

The Forgotten Rule D

By Neil Klein

McKASSONKLEIN

2211 Michelson Drive, Suite 320
Irvine, CA 92612 USA
Tel 949.724.0200 Fax 949.724.0201
neilk@mckassonklein.com

The Forgotten Rule D – *In Rem* Arrest to Recover Possession of Cargo or Other Maritime Property (Or “How to Get Your Stuff Back”)

Introduction

The global recession has forced shipping related companies to consider their options and enforce their contractual rights, especially since so many entities have been squeezed by shrinking markets and a new financial environment. The options include court intervention through well known maritime procedures.

How well do you know your ABC’s regarding U.S. Supplemental Admiralty Rules? Or rather your BC&D’s?

Much has been said and done over the years in the name of Supplemental Admiralty Rule B attachments and Rule C arrests by shipowners, cargo owners and container lessors. However, Rule D arrests have largely been ignored, possibly because maritime practitioners are not as familiar with its purpose or have not considered its benefits (this is borne out by a dearth of reported Rule D cases in U.S. federal courts over the past 30-years¹).

Maritime practitioners are quite inventive in locating vessels with cargoes and containers on board, and determining their arrival and departure dates at ports around the world. The usual suspects include certain databases, live-time vessel tracking websites, marine exchanges, and related information sources e.g. ships agents and vessel custodians. On the other hand, the target entities can be equally (or more) adept at hiding property, which often results in a game of cat and mouse.

Supplemental Admiralty Rule D provides another option for companies or individuals to recover possession of their cargo or other maritime property e.g. containers; but of course, you have to know where the assets are located before you can arrest them!

Scope of Rule D & Required Admiralty Jurisdiction

Rule D² involves the filing of a complaint in a U.S. federal court and a request for *in rem* arrest, as in Rule C, for the following three types of actions³:

1. Possession – for a vessel, cargo or maritime property (e.g. bill of lading or container) that was “wrongfully taken”
2. Petitory – to resolve “legal” title (not equitable title) to maritime property e.g. yacht or vessel
3. Partition – for judicial sale of a vessel & distribution of proceeds among the owners

Rule D provides a legal basis to adjudicate disputes over these actions, provided there is admiralty jurisdiction: in other words, there must still be a maritime claim or contract that relates to the use of a vessel, commerce or navigation on navigable waters, transportation by sea, or maritime employment.

¹ About 80 Rule D cases have been *reported* in the U.S. over the past 30-years, of which 30% relate to actions for possession, nearly 60% relate to petitory actions, and 10% relate to partition actions. These figures, however, do not take into account Rule D claims that were filed in U.S. courts but not reported.

² All references to Rules relate to the U.S. Supplemental Rules for Admiralty or Maritime Claims.

³ Supplemental Rule D states:

“In all actions for possession, partition and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.”

Courts have determined that actions for possession of a vessel require “recovery” of such vessel, not original possession i.e. the plaintiff must have had “prior possession” and thereafter move to get it back. The prior possession requirement can be met by an owner’s title interest,⁴ or by a bare boat charterer as owner pro hac vice,⁵ and constructive possession may be sufficient to include actual possession.

Further, admiralty jurisdiction is not automatic just because a vessel is involved, e.g. breach of a contract to build or sell a vessel would not be sufficient for a Rule D action.⁶

Process & Security

This Rule can be utilized by any person that claims a superior right to possession of a vessel, cargo or maritime property. For example, a Rule D action can be filed by a shipowner or charterer who wishes to recover possession of a vessel of which it has been wrongfully deprived under a charter party; by a cargo owner for a bill of lading where the shipper or consignee has refused to hand it over; or by a container leasing company for its containers where the lessee has wrongfully withheld or refused to return them.

The deprived party can file a complaint in U.S. federal court and obtain maritime process for a warrant of arrest, and then send out the U.S. Marshal to seize the property. Notice must be given to adverse parties under Rule B(2).

Similar to other maritime actions, the property may be released upon the giving of appropriate security, although in certain cases – e.g. where the party wants a specific vessel or item – this could be contested.⁷ Rule D security is not the same as Rule B security, in that it is governed by Rule E(5)(d), not Rule E(5)(a). Essentially, this means the court has broad discretion (but no guidelines as in Rules B & C) to order the release of the vessel by order of court, or “on such terms and conditions and the giving of such security as the court may require.”

Examples

1. Possession of Cargo

Thypin Steel Company v. Asoma Corporation, 215 F.3d 273 (2nd Cir. 2000)

The plaintiff filed an in rem action claiming ownership of a bill of lading for steel cargo en route from Ukraine to Houston, TX after a dispute arose over ownership (the bill was issued by the master of the vessel). The District Court issued a warrant of arrest for the bill of lading and, at a post-arrest Rule E(4)(f) hearing, received additional evidence from the parties. The Court held there was admiralty jurisdiction

⁴ *Brooks Construction v. Guthrie* (5th Cir. 1980) (Rule D granted to recover trawler, not obtain original possession).

⁵ *The Nellie*, 235 F. 117 (2nd Cir. 1916) (right to present possession as good as absolute title as against owner or anyone who wrongfully disturbs it).

⁶ See *Cary Marine Inc v. M/V Papillon B*, 872 F.2d 751 (6th Cir. 1990) where District court refused to issue warrant of arrest for vessel under Rules C & D for lack of admiralty jurisdiction and 6th Circuit affirmed. Case involved 3x agreements: Agreement #1, charter party & option to purchase; Agreement #2, vessel purchase agreement; and Agreement #3, yacht charter & option to purchase. Plaintiff filed for vessel arrest for maritime lien under Rule C & possession under Rule D. Court held claim related to purchase agreement (#2), not charter agreement (#1); therefore, Rule C not applicable since admiralty jurisdiction extended only to wholly maritime contracts. Further, plaintiff lacked “legal title” to possession of vessel and therefore no basis for Rule D. See also *Privilege Yachting v. Teed & S/S Forty Roses*, 849 F. Supp. 298 (D. DE 1994)(no Rule D for dispute under ship construction contract); and *Silver v. Sloop Silver Cloud*, 259 F.Supp. 187 (S.D.N.Y.1966) (Rule D claim not available re vessel building contract).

⁷ *The Panaghia Kathariotisa*, 165 F.2d 430 (3rd Cir. 1948)(no release; vessel ordered to remain in court’s jurisdiction until possession right determined – release would place it outside power of court & end relief as if case dismissed).

based on the bill of lading, a maritime contract, which constituted evidence as to a change of title; it noted jurisdiction depended on the nature of the contract, limited to “contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation.”

After security was put up, the bill of lading was released and the vessel arrived in Houston and discharged the cargo.

On appeal, the defendant challenged plaintiffs’ arrest of the bill of lading and argued Rule C(8) provided the appropriate procedure. Further, it contended this was a non-maritime dispute between two New York merchants over title to cargo, based on a purchase agreement which did not involve the operation, navigation or management of a ship. However, the 2nd Circuit disagreed and noted that a bill of lading for ocean carriage was a “classic” maritime contract. Further, the bill of lading at the center of the dispute was not merely a purchase agreement between merchants, but a maritime contract that involved transportation of goods over navigable waters. Therefore, it was a maritime contract (not the cargo) that was *the res* which conferred admiralty jurisdiction on the court.⁸

The procedural posture of the case was unusual: a more traditional course of action would have been for the plaintiff to have arrested the cargo in Houston.⁹

2. Title to Vessel

Coutsodontis v M/V Athena, 2008 WL 4330236 (5th Cir. 2008)

The plaintiff filed suit in District Court for the Eastern District of Louisiana and attached and arrested the vessel Athena under Rules B & D. He demanded \$15 million for release of the vessel for claims that arose from a shareholder dispute being litigated in New York, Spain and Greece. He alleged that he owned shares in the defendant corporation that held legal title to the vessel and was therefore entitled to share in the vessel's profits. And he alleged his shareholder status equated to “part-ownership” of the vessel, for which he filed for possession and partition under Rule D.

The defendant then filed a motion to vacate the arrest and attachment, arguing the District Court did not have admiralty subject-matter jurisdiction and therefore the attachment and arrest of the vessel were wrongful as a matter of law. The court agreed and ordered the vessel released.

Plaintiff appealed, but the 5th Circuit affirmed the trial court's holding that there was no admiralty jurisdiction as the claims were not maritime in nature i.e. they did not relate to the “ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment.” It noted admiralty jurisdiction was not automatic simply because a vessel was involved and ruled that the supplemental admiralty rules did not create admiralty jurisdiction in this case.

⁸ 1 *Benedict on Admiralty* 201, at 13-2 n.4 (categorizing suit to recover cargo based on maritime tort or contract as possessory action subject to Rule D).

⁹ Cargo obtains maritime character solely when on navigable waters. *Evergreen Marine Corp. v. Six Consignments of Frozen Scallops*, 4 F.3d 90, 93-95 (1st Cir. 1993) (plaintiff' shipowner's *in rem* Rule D claim against cargo of scallops dismissed for lack of admiralty jurisdiction – plaintiff did not satisfy situs prong of jurisdiction test as alleged conversion of cargo did not occur on navigable waters). See also *Nippon Yusen Kaisha v. 817 Rolls Knitted Fabric 100% Poly Charmeuse*, 2009 WL 2482156 (S.D.N.Y.) (no valid Rule D since no dispute over B/L re rolls of knitted fabric shipped in container from Shanghai to New York; dispute related to who owed freight to plaintiff carrier); *Berry Contracting v. M/V Aries Swan*, 2008 WL 4630362 (S.D. Tex.) (third party motion to intervene granted to owner of equipment on board vessel); *BP Exploration & Oil Co. v. 1146 Joints*, 1995 WL 442072 (E.D. La.) (Rule D granted due to wrongful withholding of cargo under B/L; proper security 2x value of cargo); and *Matsuda v. Wada*, 128 F.Supp.2d 659 (Rule D granted to owner of racing yacht who sued service provider re claim for conversion of yacht's bill of lading).

The end result is that while Rule D may be used to have a court decide an issue based on actual ownership of the vessel itself, it cannot be used in the case of *indirect ownership* through shares of stock in a corporation that owns the vessel. Where ownership derives from shares in the owning corporation, issues stemming from such ownership likely will require an accounting among owners or shareholders – which is not an admiralty issue to support such jurisdiction.¹⁰

3. Recovery of Containers

There do not appear to be any reported cases in the U.S. involving claims for recovery, possession or title to containers, although it is known that such Rule D complaints have been filed in various federal courts. The basis for a claim might be that a third party lessee or shipowner/charterer has refused to return specific containers, despite demand (i.e. alleged wrongful withholding) and that the owner/lessor has legal title (i.e. not equitable title) to them.

There are various issues for consideration by a plaintiff lessor:

For example, what if the containers are filled with cargo at the time of the filed action? The plaintiff lessor should anticipate that if it arrests its containers under Rule D, it will likely receive complaints from the cargo owners or consignees under the bills of lading, with a request for release of their cargo. Further, what if the containers are required to clear U.S. Customs upon discharge? No doubt there will be discussions with Customs officials (and costs) before the cargoes can be cleared.

Conclusion

A Rule D option may be available from time to time, and could be used as an alternative ground to a Rule B attachment or a Rule C arrest. Bear it in mind next time you intend to file suit in a U.S. court on an admiralty matter when your stuff has been wrongfully taken from you or if you need to prove legal title to that lovely new yacht you had built for your next trip to the Bahamas.

¹⁰ *Stathos v. The Maro*, 134 F.Supp.330 (E.D. VA 1955) (No Rule D re dispute over vessel ownership: actual controversy related to specific performance to transfer stock in vessel-owning company; no admiralty jurisdiction). See also *Trueman v. Historic Steamtug New York*, 120 F.Supp.2d 228 (SDNY 2000) (Rule D proper to determine legal title to abandoned historic vessel on national registry); *Beluga Holdings v. Commerce Capital Corp.*, 212 F. 3d 1199 (11th Cir. 2000) (no Rule D as tort conversion claim for stock certificates in vessel owning company “did not occur on navigable waters” and did not have connection to “traditional maritime activity”)

Biography

Neil Klein is a partner at McKasson & Klein LLP in California.

Neil was born and raised in South Africa. He was admitted to the South African Bar as a solicitor in 1984 and practiced maritime and transportation law. He immigrated to the US a few years later and was admitted to the California Bar in 1989.

His practice focuses on maritime and commercial litigation, with an emphasis on vessel arrests and attachments, maritime liens, charter party disputes, bunker claims, bills of lading and cargo claims. He is a frequent speaker at seminars and conferences, and has published several articles on international disputes, choice of law, Rule B and C issues, anti-suit injunctions, and “port of refuge” considerations.

Neil has been an expert witness on U.S. “choice of law issues” before the *Beijing First Intermediate Court* (2008), and on California law issues before the *Supreme Court of the Bahamas* (2005). He is a member of the International Bar Association (Maritime & Transport Law Section), as well as a Proctor member of the U.S. Maritime Law Association.

