

The Absentee Custodian

When a vessel is arrested in the United States, the U.S. Marshals Service is the federal agency that takes the vessel into the arresting court's custody. However, the U.S. Marshals Service is a law enforcement agency and is poorly equipped to maintain custody over the arrested vessel while the creditor's claims are determined. It has become common practice when a creditor arrests a vessel in the United States to enforce a maritime or mortgage lien, that a substitute custodian is appointed by the arresting party with the approval of the district court. The substitute custodian takes the place of the U.S. Marshals Service and is responsible for the care and safekeeping of the vessel and will care for the vessel during the period of arrest. In order to be appointed as a substitute custodian, the applicant will be required to submit evidence to the district court that it is sufficiently experienced and that it can perform the services required of a substitute custodian. These services generally relate to the safety and security of the vessel including, but not limited to, making sure that the condition of the vessel remains the same, normal wear and tear accepted, as when the substitute custodian took over control of the vessel.

A typical substitute custodian agreement provides that the arresting party will pay the fees and expenses of the substitute custodian. In addition, the agreement will generally require that the arresting party indemnify and hold the substitute custodian harmless from any liability incurred by the substitute custodian in the performance of its duty. Normally, the arresting party is familiar with the substitute custodian so the indemnification and hold harmless obligations do not raise a red flag. However, notwithstanding these contractual arrangements, the substitute custodian generally enjoys a priority claim over the sale proceeds of the arrested vessel for the substitute custodian's reasonable fees and expenses (these are often called "*custodia legis* expenses").

The arresting party, however, should exercise diligence during the arrest period to make sure that the substitute custodian is doing its job in a reasonable manner. The consequences of not doing so may come back to haunt the arresting party, as any damage to the vessel or its equipment during the arrest period may negatively impact the arresting party's claim against the vessel and its ultimate recovery.

In a recent arrest proceeding, the vessel mortgagee, as the arresting party, appointed a substitute custodian that failed to adequately care for the vessel. This lack of care caused substantial damage to the vessel's electrical system and the main engine. In addition, certain equipment and vessel stores disappeared. This damage to the vessel in large part resulted in a very low sale price when the vessel was sold at auction. As the mortgagee through the substitute custodian was responsible for maintaining the condition of the vessel during the period of arrest, this failure to supervise and monitor the substitute custodian performance will likely substantially reduce the mortgagee's recovery. In addition, the court barred the mortgagee from recovering its *custodia legis* expenses.

Accordingly, if you are the arresting party, choose your substitute custodian with care. In addition, during the pendency of the arrest, continue to actively monitor and supervise the performance of the substitute custodian and the condition of the vessel. Failing to do so may substantially impact your ability to recover on your claim.



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