large consumer items including car tyres and other vehicle spare parts in their cabins and were seeking that the Marshal repatriate the goods with them.

Cargo

I have not discussed the discharge of cargo from a fully loaded bulk carrier. So far we have arrested bulk carriers unloaded.

The owner of cargo not itself under arrest can apply to the Marshal under Rule 49(1)&(2) or to the Court under Rule 49(3) to have the cargo discharged. The

cost of discharging the cargo is not a cost of the arrest or the sale however, a cost to the cargo owners. *The Jogoo* [1981] 1 Lloyd's Rep 513. They would have a claim against the ship owner and thereby the proceeds of sale.

Marshals go out their way to arrest a ship before it is loaded as it must be assumed that every arrest will lead to an order for sale. Having said that if a ship is actually loading or unloading at the time the Marshal attends to arrest it and that process is nearly completed, the Marshal will wait to arrest the ship. Once a Marshal arrests a ship all loading or unloading would be stopped.

If a ship is loaded when it is arrested, the discharge of cargo would be another step in the processes to be managed by the Marshal for a judicial sale.

Repairs

The Marshal will only undertake those repairs that are necessary to make the ship seaworthy. The ship is sold "*as is, where is*". Having said that in a sale of a luxury yacht the Marshal paid \$100 or so to have the yacht cleaned by water pressure to make it more marketable.

Crew

Morale is very important during a long arrest. Some say that sailors are used to be confined on ships for extended periods. However, with an extended arrest pending judicial sale they are stuck in the one place with a lot of spare time with an uncertainty about their future employment. There has been a stabbing of a crew member during an arrest. This potential for conflict is why the Court presses ahead to make an order to sell the ship rather than let it languish for weeks.

Marshals will always consider the welfare of the crew and if an order for sale is made and the ship is at a remote port like Abbott Point, Queensland which has no crew recreational facilities the Marshal will seek approval of the Court to move the ship to a port that has them. This would have the added advantage of making it more easily accessible to potential purchasers.

Sometimes it does not take much to keep a crew happy. In one arrest of a ship which had been lying offshore for some time Justice Rares spoke to the master by phone during a hearing. Upon questioning by the judge as to the morale of the crew the Master said in a very heavy Eastern European accent bellowing through the courtroom: *“The crew want cigarettes... give them cigarettes... the crew make no trouble!”*

CLOSE

These and many other issues over the years have challenged the Marshals of the Court but they have all been overcome and the ships eventually sold with very relieved Marshals to have the ships on their way.