

# BUNKERSPOT

## ANGLE OF APPROACH

SHIPPING SIZES UP FUTURE  
FUEL OPTIONS

INSIDE:

VESSEL ARREST

FUEL MEASUREMENT

SHIP DESIGN

REGIONAL FOCUS



# Tactical thinking

Responding to wrongful ship arrest claims can be a costly and time-consuming business. As Steve Simms explains, engaging in some pre-arrest planning can be a very useful exercise for traders and suppliers

Daniel Defoe, the author of *Robinson Crusoe*, the 18th century classic novel of a seaman marooned on a desert island, also was a shipowner and an active international trader. He also was constantly in debt. At one point he was arrested and sent to debtors' prison until his possessions (including his ship) were sold to pay the debt.

Although there was no question of his debt, Defoe still didn't take his arrest quietly. He protested that he had been wrongly and unjustly arrested. He demanded his release and threatened damages.

Eventually, Defoe was released from prison (there is no record of what became of his wrongful arrest threats), resuming his international trading and writing career (although without his own ship). A few years later (1726) he wrote another book, *The Political History of the Devil*, in which he observed that '[t]hings as certain as Death and Taxes, can be more firmly believ'd.'

With experience as shipowner, debtor, and in his view wrongfully arrested, if Defoe had ever written on ship arrest, he also would have added that it is as certain as death and taxes that a shipowner will threaten wrongful arrest, when a bunker supplier or trader arrests (or even thinks about arresting) the owner's ship.

Owners routinely express outrage at what is a common occurrence in maritime commerce. Most owners truly are not surprised when a bunker supplier or trader arrests or threatens arrest of their chartered or formerly-chartered vessel. Instead, the root of owners' outrage is that their charterers have not paid them for months. Those same charterers have not paid the bunker suppliers or traders either, but it is the bunkers provided to the owner's vessel that at least has kept the vessel able to navigate, deliver cargo, and be positioned for a paying charter.

Owners, of course, whose charterers are behind on hire, have every reason to know that the charterers aren't paying for their bunkers, either. The owners also, of course, would be the last to give effective notice to bunker suppliers and traders of charterer financial problems that the owners have known about for months. The immediate result would be the suppliers' and traders' withdrawal of credit and insistence on cash in advance. The owners then would have the choice of paying for the needed bunkers themselves, or having the charterer take



what little cash it might have to pay for the bunkers instead of paying it to the owners as charter hire. So, such owners almost always hang back, having every reason to know that their charterers are not paying for bunker supplies, and benefitting from the bunkers that the charterers didn't pay for.

Nevertheless, those same owners readily cry wrongful arrest when a bunker supplier or trader seeks to have the owner, who has benefitted from the unpaid-for bunkers, pay the supplier or trader for the benefit. The threat, owners believe, may give them leverage to settle for less than the full amount owed, or even deter an arrest altogether. Unlike a vessel arrest, which usually involves a significant commitment of planning, money and time, too, a wrongful arrest threat is cheap to make and, almost always, carries no downside even if the threat itself is wrongful.

So, should a certain wrongful arrest threat make a difference to a bunker supplier or trader's decision to arrest or maintain arrest?

The answer is – usually not, with the right pre-arrest planning.

Make sure you know the wrongful ship arrest law of the place, or places, you might arrest. Choose the best one available: different countries have different wrongful arrest standards. Although most of the world's countries (with the notable exceptions of the United States, Panama and Singapore) are parties to the 1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (the '1952 Arrest Convention'), the Convention allows local law to decide whether there is a wrongful arrest.

The 1999 International Convention on the Arrest of Ships ('1999 Arrest Convention'), however, authorises the court considering arrest to require an arresting plaintiff to post security against potential wrongful arrest damages. Wrongful arrest under the 1999 Arrest Convention can include arrest which a court considers 'unjustified' or where even if justified, the arrestor has demanded and owner provided 'excessive security'. Only 11 countries (including Denmark, Finland, Norway and Spain), however, have ratified the 1999 Arrest Convention. Under the Convention, national law still determines the amount of wrongful arrest damages.

The general guideline is, the more northerly the arrest location the more strict the wrongful arrest standards. So, in the Netherlands, Germany, Poland, Denmark, Norway, Sweden and Finland, for example, even if a bunker supplier or trader arrests believing that it has the strongest grounds for arrest, if it loses, the arrest can be considered

wrongful and the bunker supplier or trader will have to pay damages. Those damages can be substantial and include loss of charter hire, berth and crew expenses, port charges, and generally, any expense which the owner has incurred because of the arrest (including the legal expense for defending against the arrest). The owner must try to limit ('mitigate') its damages, but that is the only restraint on the damages which an owner (or charterer in control of the vessel) can claim if an arrest attempt in the Netherlands, Germany, Poland, Denmark, Norway, Sweden or Finland is lost.

Ships are arrested in these countries, but only on the firmest of grounds applying the

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national laws. Consequently, if you are at all uncertain about your grounds for arrest, and there is an alternative location for arrest, avoid arresting in the Netherlands, Germany, Poland, Denmark, Norway, Sweden or Finland, or other countries which are 1999 Geneva Convention signatories. There, an owner's wrongful arrest threat has a significant possibility of becoming realised in damages, the arrest already more expensive by the court requirement of an arrestor having to post security on arrest against those damages.

Other locations such as Australia, South Africa, and Nigeria also have standards

which could favour owners threatening wrongful arrest. In Australia, since Admiralty Act 1988 (Section 34), where '(1)(a) a party unreasonably and without good cause':

- i. demands excessive security in relation to the proceeding; or
- ii. obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property, the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

The South African and Nigerian standards also look to whether the arresting party has acted reasonably and with good cause to arrest. These standards can, with a shipowner's threat, be expensive to defend against. Most charters, for example, will have express no lien provisions stating that all bunker supply is solely to charterers' account. An owner facing an arrest in Australia, South Africa or Nigeria certainly could raise (and in fact have raised) that the arresting trader or supplier knew the vessel was chartered, should have expected that the charter made bunkers the charterer's sole responsibility, and therefore, where the charterer was no longer in charge of the vessel, that the trader or supplier acted unreasonably and in bad faith by arresting the vessel.

Such claims have been defeated, but at a significant expense. Their availability more often leads to a supplier or trader arresting in Australia, South Africa or Nigeria, even on the strongest of claims, accepting settlement for much less than the full amount due. Ships are, of course, successfully arrested in jurisdictions such as Australia, South Africa and Nigeria, but bunker suppliers or traders considering arrest should also avoid these jurisdictions if better ones are available.

Generally, owners' wrongful arrest threats mean less in countries south of the Baltic region. In these countries, including the United Kingdom, Belgium, France, Italy and Greece, Canada, New Zealand, Singapore, and Hong Kong, an owner seeking to recover wrongful arrest damages must prove fault of the arresting party for the damages, which must be proof of 'abuse of rights', 'gross negligence' or 'bad faith'. Basically in these countries, the owner seeking wrongful arrest damages must prove that the arrest was for a purpose other than actually recovering

for unpaid bunkers; that the arrest's purpose was to maliciously injure the owner or that it had absolutely no legal basis.

The specific UK rule is that the owner must prove malice (*mala fides*) and gross negligence (*crassa negligentia*) on the part of the arresting party. In *Forsythe International (UK) Ltd v. Silver Shipping Co. Ltd and Petrol Globe International Ltd (The Saetta)* [1993] 2 Lloyd's Rep 268 (which involved an owner's wrongful arrest claim against a bunker supplier, which had arrested asserting its title retention clause for unpaid bunkers), the Court explained the standard which English and most Commonwealth courts have invariably followed (going back to the English case of *The Evangelismos* (1858) 12 Moo PC 352) for over 150 years: *Their Lordships think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either mala fides, crassa negligentia, which implies malice, that would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. . . .*

The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or gross negligence which is equivalent to it?

Consequently, in the United Kingdom and other similar jurisdictions, successful wrongful arrest cases are almost non-existent. Considered to be part of a defence to such a case is advice of counsel, that is, whether the arresting party, prior to arrest, took advice from competent vessel arrest counsel and relied on it.

Nevertheless, even in jurisdictions requiring that owners alleging wrongful arrest prove actual malice or gross negligence, owners successfully defeating arrest can claim their 'costs'. Costs can include attorneys' fees, the costs of keeping the vessel while arrested, and the amount the owners paid for security (for example, a bond) to have the vessel released. Consequently, even though if unsuccessful in these countries, an arresting bunker supplier or trader may not have to pay greater 'wrongful arrest' damages, it still may have to pay significant 'costs'. On the other hand, in these countries an owner asserting 'wrongful arrest' which loses the assertion, may also have to pay the successful bunker supplier's or trader's 'costs'. This is somewhat of a deterrent to owners pressing their wrongful arrest claims (which are almost

impossible, again, for the owners to win), but owners still can attempt to have claims settled for less than arrestors are entitled to on the threat of 'costs' if the claim does not succeed.

So, in the United Kingdom and other similar countries where an owner threatens wrongful arrest, the threat is one to ignore, particularly where the arrest proceeds on the advice and at the direction of competent arrest counsel. But, if other, better arrest jurisdictions are available, then bunker suppliers and traders should consider arresting, instead, in those jurisdictions given the possibility of having to pay 'costs' even though the court would not consider the arrest wrongful.

Such a jurisdiction is the United States. Generally in the United States, including in ship arrest cases, 'costs' are almost never awarded. There is no automatic legal fee shifting, unless some contract between

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the parties has provided for that (and, no competently advised bunker supplier or trader would ever have contractual terms and conditions requiring it to pay an owner if an arrest didn't succeed). 'Costs' are very limited, to, for example, what is paid for transcripts of testimony actually used in a case. As confirmed by one of the US Courts of Appeal (the court of authority immediately below the United States Supreme Court) in 1937 (*Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 297 (5th Cir. 1937)), in order to prove wrongful arrest, an owner has the burden of proving bad faith, malice, or gross negligence. US courts have to follow this standard, which is effectively identical to that of the United Kingdom and similar countries, and as difficult to prove. In the United States also, the 'advice of competent counsel, honestly sought and acted upon in good faith is alone a complete defence to an

action for malicious prosecution.' (*Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd.*, 959 F.2d 49, 53 (5th Cir. 1992).)

Consequently, particularly if the arrest claim may be subject to challenge, bunker suppliers and traders should choose the United States as their arrest location. Even where the arrest grounds may be weak, with advice of competent arrest counsel, as much as the owner might threaten wrongful arrest, the owner most likely will recover nothing even if the arrest is unsuccessful, not even if it is hardly any of its 'costs'.

Good pre-planning also involves good and current sales terms and conditions, confirmations, bunker delivery receipts (BDRs) and invoicing: Your sales terms and conditions should provide for the greatest opportunities for arrest.

Generally, US law extends these possibilities, so that your terms and conditions should make plain that US maritime law, and specifically the United States *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. Section 31341 et seq., governs your provision of bunkers to the vessel. On the other hand, inclusion of English or similar law as controlling frequently is fatal to a US arrest asserting maritime lien rights; English and similar law does not allow for *in rem* maritime liens. An assertion of English or similar law to control sales terms and conditions – except as it concerns title retention (and there can be drafting to have that limited application of English law) – gives no specific benefit to a bunker supplier or trader not even in English courts for the purpose of arresting a vessel.

Your sales terms and conditions also should define 'buyer' to include not only the direct customer, but also the vessel's owners and managers. Your confirmations, BDRs and invoicing also should be addressed in the same way.

Your sales terms and conditions also should provide that you may arrest immediately and without notification to anyone if you believe that payment is insecure. A bunker supplier arresting in Singapore recently succeeded in overturning a lower court decision of wrongful arrest (*The STX Mumbai* [2014] SGHC 122), where the lower court had considered an arrest, done while the invoicing for a bunker supply was otherwise not overdue, was wrongful. The bunker supplier had good reason to be insecure: STX, the direct customer, had entered insolvency proceedings. Overturning the lower court, however, was an expensive exercise which arguably could have been avoided with sales terms and conditions

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permitting immediate arrest without prior notice and while invoicing was in terms.


The advice immediately above is very general; there are thousands of vessel arrests each year in hundreds of jurisdictions and the legal standards sometimes change. It is important before arrest, though, to know what your terms and conditions say and have them not hamstring your arrest, or even give an opposing owner a foothold to argue that your arrest was wrongful. So, before you need next to arrest, have competent arrest counsel review your sales terms and conditions, and then do that on a regular basis. With that you can arrest with more confidence of turning back the certain owners' wrongful arrest threats.

Also fight back: where you threaten arrest – or arrest – and receive the owner's certain wrongful arrest threat, fight back. In the United States, for example, it is so difficult to prove wrongful arrest that almost always an owner's wrongful arrest claim asserted in court is itself made in bad faith. United States law (Federal Rule of Civil Procedure 11) allows for the recovery of attorneys' fees to defeat bad faith claims. Consider, then, when an owner asserts a wrongful arrest

claim in court, fighting back with court rules or similar provisions allowing the recovery of attorneys' fees and other sanctions for bad faith assertions in court. Take discovery (evidence) for the basis of such claims. If on threat of arrest, prior to court action, an owner threatens wrongful arrest, your counsel should respond back that if on arrest that bad faith assertion is made in court, the arresting supplier or trader will seek sanctions, including full attorneys' fees and costs to defend against and defeat the bad faith wrongful arrest threat.

Defoe, if he had written about it, again would have said that shipowners' wrongful arrest threats, when a bunker supplier or trader threatens or does arrest, are as certain as death and taxes. With the right pre-planning, though, including arrest in the right jurisdiction, the inevitable threat will mean nothing at best for the owner, and for the bunker supplier or trader fighting back, bad faith sanctions against the owner irresistibly asserting them.

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## AN INTRODUCTION TO FUEL MEASUREMENT

by Nigel Draffin

Every transfer of fuel from terminal to barge/road tanker and barge/road tanker to the receiving ship requires accurate measurement to determine the quantities transferred – usually by measuring the tanks before the start of the transfer and on completion.

As business margins increasingly come under pressure, it is essential that purchasers of bunker fuel take delivery of the product they have paid for – inaccurate measurement of fuel, whether through poor practice or through intentional short delivery, can result in significant financial losses.

In this timely and clearly-written book, industry expert Nigel Draffin addresses the basics of quantity measurement and provides an excellent overview of measurement equipment, including thermometers, gauges, and calibration.

As the use of mass flow metering increasingly becomes the industry norm, Draffin looks at the intricacies and challenges of fuel flow measurement. He also reviews fuel sampling methods, fraudulent practices, and discusses the key role of the marine surveyor in bunker quantity surveys.

This compact, practical and useful book also provides a brief but informative introduction to the complexities of measuring liquefied natural gas (LNG) when used as a marine fuel.

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