

Federal Court of Australia
Guidelines for offshore arrests

Introduction

These guidelines have been developed to assist the Admiralty Marshal to manage the issues that may arise in cases where a ship is to be arrested or held in custody at anchor.

In particular, the guidelines deal with the following issues:

1. When, and on what conditions, should the Marshal give the relevant port authority sufficient notice of an impending arrest so as to allow it to make arrangements to minimise any disruption the arrest might cause to port operations.
2. In what circumstances should the Marshal arrange to arrest a ship at anchor.
3. In what circumstances should the Marshal keep an arrested ship at anchor rather than in a port at a berth or inner harbour mooring.

In each case the arrangements to be made by the Marshal will involve an assessment of the risks of a ship avoiding arrest or departing Australian waters notwithstanding that it is the subject of an arrest.

Background

Most major Australian ports no longer have lay berths or harbour moorings at which vessels may be arrested or kept while in the Marshal's custody.

The arrest of a ship at a working berth can lead to significant disruptions of port operations and inevitably involves the further disruption and expense of having to relocate the ship.

It is desirable that the Marshal, wherever possible, should avoid or minimise this disruption and expense by arresting and holding ships other than at, or in the vicinity of, working berths.

The Marshal's obligations

Under the *Admiralty Rules 1988* (Cth) ('the Rules'), the Marshal **must** take all appropriate steps to retain safe custody of, and preserve, a ship or other property that is the subject of an arrest.

Rule 47 includes the following provisions:

- (1) Subject to these Rules, 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.

Rule 47 imposes an overriding obligation on the Marshal to take all appropriate steps to retain safe custody of the ship and to preserve it.

Notification of impending arrest

When a Marshal is aware of an impending arrest of a ship, contact should be made as soon as is reasonably possible with the relevant port authority and AMSA.

This should be no later than after an arrest warrant has, in fact, been issued but may be sooner should a Marshal have reasonably formed a view that there is a strong likelihood of an arrest occurring in the near future in a particular port.

When notification is given the Marshal should also discuss with the relevant port authority (ordinarily the Harbour Master) and AMSA the following:

- the safety and/or security implications of the intended arrest;
- the implications/impacts on port or harbour operations (this aspect need only be discussed with the relevant Harbour Master); and
- any potential Court orders which may be sought that may prevent the Harbour Master or AMSA from taking the full range of regulatory or other actions that they would otherwise ordinarily be entitled to take.

The discussions between the Marshal, the Harbour Master and AMSA should be kept confidential.

It should be made clear to the relevant port authority that information about the arrest may be divulged to its key operational personal in order to assist the arrest process (e.g. to arrange access for the Marshal to the port or harbour or onto a pilot boat) but must not be used in a way that may impede the Marshal in securing the safe custody of the vessel (e.g. by not allowing a ship that is scheduled to berth from berthing due to the fact that it is to be arrested by the Marshal).

Generally, it will not be necessary for formal confidentiality undertakings or indemnities to be sought by the Marshal before divulging information in relation to an impending arrest to the relevant port authority or AMSA. However, the Marshal may in his/her discretion seek confidentiality undertakings or indemnities in circumstances where it is considered to be reasonably necessary.

In instances where the Marshal becomes aware of safety issues or has safety concerns in relation to a vessel that is to be arrested or that has been arrested then these issues and/or concerns should be brought to the attention of the relevant Harbour Master and AMSA as early as is reasonably possible.

Arresting vessels at anchor - Assessing the risks

While it is generally desirable to arrest a ship while it is at berth, there will be circumstances in which this is not possible because no berth is available or arresting a ship at a berth will cause significant disruption to the relevant port's operations.

In such circumstances the Marshal will need to consider arresting the ship at anchor.

Arresting a ship at anchor will usually mean that the Marshal is not able to exercise the same degree of control as over a ship that is arrested while at a berth or an inner harbour mooring. This may increase the flight risk in relation to the ship that is to be arrested or that has been arrested.

The Marshal will therefore need to assess the risks associated with arresting a ship at anchor (as opposed to waiting for it to berth) and/or leaving it at anchor after it has been arrested.

In assessing whether a vessel should be arrested at anchor the Marshal may take the following matters into consideration:

- whether the Marshal can safely board the ship while it is at anchor;
- whether there is appropriate transport available to the Marshal to enable him/her to board the ship;
- the operational requirements and possible disruption/impact(s) on the relevant port's operations;
- whether the ship's AIS system is functioning (the relevant Harbour Master will generally have information in this regard);
- the level of English proficiency on the Bridge of the ship;
- the size and type of ship;
- whether the ship poses an environmental risk to the water, the seabed or the adjacent shoreline(s) if left at anchor;
- whether crew repatriation is likely which may lead to reduced functionality and moveability of the ship;
- whether the ship has cargo on board and, if so, the nature of that cargo (e.g. perishable goods or livestock) and the port where that cargo is destined;
- whether the ship is a foreign owned and flagged ship and, if so, the country of the owner and the country of flag;
- the frequency of the ship's visits to Australia (e.g. if it is a liner vessel that regularly calls at Australian ports it is probably less likely to flee);
- the value of the maritime claim against the ship;
- the amount of bunkers onboard the ship;
- whether there is sufficient fuel to operate the main engines and generators so that power onboard the ship can be maintained;
- the amount of crew provisions on board the ship;
- whether the next scheduled port of call is an Australian port or a foreign port;
- the health and welfare of the crew;
- weather conditions (current and predicted); and
- whether the ship requires repairs or maintenance work, is under a salvage agreement or has any other safety issues that may be relevant to the issue of arresting and/or leaving a ship at anchor (e.g. hull damage).

The above list is not exhaustive and should be regarded as a guideline only.

In no circumstance should a ship at anchor be allowed to become a “dead ship” whereby it is without sufficient crew or fuel to enable it to be moved to a safe port in the event of imminent bad weather or other emergencies.

Ships that have been arrested by the Marshal while at a berth or at an inner harbour mooring should only be moved to an anchorage position or to another port pursuant to a Court order or a letter of consent by the arresting party on terms suitable to the Marshal. It should be borne in mind that it may be cheaper for the arresting party if a ship is allowed to stay at anchor as opposed to at a berth while under arrest. In this regard the Marshal should primarily take into consideration operational and safety factors and not representations by solicitors which may be aimed at keeping costs of their client to a minimum without sufficient regard to any potential risks that the ship may abscond if at anchor.

Keeping a ship under arrest at anchor

A Marshal who has arrested a ship that is at anchor should take steps to minimise or avoid any flight risk.

These steps should be proportionate to the level or degree of flight risk, and might include one or more of the following.

- Removing original ship documents from the vessel.

The type of original ship documents that the Marshal may seek to remove include:

- Classification certificates (hull and machinery)
- Survey Certificate
- Registration Certificate
- Safety Equipment Certificate
- Radio Certificate
- International ship security certificate
- Safe Stowage Manual.

Original ship documents should be removed only with the consent of the Master of the ship or pursuant to an order of the Court made under Rule 50 of the Rules.

Original ship documentation should, wherever possible, be kept in the custody of the Marshal. The documents should be retained in a safe or other secure room designed for the safe storage of documents at the registry where the arrest has taken place.

In instances where the arrest has taken place at a regional port the Marshal may request the relevant port authority or the local police whether they are willing to take custody of the original ship documents and store them in a safe or other secure facility/room on their premises. In such circumstances the Marshal

should obtain a receipt from the relevant port authority or police station in relation to the documents that have been handed over.

When a ship is released from arrest either the Marshal should return the original ship documents to the ship or request the relevant port authority or police officer who has agreed to take custody of the documents to return them as soon as is reasonably possible.

- Placing guards or detention officers on board the arrested ship.

The Marshal should seek a Court order before proceeding to place any guards on board an arrested ship.

The Marshal will need to prepare an application to the Court and a supporting affidavit setting out, amongst other things, who the proposed guards are, which company (if any) they work for, what their qualifications/experience are in relation to securing/guarding assets, any insurance arrangements in place (i.e. personal injury insurance and liability insurance for damage caused to property or injury caused to third parties) and the likely costs.

- Moving the vessel to a secure berth. This may include a lay up berth or a non-working berth (should one be available) or possibly a naval berth.
- Seeking the assistance of AMSA and other authorities such as Customs and the office of Transport Security.

If none of the above steps are appropriate or cannot be exercised for whatever reason then the Marshal should approach the Court and seek orders that the ship be moved to another port.

Where the Marshal has formed the view that a ship can remain at anchor while under arrest, s/he must bring this to the attention of the relevant Judge in the arresting registry or the issuing (of proceedings) registry as soon as is reasonably possible.