11th Members´ Meeting

www.shiparrested.com

Hamburg, 13 June 2014

Conference Papers

SHIP ARRESTED.COM

ELEVENTH MEMBERS' MEETING OF SHIPARRESTED.COM

Conference hosted by Segelken & Suchopar

Hamburg, Friday 13 June, 2014

Registration opens at 8h30

09:00 - Opening address
Valentine de Callatay, www.shiparrested.com network

09:15 – Guests addresses

09:45 – Legal Issues on the Incorporation of Arbitration Clauses in Bills of Lading, Dr. Andrea Lista, Southampton Institute of Maritime Law.

10:30 – Arrest procedures:
* *"Changes in the German Maritime Code", Jan Albers, Segelken & Suchopar*
* *"Ship Arrest in Argentina", Dr. Emilio A. Callegaro, ALS-ADMIRALTYLAW*
* *"Ship Arrest Procedure", Costa Rica, Abraham Stern, Pacheco Coto*

11:30 – Coffee Break

12:00 – International Panel Discussion: "Strange and nteresting arrests"
Chaired, Richard Faint, Arbitrator, Charterwise Ltd.

13:00 - Conference Lunch

14:00 – Arrest topics:
* *"The Action in Rem", Marc de Man, De Man Pilotte*
* *"Alter Ego Liability in U.S. Supplemental Rule B Admiralty Actions", Charles Moure, Harris & Moure*
* *"Arrest and arbitration in the UAE: Throwing the towel?", Alessandro Tricoli, Fichte & Co.*

15:30 – Coffee Break

16:00 – Industry Focus:
* *"Practical aspects in insolvency proceedings- Arrest, Sale or keeping the vessel in Trade?", Tim Beyer, Schulz & Brown*
* *"How should a bunker supplier best secure their credit", Mohammed El-Hassan, Monjasa AS*
* *"Alternative ways to fight an arrest: Dealing with innovative bunker suppliers", Johannes Grove Nielsen, Bech-Bruun*

17:30 - Closure of the conference

19:00 – Conference dinner – in the (private) Hafen-Klub Hamburg

LEGAL ISSUES ON THE INCORPORATION OF ARBITRATION CLAUSES IN BILLS OF LADING

By Dr Andrea Lista
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This session will consider the issues revolving around the incorporation of Arbitration Clauses in bills of Lading under English law.

The first issue relates to the identification of the charterparty which is to be incorporated. That is the very first thing that an English court would do even if the parties have not clearly identified which one of a string of several charterparties is to be incorporated. The words of incorporation will then be considered in order to ascertain whether they will incorporate an arbitration clause in the charterparty. General words of incorporation will not suffice for the incorporation of an arbitration clause - Navig8Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady). Due to the principle of separability of the arbitration agreement (which will be discussed in detail), specific reference to the arbitration clause is required, although in the past the jurisprudence on this matter has been oscillatory (Aughton v Kent, Thomas v Portsea, The Merak, The Rena K). The position where the charterparty has not been drawn up and signed will also be taken into account - Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No. 2). If the arbitration clause is incorporated into the bill of lading between the shipper and the carrier, under English law the clause will also bind the third party receiver. Finally, the English court can issue an anti-suit injunction in order to restrain a party from commencing or pursuing legal proceedings in breach of a London arbitration clause in a bill of lading assuming that the proceedings are not issued in the courts of an EU Member State or Lugano Contracting State. If that is the case, the session will consider possible ways to circumvent the current EU regulatory framework.

Dr Andrea Lista, Dott. Giur. *LL.D. (Italy), LLM (Soton), Practising Advocate (Italy), PhD (London), Legal Consultant, Associate Professor in Commercial Law, Director of LLM Programmes, School of Law, University of Southampton.*

Andrea has notably worked as a legal advisor to a multinational enterprise leading in underwater technology and has been a legal consultant to the European Parliament. He has lectured for many years in various areas of commercial law (international trade, competition law, internal market law, international commercial arbitration, and corporate law) in Southampton and London, widely published in leading international journals.

Andrea has vast experience in EU law, corporate law, international trade and international commercial arbitration, and he is a legal consultant to companies and law firms.

In May 2013, Andrea was awarded the 'ETA Excellence in Teaching Award as the Overall Outstanding Professor in the School of Law, University of Southampton', and the 'Vice Chancellor Teaching Award for Excellence in Teaching'.

CHANGES IN THE GERMAN MARITIME CODE

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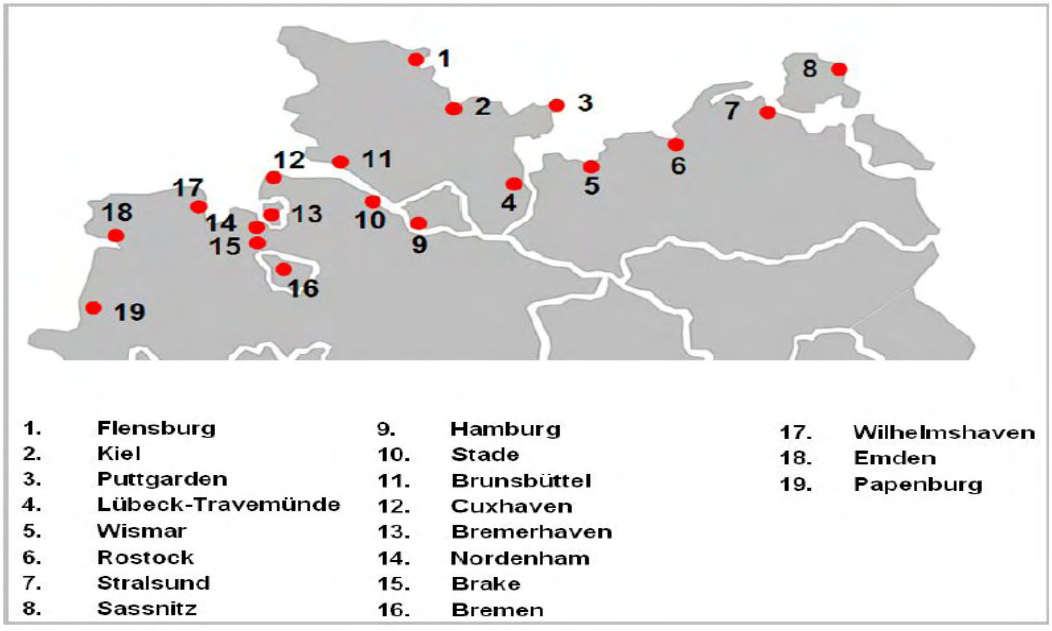
The Agenda

1. Prologue: Germany in the Centre

●19 Seaports:
The largest:
-Hamburg
-Bremen / Bremer-haven
- Wilhelmshaven?

● Hub for Baltic Sea Transports

● Transhipment port for transports to Middle/East European Destina-tions



2. The Recent Revision of the German Maritime Law

2.1. The International Law background:

- Germany has <u>not</u> ratified the Visby-Protocol, it is still a Hague-State
- Germany has ratified neither the Hamburg nor the Rotterdam Rules
- However, Germany has incorporated the Visby Protocol into its domestic maritime law (so, **<u>basically Germany is a Hague/Visby-State</u>)**
- Contained in the 5th Book of the HGB (German Commercial Code)

❖ <u>Completely revised with effect from 25 April 2013</u>!

2.2. The Three Major Changes of the Maritime Law at a Glance**:**

1. **Exclusion of Liability:**
   For **Error in navigation** & **fire <u>only if this is ontractually agreed</u>** (general business terms sufficient)

2. **Modification of the Legal Rules of Liability:**
   Allowed, if negotiated and agreed **<u>in the individual case</u>!**
   <u>PS:</u> No exclusion of liability for damage occurring **outside the tackle-to-tackle period** by means of gen. bus. terms !!!

3. **No Reference to Jurisdiction Clauses in C/P:**
   -**This is actually a unique approach of German law:**
   -Any reference made in a B/L to the terms of a CP is **considered to be void**. Only those clauses are valid which are printed on the B/L itself !!
   <u>Consequence</u>: double jurisdiction?

2.3. The One Major Change Concerning the Arrest of Ships:
- No "Good Reason" required anymore to obtain an arrest order !!

3. The Law on Ship Arrests

3.1. Purpose of Ship Arrests

1. Obtaining Financial Security
2. Pressure to Settling the Underlying Claim
3. Creating Inland Jurisdiction

3.2. Legal Prerequisites

#1: The Claim

1. Content of the Claim:
- Any claim for payment
- Not restricted to maritime claims

2. Debtor of the Claim:
- Owner of the vessel or bareboat charterer
- Other charterers not sufficient
- No Arrest in Rem !

3. Target of the Claim:
- The ship herself
- Any sister vessel
- Special Case: Arrest in Bunkers

Legal Prerequisites #2:

1. No "Good Reason":
- Major change of German law on Ship Arrests
- Applicant does not have to demonstrate and prove anymore that without the particular arrest the enforcement of his claim would be impossible!

2. Required Evidence:
- Copies of relevant documentation
- Affidavit !!

3.3. The Court Procedure:

1. Competent Court:
The applicant may choose either
- the Court competent to hear the proceedings on the merits (if it is a German Court)
- the local country Court, in whose judicial district the vessel is arrested

2. The Decision of the Court:

- The Court will decide by Order (within few hours) without prior hearing of the defendant if the claim is conclusively justified
- Otherwise it will fix a hearing date (delay !)
- The Order must be served by the Applicant.
- (Only) possible defence: "Schutzschrift" – a preventive statement of defence

3. Counter-Security:

- May be required by the judge – subject to his discretion

4. Security Required to lift the Arrest:

- Usually 110% of the claim (costs & interests)
- Guarantee of a bank that is permitted to operate in the European Union
- Other Guarantees only if so allowed by the Court

3.4. Risks & Costs:

1. Wrongful Arrest:

- **Strict liability** provided by German Law depending solely on the decision of the judge that the arrest was unjustified from the very beginning

2. Costs:

- The Court fees' are calculated on a fixed schedule
- The Applicant has to bear the costs for the Maintenance of the ship while it is arrested (can be recovered as a part of the claim)

4. Summary

<u>What is important:</u>

- **To know:**
  1. **Who is the right claimant?** (co-insurers / subrogation)
  2. **Who is the right defendant?** (Bs/L , CP)
  3. **Details of the claim**
  4. **Affidavit**

<u>Your chances:</u>

1. You may expect not only a fair and speedy trial but also at very reasonable costs.
2. Since there is no requirement for a "Good Reason" an arrest can be obtained easily and promptly
3. However, counter-security may possibly be required

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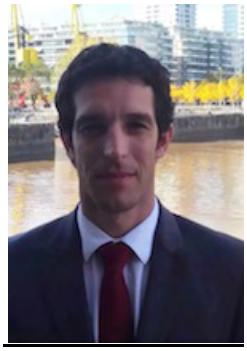
SHIP ARREST IN ARGENTINA



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Overview

1. Please give an overview of ship arrest practice in your country.
Ship arrest in Argentina is a practical and legal alternative designed to ensure that credit holders against national or foreign vessels should collect their debt. Embargo involves the possibility of banning sailing of embargoed vessels, thus ensuring collection preventively while leaving open the possibility of foreclosure. The formality is usually swift and simple, matching the pace of foreign trade and the eventual change of jurisdiction of vessels liable to be embargoed. Let it be noted that embargo can be requested in advance to arrival of a vessel to an Argentine port.

Applicable Laws

2. Which International Convention applies to arrest of ships in your country?
The Argentine Republic has not subscribed any international conventions that regulate ship embargo or arrest. However, these institutions are present in its legislation, namely in Navigation Act Nª 20,094 of 1973, published on February 2, 1973, which reflects some provisions of the Brussels Convention of 1952. According to the provisions of the Argentine Navigation Act, ship arrest in Argentine territory is fast, swift and favorable to the creditor´s interest.

3. Is there any other way to arrest a ship in your jurisdiction?
There are two ways of obtaining an embargo and banning navigation: preventive embargo and foreclosure. Both options require action on the part of a judge with jurisdiction over the issue giving rise to credit justifying the embargo. Both can and should bring about interdiction of sailing. The difference between them is that the former requires court order and the latter requires court ruling following due judicial process.

4. Are these alternatives e.g. saisie conservatoire or freezing order?
Under Argentine legislation we see two types of unavailability, namely: a) legal unavailability – embargo – and/or b) physical unavailability – detention or arrest. Thus our legislation provides the tools to obtain not only legal but also physical unavailability of a ship.

Claims subject to ship arrest

5. For which types of claims can you arrest a ship?
In order to answer this question we must first ascertain that no matter the origin of the credit,
any claim can lead to ship arrest, following court order or court ruling. Any credit, ordinary or privileged, stemming from a maritime claim or not is valid to request ship arrest or embargo. Requirements for the embargo or arrest to be granted depend on credit origin. Our Act, in sections 531and 482 shows the relationship between the credit involved and the ship liable to be embargoed or arrested.

6. Can you arrest a ship irrespectively of her flag?
Absolutely: ship arrest is irrespective of her flag for privileged credits. Foreign (non Argentine) ships can be arrested due to: i) debts incurred in in Argentine territory with respect to the ship involved,

or to another that belongs or belonged at the time of the credit to the same owner (principle drawn from the Brussels Convention of 1952), and ii) debts stemming from ship activity or from credits alien to it when they are recoverable before Argentine courts. This last option widens the chances of arrest and embargo of a ship when it is moored in Argentine territory. Regarding national vessels, the conditions for embargo and arrest are three. I) privileged credits; ii) other credits at the port of the owner's domicile or main facility; iii) credits alien to the ship, in which case the ordinary legal requirements must be filled.

7. Can you arrest a ship irrespectively of the debtor?
Yes. A ship may be arrested irrespectively of the debtor. The prohibition to embargo or arrest does not fall on the character of the debtor but of the ship. According to the provisions of section 541, there is an absolute prohibition to embargo or arrest: a) war ships, national or foreign; ships under construction with a view to join military forces of a State; ships at the service of national, provincial or municipal governments; and there is a relative prohibition to embargo or arrest ships belonging to national, provincial or municipal governments and ships loaded and ready to depart.

8. What is the position as regards sister ships and ships in associated ownership?
There is no mention of sister ships in our legislation. Regarding associated ownership, our legislation says that a ship belongs or belonged to the same owners when all and every part of it belongs to the same owners. E.g. Supposing I intend to embargo and arrest ship Z by virtue of a credit generated by ship Y, which at the time of credit origin belonged to A, B and C, the cautionary measure on Z will be relevant provided Z belongs to A, B and C.

9. What is the position as regards Bareboat and Time-Chartered vessels?
Our legislation deals with this issue under the category "buque locado" (chartered vessel). If the ship that caused the credit was at the time chartered, operated by its ship owner/builder or by a time freighter, any other boat owned by the ship owner or the time freighter is liable to embargo, but not any other ship belonging to the same owner. In this case, the law restricts the possibility of issuing cautionary measures with respect to a ship different from the one that originated the credit owned by somebody who did not have direct or personal intervention in the original obligation.

Arrest Procedure

10. Do your Courts require counter-security in order to arrest a ship?
According to the provisions of the Argentine law, the court, more specifically the judge, who is dealing with the request for embargo or arrest will assess the need or otherwise of requiring counter security. This is in answer to two clashing interests, both relevant. On the one hand is the advisability of clearing obstacles to navigation, which is the main purpose of a ship; on the other hand, releasing the ship to navigate freely would eventually jeopardize the credit generated by its own activity. Let it be noted that the counter security that is customarily is responsibility of the intervening Court.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?
From a procedural point of view there are no significant differences, except in cases when credit stems from matters alien to the ship activity. In these cases, the parties must appear before the court that has jurisdiction in the matter of the credit, e.g. credit stemming from a bank loan to the ship owner, or credit for compensation for damages generated by a car crash due to fault or negligence of the owner of the ship.

12. Does you country recognise maritime liens? Under which International Convention, if any?
Yes. Our country recognizes lien with respect to debt or credit that is relevant to move on to ship embargo.

13. What lapse of time is required in order to arrest a ship since the moment the file arrives to your law firm?
Once in possession of the relevant documents, the time to draw an embargo or arrest will vary depending on the next port of call. The possibility of application in the port of Buenos Aires should take a reasonable period of time, in the understanding that we must file the claim before the

competent court, and provided that the ruling is issued before the ship leaves the Argentine port.

14. Do you need to provide a POA, or any other documents of the claim to the Court?
To act in the name and representing an individual or a legal entity we need a POA apostilled by The Hague.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?
The documents required to embargo or arrest a ship are those that prove the existence and nature of a credit (contracts, invoices, etc) in the original and/or notarized, apostilled copy and the POA mentioned above. They must all be submitted at the time of request of arrest, which means that this firm should have access to them in advance.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?
The Argentine court dealing with the arrest must take the substantive claim, which means that the preventive embargo must be followed by foreclosure.

Miscellaneous

17. Which period of time will be granted by the Courts in order for the claimants to take legal action on the merits?
There is no term, only the terms provided for in the context of the statutes of limitation.

18. Do the Courts of your country acknowledge wrongful arrest?
No. Both embargo and arrest are legal remedies and call for immediate compliance, both on the part of the court and the law enforcing agency, in this case the Coastguard.

19. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?
Argentina has a lengthy sea coast, and Argentine judges have great experience in maritime law. Judges have been in office for many years and are well acquainted with the particulars of the activity. They will bear in mind the best interest of the claimant as well as the rights of the defendant.

20. Is it possible to have a ship sold pendente lite; if so how long does it take?

The option to sell a boat for the purpose of collecting the credit that gave way to the embargo involves a court procedure that the parties have to follow. Both parties are entitled to procedural tools which may speed or slow the process of liquidation. The final duration of the process may be influenced by many factors, both intrinsic and external, so much so that we are not in a position to estimate any specific period of time.

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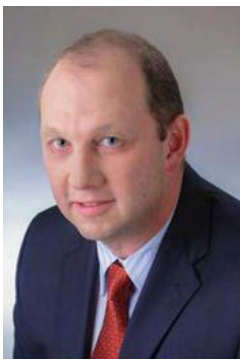
As lawyer of Argentinean Insurance Companies, Freight Forwardes and Importers/Exporters, Emilio daily deals with coverage matters, recovery actions, interpretation of Argentinean General Insurance law & International insurance terms and conditions, solving matters relatives to maritime, air and road carriage, locally and international.

SHIP ARREST PROCEDURE COSTA RICA



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Arresting a ship in Costa Rica represents a valuable tool to enforce maritime claims and maritime liens against ship-owners and other related operators due to the long-lasting process of our Courts, which in turn, obligates defendants to react quickly in order to release a detained vessel or avoid litigating a claim that can take several months or even years.
Costa Rica has three active ports. The main one is Puerto Moín in the Province of Limon; a small town in the Atlantic Coast that receives over a million TEU's a year. On the coast of the Pacific Ocean we have Puerto Caldera with traffic of over 250,000 TEU's a year. We also have a second specialized port on the Pacific side that is used only for sugar and derivative products, such as molasses and ethanol.

The arrest procedure in Costa Rica is regulated by two different laws:
1) The International Convention For The Unification Of Certain Rules Relating To The Arrest Of Sea-going Ships (Brussels, 1952); and
2) The Maritime Commercial Code of 1853.
3) The Brussels Convention regulates the arrest procedures for maritime claims, while the Maritime Commercial Code regulates maritime liens.

MARITIME CLAIMS:

The whole process is regulated and governed by the International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952) and is executed as a preventive or precautionary attachment. The convention was ratified by the Government of Costa Rica on October 23rd, 1954, and has been in effect since then.
Although Costa Rica ratified the Convention, we made two reserves that shall be discussed in detail:

Costa Rica only recognizes the arrest of a ship which is owned by the person or legal entity who appears as the actual registered owner at the time in which the arrest is filed. On the contrary, the Convention provides -without taking into consideration who is the actual owner of the vessel- that a claim can be filed against the owner of a ship at the time when the maritime claim arose (Paragraph one, Article 3 of the Convention). *As such, under Costa Rican law a claimant cannot arrest a ship for maritime claims that arose under the control of a previous owner.*

Furthermore, under Costa Rican procedural laws the only Courts with sufficient jurisdiction to determine the case upon its merits are the ones of the vessel's flag or those in which the defendant is domiciled, with the exception of the following maritime claims:
A. Disputes as to the title to or ownership of any ship;
B. Disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship; and
C. The mortgage or hypothecation of any ship.

The jurisdiction for these three maritime claims is established in accordance with article 7 of the Convention.

This preventive attachment, which also constitutes a physical arrest of the ship, operates in the absence of a valid title claim with plaintiff's right of execution (referred to in our laws as "Título Ejecutivo"). Under the precautionary attachment process, the claimant holding in his favour a

legitimate maritime claim, is compelled by law to post a cash bond equal to 25% of the total value of the claim or 50% for non-monetary pledges (such as a Letters of Credit or Bank Warranties). The holder of a "Título Ejecutivo", together with a formal ruling from a Court of Law, exonerates the Claimant from posting any type of bond or warranty. Some examples of a "Título Ejecutivo" in Costa Rica are: Public Deeds; Registered Public Deeds; Judicially Recognized Documents; Judicial Admissions; Final Non-Appealable Judgments; Promissory Notes; Checks and invoices duly signed by the registered debtor.

It is imperative to take into consideration that the claimant filing a preventive attachment shall file the merits of the claim within a month following the precautionary arrest, provided that non-compliance could result in loss of the posted bond in favour of the alleged defendant.

In sum, under Costa Rican law a vessel can be arrested for the following maritime claims:

A. Damage caused by any ship either in collision or otherwise;
B. Loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
C. Salvage;
D. Agreement relating to the use or hire of any ship whether by charter party or otherwise;
E. Agreement relating to the carriage of goods in any ship whether by charter party or otherwise;
F. Loss of or damage to goods including baggage carried in any ship;
G. General average;
H. Bottomry;
I. Towage;
J. Pilotage;
K. Goods or materials wherever supplied to a ship for her operation or maintenance;
L. Construction, repair or equipment of any ship or dock charges and dues;
M. Wages of Masters, Officers, or crew;
N. Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or its owner;
O. Disputes as to the title to or ownership of any ship;
P. Disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
Q. The mortgage or hypothecation of any ship.

It is also important to state that although Costa Rica does not have a legal vehicle technically known as a *Saisse Conservatoire*, the precautionary attachment as regulated by our Procedural Civil Code has the same effects, but not as extensive as the United States Federal Rule B Attachment.

With regard to other legal scenarios of the arrest procedure, Costa Rican law allows the arrest a ship irrespective of its flag, but considering the debtor, sister ships, or ships in associated ownership. As a procedural condition, there has to be a legal and economic link between the claim and the defendant, and proof of ownership or use rights shall be presented to the Court within a month following the precautionary arrest. The same principle applies to Bareboat and Time-Charted vessels.

Under normal circumstances the length of time required to arrest a ship from the moment the file arrives to a law firm, may be up to 7 working days, provided that all preparatory steps have been completed (having prima facie evidence that the claim is valid, consular apostille, official translations, and drafting the initial claim). Upon filling the preventive attachment the court shall also issue an arrest notice to the Harbour Master, who will be in charge of executing the arrest.

Since Costa Rica follows a preventive or precautionary attachment process, in which posting a bond or counter-security is mandatory, the initial filing only requires sufficient evidence so as to create a presumption of the alleged maritime claim. However, within a month following the precautionary arrest, the claimant must file the merits of its claim and all the legal evidence. Any supporting documents have to be presented with all the formalities of the Law (notarized, apostilled and translated into Spanish). As of today, no documents can be filed electronically. Any claimant with the intention to arrest a ship in our country has to understand that Costa Rica is Civil Law Jurisdiction and formalities are as important as the merits. Non-compliance of formalities can render

a claim futile. Part of these formalities is the issuance of a Judicial Power of Attorney appointing a licensed lawyer to represent the case.
Among the most important miscellaneous considerations, we should point out that:

A. Our Courts acknowledged wrongful arrests and Claimant bears the risk of arresting the ship without a just cause. Therefore, if he loses the preventive attachment or the case on the merits, his arrest may be considered wrongfully filed and could be sentenced to indemnify all costs and damages caused to the ship, as a result of such wrongful arrest.
B. Our Courts also recognised the piercing and lifting of the corporate veil but under very restrictive circumstances. The burden of proof to obtain such an order is the exception to the rule and generally the remedy is only available for cases in which a criminal offense has been committed.
C. Our Courts do not allow having a ship sold *pendente lite*. If a ship has been arrested and the arrest is not lifted in the injunction proceedings or by way of an alternative security, the detention will be maintained until the Claimant has obtained a title (judgment or arbitration award). Once such title is obtained, the conservatory arrest will automatically be transformed into an executory arrest. This may be followed by a judicial/public sale of the vessel before the court, if so requested, in which case the court will determine the pre-conditions for such auction.

MARITIME LIENS:

In Costa Rica, ships can also be arrested based on a valid Maritime Lien, which is regulated by our Maritime Commercial Code of 1853. This Code has 161 years without a single reform and many of its articles and institutes are completely outdated. As of today, Costa Rica has not ratified any International Convention on Maritime Liens.

The arrest process under the Commercial Maritime Code of 1853 is executed as a foreclosure process due to maritime liens and also constitutes a physical arrest of the ship. The process is considered an *in rem* proceeding (see ATLANTIC SHIP SUPPLY, INC. V. M/V LUCY) and the claimant holding in his favour a recognized Maritime Lien does not have to post a cash bond or monetary pledges (Such as a Letter of Credit or Bank Warranties).

Under article 542 these are the recognized maritime lines (in order of rank):

A. Public Treasury Debts against the ship.
B. Expenses of Justice during *custodia legis*.
C. Port Fees, including Pilotage, tonnage and anchorage.
D. Custodian and guardian wages and any other expenses used to preserve the vessel until judicial sale.
E. Storage fees to protect the gear and accessories of the ship.
F. Seamen's wages (including those of Masters).
G. Debts incurred by the Captain in the benefit of the ship during the last trip prior to the arrest.
H. Debts for materials and labour for the construction of the ship, prior to maiden voyage, and after sail, debts for the unpaid purchase price owed to the previous owner and debts incurred for repairing, rigging and provisioning the ship before last sail.
I. Insurance claims.
J. Damages owed to shippers for goods loaded on the ship but not delivered to the consignees, and the corresponding compensation for general average.

It is important to note that our Maritime Commercial Code does not consider tort liens (including personal injuries or death) or preferred ship mortgage liens. Therefore, and under the actual set of rules and regulations, a Claimant has very few options to arrest a ship due to a Maritime Lien.

Abraham Stern Feterman *is a partner at PACHECO COTO, a multinational firm which in addition to its important experience in the field of shipping, presently advises its clients in a wide range of legal, commercial, financial, insurance and taxation matters. The firm is headquartered in San José, Costa Rica, with full operative offices in Guatemala, Honduras, El Salvador, Nicaragua, Switzerland, Spain and New Zealand. Mr. Stern has a Masters of Laws in Admiralty from Tulane University. He has specialized in Maritime and International Law since 1995 and was admitted to practice in the State of Louisiana in 1997. Prior to joining Pacheco Coto, he worked at Chaffe McCall in New Orleans, Louisiana, where he focused his practice on Maritime Law, Aviation Law and International Corporate Transactions.*

INTERNATIONAL PANEL DISCUSSION

STRANGE AND INTERESTING ARRESTS

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1. m.v. EDOIL Bankrupt Shipowner - unpaid crew - voyage stopped in France short of destination. Cargo interests wanted to detain vessel. ITF involved and a unique solution reached. **(Dick Faint)**

2. George Chalos (Chalos & Co. - New York) instructed by P&I Club to try for a sister ship arrest (not easy in the USA) but went for an "alter ego" application. Strange telephone call at 03:00 led to the involvement of a 85 year old lady and uncovering a large fraud case.

3. Francisco Carreira-Pitti (Carreira Pitti P.C. Attorneys - Panama) Arrest – attacment and Flag Arrest.

4. Russell Kelly (LA Marine - Southampton) Arrest of Wessel in two parts!

5. Alexey Karchiomov (Egorov Puginsky Afanasiev & Partners - St. Petersburg)

6. Arthur Nitsevych (Interlegal - Odessa) **Georgia,** not a signatory to the arrest convention - 1st conservative arrest with arbitration in London. **Ukraine** 1st arrest case under 1952 convention (which came into force in 2012).

***Richard FAINT**, LLM MBA FCIArb MIEx - Chartered Arbitrator, took in 1963 his 1st Trip to sea - Ex - seagoing deck officer (Deckboy to 1st Mate). In the seventies, he worked in London and got experience of Lloyd's and Companies Insurance market as a claims broker and for a major East European fleet (P&I placing & claims handling). From 1981to1995, he was in Switzerland, trouble-shooting for ANDRÉ & CIE Switzerland – dealing with all problems related to the International Sale of Goods Carried by Sea including Insurance, Litigation, Sale Contracts, Charterparties, Bills of Lading, Letters of Credit and Arbitration in various formats. In 1995 he sets up CHARTER WISE LTD. as a Shipping & Trade Consultancy Advising on and handling claims, arbitrations and problems for various companies.*
His Special Interests are: The Buyers position in the International Sale of Goods Carried By Sea; Sub - standard ships, particularly S.32 (2) SOGA 1979. Discrepant documents. E-Commerce in International Trade; Master's responsibility in modern day contracts; Author 'Marine Law' & 'Marine Insurance' for International Institute of Marine Surveyors; Guest lecturer at Institute of Maritime Law, Southampton & speaker at Trade Conferences and Seminars.

THE ACTION IN REM

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About 25 years ago, when traveling to Buenos Aires, Argentina to handle a case in that interesting city, the late brilliant lawyer, Arturo Ravina, picked me up at my hotel and took me to a beautiful building on Calle Florida which housed the Naval Academy. There a gathering of the Argentinian Maritime Law Association was taking place, attended by such luminaries as Dr. Domingo Ray, Dr. Mathe, Dr. Lopez Saavedra and Dr. Cappagli. Dr. Chami was young man then and Jorge Radovich was quite humble in a corner, but always with that marvelous voice of his.

Without prior warning and preparation, Dr. Ravina simply asked me to address this illustrious audience. The rug was pulled from under my feet, but suddenly I blurted out and asked "Why do you not have the action *in rem*" and went on to set out the difficulties I experienced in arranging for the arrest of a ship at the Port of Buenos Aires and any further suggestions.

My topic today is, simply put, the action *in rem*. What are its origins? It is obviously a Roman law derivative.

Action *in rem* - Action *in personam*. *In rem* means in the thing itself. The action *in rem* is against an item of property and not against a person. In Latin, *in rem* means "against or about a thing". It derives from the word "res", which means "the thing".

It is the ship, or cargo, or freight, or even the proceeds of a sale, that is sued and not the owner of the ship, cargo or freight. It is the ship that suffers the consequences. The owner suffers the consequences if it is an action *in personam*.

It is the most pernicious and efficient of weapons used by those who have a claim against the ship, be it under Convention, or a statutory grant of jurisdiction or maritime custom.
The action *in rem* was inextricably intertwined with the maritime lien. The case of The Bold Buccleugh (1852) 7 MOO PC 267 is the leading authority on the essence of a maritime lien. It is the foundation for a proceeding *in rem*, which in turn is the legal machinery to perfect a right born at the moment the lien attaches. In other words a maritime lien is a claim or privilege upon a thing (res) to be carried into effect by legal process, namely the action *in rem*.
The question then arises in relation to the CIVILIAN nature of this extremely efficient legal weapon. To answer this question, we have to define Maritime Law.

Substantive Maritime Law is in itself a legal system, having its own particular law on various areas:
- sale (as regards sale of ship)

- hire (as regards charter parties)
- contract (as regards carriage of goods by sea)
- insurance (marine insurance, undoubtedly one of the first forms of insurance)
- corporate law
- its own particular procedures (the action *in rem, in personam* and attachment
- its own Courts, the Admiralty Courts and its own *lex mercatoria* (the *lex mercatoria* or general maritime law)

Maritime Law also consists of modern international Conventions, including Conventions on collision, salvage, carriage of goods by sea, maritime liens and mortgages, and shipowners' limitation. These Conventions have been able to bridge the gap between the two principal Western legal families, namely the CIVIL and the COMMON law and are applied similarly by the judicial institutions of different jurisdictions, such the UK and France. These Conventions foster international harmonization of law, by promoting a constructive synthesis of the legal traditions from which they sprang.

It may further be stated that maritime law is a mixed legal system in its own right, found in all jurisdictions, including those belonging to only one major legal tradition. Maritime Law is CIVILIAN in its origin with an infusion in the last two centuries of English common law principles and innovation. Let me then delve into this aspect in greater detail.

It should be remembered that in England there was a strong CIVILIAN trait for quite some time. In fact, there was a historically difficult relationship between the common law courts and the Admiralty Courts since the creation of the Admiralty Courts as far back as the late 13th century. It took a full five hundred years into the late nineteenth century before the tension between the civilians and the common lawyers was resolved through the Admiralty Court as a unique judicial institution applying the Civil law and conferring its power in the form of Admiralty jurisdiction on the common law courts. Originally, the English High Court of Admiralty was an instrument of the office of the Lord High Admiral. The English Crown delegated its Royal Prerogative in maritime matters to the Admiral. The Admiralty Court came into existence to deal with disputes within the Admiral's jurisdiction.

More specifically, Roman law was taught at Oxford and Cambridge, but covered only probate and matrimonial law insofar as both were inherited from canon law, and maritime law, adopted from the *lex mercantoria* through the Bordeaux trade. The Roman law encompassed civil law developed mainly from customary law, that was refined with case law and legislation. Canon law further refined court proceedings. Maritime Law adopted the Roman procedure of *in rem* actions, and the High Court of Admiralty in England, from the outset, used as a procedural tool the action *in rem*.

Another feature of the High Court of Admiralty was its application of principles of equity based on many sources such as Roman law and natural law.

It is interesting to emphasize the resentment of the Common Law Courts against the power exercised by the Civil Law Court of Admiralty. From 1296 onwards the common lawyers tried to limit the Admiralty jurisdiction to a restricted field covering only "things done upon the sea".
However, the common law courts could not effectively deal in their subject and practice with pre-judgment attachments of ships. They could not apply the action *in rem*. This was exclusively part of the Court of Admiralty jurisdiction.

The Admiralty Court had a large resurgence in its civil jurisdiction in the early 1800's due to its prize law jurisdiction. The great maritime wars of the period (the Napoleonic wars) gave rise to the introduction of prizes of war in the English jurisdiction. The prize that made it back to the capturing vessel's country, namely England, would be sued in the Admiralty Court *in rem* against the vessel itself. Lord Stowell, the then judge of Admiralty, raised the Admiralty Court at that time to an important position. There was a constant appeal to the Prize Court. The prize that was brought to England would be sued in the Admiralty Court *in rem* against the captured vessel itself. To convey clear title to its new owners the Prize Court had to condemn the vessel.

In 1840, an Act of the British Parliament was passed to improve the practice and extend the jurisdiction of the Court. In that year, there was a movement for the revival of the English Admiralty jurisdiction. Admiralty Court Acts were passed in 1840, 1854, 1861 which provided broader and fuller jurisdiction to the High Court of Admiralty. Its general jurisdiction was extended to title and mortgages of ships, salvage, towage, necessaries, building, equipping and repairing ships, claims for damage to goods and bills of lading, seaman's wages, etc. This certainly went considerably further than "a thing done upon the sea".

During this time, great CIVILIAN judges such as Dr. Stephen Lushington and Sir Robert Phillimore rendered important decisions. This was an epoch where the background showed the development of steam shipping, giving rise to increased commerce and increased incidents of salvage, collision and damages. All of this increased the importance of the Admiralty Court in its CIVILIAN development. But lurking in the shadows were the common law lawyers and their resentment towards the CIVILIANS.

Before dealing with the disastrous collapse of the CIVILIANS, I need to describe to you who they were and how they developed. As stated earlier, the Civilians were the descendants of the canon lawyers, and retained their heritage by continuing their monopoly over Ecclesiastical as well as Admiralty practice.However, Henry VIII abolished the Faculties of Canon Law at Cambridge and Oxford. This suppression of the CANONISTS led them to become CIVILIANS principally in the practice of Civil Law.

For many centuries, the advocates and judges of the Admiralty Court formed part of the "College of Civilians" or more particularly "Doctors' Commons".Doctor's Commons was an offspring of Trinity Hall, Cambridge, itself founded in 1350 as a college for study of the civil and canon laws modified by statute law. Doctors' Commons was the equivalent of a rather private club. The number of advocates at its incorporation comprised of seventeen (17) members, and in 1858 it reached 26 members. These members at the time had an absolute monopoly of Admiralty matters in England.

To become a Fellow of the College of Advocates, one had to have earned a doctorate in civil law, at either Oxford or Cambridge. This was a strict requirement. No person in holy orders was admissible despite the ecclesiastical functions of the College and its concern with canon law. It was done to avoid an obvious conflict of interest.

The candidate had to be admitted as an advocate of the Arches and elected by a majority of the Fellows of the College, approved by the Archbishop of Canterbury directed to the dean of the Arches, and this admission had to be preceded by one year's Court attendance, known as the "Year of Silence" during which the candidate was not allowed to plead. The qualification process, as you may well imagine was quite stringent. These were the pure CIVILIANS, both judges in the Admiralty Court and proctors (coming from the Latin word and tradition "procurator").

These Doctors had a vast and unique knowledge and the Admiralty Court was thus governed by the civil law, the laws of Oleron, and the customs of the Admiralty. They fashioned, created innovated in the field of Admiralty Law and Procedure. Amongst them, until the end, you have Lord Stowell, Dr. Stephen Lushington and Sir Robert Phillimore (the last Civilian judge), all of whom perpetuated and approved the use of the arrest *in rem*.Allow me to provide you with further details.

Doctors' Commons occupied a magnificent building behind St. Paul's Cathedral where the Admiralty and Ecclesiastical law disputes were argued. The premises where the doctors sat were sumptuous as was their attire. As judges in general, they wore scarlet robes, grey wigs, academic hoods and black velvet doctors' bonnets. As proctors they wore dark blue gowns with the hoods of their degree.
Charles Dickens in David Copperfield described Doctors' Commons as "a lazy old nook...that has an ancient monopoly in disputes among ships and boats".

This tranquil atmosphere of Doctors' Commons was shattered in 1853 by the revelation of the Swabey affair. Mr. Swabey was the Registrar of the Admiralty Court, who embezzled in excess of £75,000.00. This was discovered in November, 1853. This affair prompted the British Parliament to examine closely the function of the Doctors' Commons. In addition, the expenses of the Court became exorbitant due to the replacement of money by stamps and very difficult printing problems arose. These procedural expenses angered the proctors practicing in the Admiralty Court.

The Court of Probate Act of 1857 abolished the special privilege of the Civilians alone to practice Admiralty and thus, in turn, caused the end of their corporate existence.In March, 1858, the College of CIVILIANS or Doctors' Commons was liquidated. In 1859, an Act was passed which enabled common law lawyers to practice before the Admiralty Court. The common Hall of Doctors' Commons was demolished in 1861, its splendid library dispersed, and many of its volumes remain today in the Admiralty registry or in storage in the basement of the Royal Courts of Justice. Despite the destruction of the Doctors' Commons as an English institution, a few doctors continued to live on and blossom. Under their care, the Admiralty Court underwent a great transition from the Civil to the Common law, but under their care, the Court retained its civilian character despite this

transition. In fact, the action *in rem* survived and flourishes to this date, but in a much more streamlined fashion.

As an example, what is today called the Affidavit to Lead Warrant, was called in the early 1800's the Affidavit of the cause of action.The service of the warrant of arrest has been simplified today. In the early 1800's, the warrant was served upon the vessel by the Marshall by exhibiting the original and holding it to the main mast, then nailing a copy in its place. This was accompanied by the overt practice of chalking a fowled anchor, symbolic of the jurisdiction of the Admiralty Court on some prominent space topsides in addition to the service of the warrant. The Marshall then executed a certificate of service filed in the Registry together with the original warrant.

Today, this Warrant with the Statement of Claim and Affidavit to Lead Warrant are all served on board the vessel. The warrant is scotch-taped on the bridge in front of the wheelhouse. Upon service of the warrant of arrest, the same is served at the Pilotage Authority, the Port Authority and Customs Authority. The vessel is therefore paralyzed for all intents and purposes.

The action *in rem* is very popular amongst maritime claimants that can make use of it. It is of immense convenience. Ships, as we all know, and as stated by the Canadian Supreme Court, are "elusive". The action *in rem* can bring advantages which are lacking in an action *in personam* which may be difficult if not impossible to institute. The action *in rem* forces jurisdiction and opens the way to obtaining adequate security in lieu of the ship and peace of mind that there will be an ultimate satisfaction. If security is not provided, the Court may sell the "res" in order to satisfy the judgment for the claim, subject to the question of priorities.

Security is of the utmost importance. This is where the Letter of Undertaking comes into the picture. Yes, one can free a vessel with a bail bond or bank guarantee, but it is the P & I Letter of Undertaking which is most often used to free the ship from an action in rem. Therefore, it becomes imperative that the Letter of Undertaking be properly worded. (set up LOU as an example)

The LOU must be very clear as to its beneficiary. If it covers a cargo loss, the party having title to the cargo has to be mentioned and the Cargo Underwriters involved. It could be issued to avoid the action in rem/arrest all together or subsequent to the institution of the action in rem and consequent arrest. The sum sought should be that determined plus one third to cover interest and costs. It should state the local court (the Federal Court of Canada), which should have the jurisdiction to hear the case, and it should remain valid after a final judgment (including Appeals up to the highest court of the land, the Supreme Court of Canada) or after settlement.

The specter of the action in rem has prompted settlements well before even an arrest takes place. The clause "refraining from arrest" is very important - example - the Zealand Beatrix.
The Release is provided if the LOU is satisfactory. It must be filed in the Registry of the Court.

To conclude, the action *in rem* is indeed a powerful weapon, and I submit to you that it should form part of the juridical arsenal of all the jurisdictions that deal with maritime claims, including maritime liens. It is civilian in origin. Therefore, why wait to introduce it in all the civilian jurisdictions? Why should it be exercised principally by common law jurisdictions? The great paradox is that it is a civilian procedure originally but used by the Common law jurisdictions. In fact, the majority of the Civilian jurisdictions ignore it. For those who do not have this procedural recourse, I humbly submit that a simple amendment to Civilian Codes of Procedure or a legislative enactment is all it may take to introduce the action *in rem*.

Marc de Man *was born in Antwerp, Belgium. He lived in Buenos Aires, Argentina and Santiago, Chile and now resides in Montreal, Quebec, Canada, having studied at McGill University, where he obtained a Bachelor of Arts (Honours Philosophy) (1968) and a Bachelor of Civil Law Degree (1972). He further obtained a Licence in Diplomatic and Political Sciences from Brussels Free University (1969). Mr. de Man was admitted to the Quebec Bar Association in 1974. He is a member of the Canadian Bar Association, the Canadian Maritime Law Association, the Canadian Board of Marine Underwriters, the Association of Maritime Arbitrators of Canada, the Association of Average Adjusters of Canada and many other organizations. He is presently the Vice-President for Canada at the Iberoamerican Institute of Maritime Law. He is a guest lecturer at McGill University, and a speaker at various conventions and seminars, both in Canada and throughout the world. Mr. de Man is specialized in Maritime and Transportation Law, International Trade and Commercial Law, arbitration and mediation, representing P & I Clubs, Cargo Underwriters, Shipowners, Charterers, Ship Suppliers, Shippers and Consignees of cargo. In Commercial Law, Marc de Man has represented several Latin American banking institutions, shipping and trading companies. He represents interests emanating from North America, South America, Europe, Asia, Africa and Australia.Mr. de Man is fully trilingual in French, English and Spanish.*

ALTER EGO LIABILITY IN U.S. SUPPLEMENTAL RULE B ADMIRALTY ACTIONS

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Introduction

Shipping is risky business. Commercial shipping carries substantial inherent dangers, and the transient and international nature of the industry heightens the risk of financial loss due to unpaid debts and judgments. Recognizing this, some jurisdictions still permit "quasi in rem"[1] maritime attachment and garnishment actions in Admiralty under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B").

Federal Courts have original jurisdiction over admiralty and maritime suits.[2,3] Rule B codifies the traditional maritime attachment rule, allowing a plaintiff to attach the property of a foreign defendant where the defendant's only connection to the jurisdiction is the presence of its property. Traditionally, Rule B has three primary purposes: 1) to acquire jurisdiction over a defendant who cannot be found within the district;[4] 2) to provide security for the plaintiff's underlying claim; and 3) to
seize property to enforce a judgment.[5] Rule B actions are *in personam* actions against the debtor, allowing the claimant to seize the debtor's property within the district. Seizing the debtor's property may include garnishing property or seizing other assets owned by the debtor but held by a third party.[6] Rule B actions contrast with Rule C actions, which authorize a plaintiff with a maritime lien to seize the property against which the lien is asserted (*in rem*).

Here Today, Gone Tomorrow: The Case of the Disappearing Defendant

To commence a Rule B action, a plaintiff must file a verified complaint praying for an attachment with an affidavit stating that the defendant cannot be found in the district. The plaintiff must make a *prima facie* showing of the following elements:

1) the plaintiff has a valid admiralty claim against the defendant;
2) the defendant cannot be found within the district;
3) property of the defendant can be found within the district (or will soon be within the district); and
4) there is no statutory or maritime law bar to the attachment.[7]

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[1] The term "*quasi in rem*" is somewhat of a misnomer in this context. Admiralty and maritime attachment "presuppose[] an *in personam* claim" against a defendant. *See* 2 T. Schoenbaum, *Admiralty and Maritime Law* §21-2, 520-21 (5th ed. 2011). Rule B functions to permit personal jurisdiction over a defendant who "cannot be found within the district" by attaching the property of the defendant or garnishing a debt owed. *See id.*

[2] 28 U.S.C. § 1333.

[3] Rule B was originally approved by the United States Supreme Court in *Manro v. Almeida*, 23 U.S. 473 (1825) and first promulgated under the Admiralty rules by the Supreme Court in 1844. Schoenbaum, *supra* note 1, 519.

[4] *See* Fed. R. Civ. P. Supp. Rule B(1)(a). For a more complete explanation as to what compliance with Supp. Rule B(1)(a) requires, *see* Joshua S. Force, *State Attachment and Garnishment Procedures in Maritime Matters: A Primer*, 20 U.S.F. MAR. L.J. 1, 4 (2007-2008).

[5] *See* Schoenbaum, *supra* note 1, 520.

[6] *See* Robert M. Jarvis, *An Introduction to Maritime Attachment Practice Under Rule B,* 20 J. OF MARITIME L. & COM, No 4 521, 525 (1989).

[7] *See, e.g., Equatorial Marine Fuel Mgmt. Servs. PTE v. MISC Berhad,* 591 F.3d 1208, 1210 (9th Cir. 2010); *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd*., 460 F.3d 434, 445 (2d Cir. 2006); *Vitol, S.A. v. Capri Marine, Ltd.*, 2011 U.S. Dist. LEXIS 132206 (D. Md. 2011); *Tetra Tech Ec, Inc. v. White Holly Expeditions LLC*, 2010 U.S. Dist. LEXIS 92935 (M.D. Fla. 2010); *Anchor Marine Transp. Ltd. v. Lonestar 203*, 2009 U.S. Dist. LEXIS 29281, 3-4 (W.D. La. 2009) (citing *Aqua Stoli*, 460 F.3d at 439); *Western Bulk Carriers, Pty. v. P.S. Int'l*, 762 F. Supp. 1302, 1306 (S.D. Ohio 1991); *see also* Jarvis, *supra* note 6, at 526-530.

But what if the original defendant no longer exists? Entities involved in the shipping industry—particularly vessel owners and charterers—can dissolve overnight. The ephemeral nature of these entities raises new challenges to the application of Rule B. Consider the following example: a vessel owner and charterer enter into a charter party agreement. The charterer defaults on a payment to the vessel owner. The vessel owner subsequently invokes the arbitration clause of the charter agreement and obtains a favorable arbitration award. The vessel owner attempts to collect the debt owed and discovers the charterer has since dissolved without a trace. Shortly thereafter, the vessel owner discovers a separate company which appears to be almost identical to the dissolved company (for example, the two may have very similar corporate identities). Can this entity be held responsible for the dissolved company's breaches in a Rule B action?

Arguably, alter ego questions go to the first three elements of a Rule B action having to do with the defendant. *See, e.g., KPI Bridge Oil Sing. PTE Ltd. v. Berlian Laju Tanker TBK PT*, No. C 12-00710 WHA, 2012 U.S. Dist. LEXIS 37751 at *5-6 (D. Cal. 2012) (discussing alter ego theory as implicating whether property of the *defendant* could be found within the district); *OS Shipping Co. v. Global Mar. Trust(s) Private Ltd*., No. 11-CV-377-BR, 2011 U.S. Dist. LEXIS 49054 at *13 (D. Or. 2011) (asking whether plaintiffs had made a valid case against an alter ego defendant when the governance and assets of the defendant debtor were transferred to the alter ego defendant, but ultimately finding only that plaintiffs met their burden to show it was *reasonably likely* they would prevail on their alter ego liability claim). Constituent courts of the Ninth Circuit may be trending toward upholding Rule B actions where the defendant held liable for the debt is determined to be the alter ego of the defendant debtor. This appears to be true even though the definition of alter ego remains in flux within the Ninth Circuit.

Alter Ego Factors

Admiralty courts generally apply federal common law when examining issues of corporate identity. *See Chan v. Society Expeditions,* 123 F.3d 1287, 1294 (9th Cir. 1997); *accord KPI Bridge,* LEXIS 37751 at *6; *OS Shipping,* LEXIS 49054 at *14. The Ninth Circuit[8] has not enumerated specific factors that must be present to warrant piercing the corporate veil. *KPI Bridge*, LEXIS 37751 at 10. However, "[d]isregard of corporate separateness 'requires that the controlling corporate entity exercise total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own.'" *Chan,* 123 F.3d at 1294 (citing *Kilkenny v. Arco Marine Inc*., 800 F.2d 853, 859 (9th Cir. 1986)); *accord OS Shipping*, LEXIS 49054 at 15. Similarly, disregarding the corporate form is proper where a corporation "so dominates and disregards its alter ego's corporate form that the alter ego was actually carrying on the controlling corporation's business instead of its own." *Chan,* 123 F.3d at 1294; *accord OS Shipping*, LEXIS 49054 at 15. At least one court has specifically interpreted *Chan* to

permit alter ego liability "either when the corporate form is used to perpetuate a fraud *or* when one corporate entity exhibits 'total domination of the subservient entity.'" *accord OS Shipping*, LEXIS 49054 at 15. However, mere common ownership is not sufficient cause to disregard the corporate form. *See Chan,* 123 F.3d at 1294.

Charting a Course to Expanding Rule B Maritime Claims

A recent U.S. District Court (Western District of Washington) case [redacted] introduces an unusual twist to the traditional quasi in rem Supplemental Rule B proceeding, where the property subject to the plaintiff's maritime attachment was allegedly owned not by the defendant debtor, but by the defendant debtor's alter ego, added as a co-defendant to the lawsuit. *See* [redacted].

In that case, plaintiff [redacted] and defendant [redacted], entered into a Voyage Charter agreement in which the defendant agreed to charter plaintiff's vessel for $337,452.94.[9] *Id.* at 3. Defendant [redacted] eventually breached the agreement by failing to pay the fee agreed upon by the parties. *Id.* An arbitration clause in the agreement caused the parties to submit to arbitration in

[8] The Second Circuit, however, has described factors that are indicators of an alter ego. *See, e.g., Wm. Passalacqua Builders v. Resnick Developers S.,* 933 F.2d 131, 139 (2d Cir. 1991).

[9] Plaintiff was a Panama company, and defendant [redacted] was a British Virgin Islands Company prior to dissolution. Co-defendant (and alleged alter ego) [redacted] was a Hong Kong company, incorporated before [redacted defendant] had dissolved. *See* Am. V. Compl., [redacted], at 2, 4.

London. *Id.* Both parties appeared with counsel, and the Tribunal issued a Final Arbitration Award in favor of plaintiff for $220,882.09, plus pre- and post-award interest, and plaintiff's fees and costs (including the arbitration fee of $17,679.27) and interest. *Id.* Within several months of the Arbitration Award, defendant [redacted] defaulted on its payment of its annual fees to the British Virgin Islands Financial Services Commission Registry and was declared dissolved. *Id.* [Redacted defendant] never paid plaintiff the Arbitration Award.

Plaintiff's Complaint alleged structural, management, and governance similarities between the two co-defendants sufficient to plead an alter ego theory: the same company owned and controlled all of the shares of both companies while they were both still operating; the two defendant companies had the same beneficial owner; co-defendant [redacted] made freight payments to plaintiff to charter plaintiff's vessel through their common shareholder; and the co-defendants shared bank accounts, office space, employees, and addresses. *See* Am. V. Compl. [redacted], at 4. Plaintiff also alleged that the vessel chartered by co-defendant [redacted], which was (or would be shortly) in the district, carried fuel owned by [redacted co-defendant]. In other words, the property subject to maritime attachment was the fuel on the vessel chartered by defendant debtor's alter ego, [redacted].

Plaintiff's complaint alleged three causes of action: enforcement of the Maritime Arbitration Award, Alter Ego, and Supplemental Admiralty Rule B Attachment. In this manner, plaintiff was able to demonstrate 1) a contractual breach and corresponding expectation damages; 2) that the co-defendants were effectively one and the same and each responsible for the debts and liabilities of the other; and 3), for Rule B attachment purposes, property (fuel on a vessel) of defendant [redacted] was in fact the property of its alter ego, co-defendant debtor [redacted].

The Court's order authorized attachment of the defendants' assets (the fuel contained on the chartered vessel) held within the district and issued an Order Authorizing Rule B Attachment of Assets, [redacted]. Within a week, the Court also issued an Order Permitting Deposit of Funds with the Court and Releasing Attachment and Arrest. *See* Order [redacted]. The lawsuit settled before going to trial. Upon settlement, the Court ordered disbursement of the $650,000 in funds previously deposited into the court's registry to satisfy the parties' terms of settlement. Under that order, plaintiff received $267,500 without interest or charges from the original bond amount. The balance of $382,500 from the bond (plus accrued interest) was returned to co-defendant [redacted].

Conclusion

The preservation and expansion of Rule B actions in the manner described above serve an important purpose in regulating the international shipping industry. The expansion of Rule B attachment scenarios reflects and responds appropriately to the fleeting nature of shipping charter companies organized offshore. The result is significant: now, two foreign parties, compelled to arbitrate under their charter party in a country foreign to them both, may still be subject to Rule B attachment in the U.S.—even if one of the parties has dissolved post-arbitration and has set up as a new foreign entity. The next development we might expect to see in the Ninth Circuit is a clarification of the corporate alter ego elements used in these actions.

Abstract to: "Alter Ego Liability in U.S. Supplemental Rule B Admiralty Actions" submitted by: Charles Moure. This paper discusses the preservation and expansion of admiralty claim attachments of property in the U.S. District Court for the Western District of Washington, and more generally the U.S. Ninth Circuit Court of Appeals, through the courts' application of alter ego liability. The courts' recent reception to alter ego arguments in Supplemental Rule B actions makes room for recourse when a debtor party has formally dissolved and resurfaced as a new entity. This paper reviews the *prima facie* showing that successfully secured fuel owned by a company nominally distinct from the debtor, and looks at what alter ego factors remain to be clarified for maritime attachments along the U.S. Pacific Coast.

***Charles Moure**, partner and founder at Harris Moure, pllc, focuses on U.S. domestic and international litigation with an emphasis on maritime law. For twenty years he has represented individuals and businesses involved in complex multi-jurisdictional disputes, and he has effected numerable vessel repossessions and arrests. Charles has been interviewed by Fox News regarding international extradition and by PBS regarding maritime piracy, and has travelled to speak on admiralty attachment proceedings and legal issues in marine life preservation. He lives and practices law in Seattle, Washington, in the U.S.*

ARREST AND ARBITRATION IN THE UAE: THROWING THE TOWEL?

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SHIP ARREST IN UAE – OVERVIEW

•Ship arrest is regulated in the UAE Maritime Code
•Arrest is possible for enumerated 'maritime debts'
•The "maritime debts" coincide almost entirely with the maritime claims under the 1952 Arrest Convention
•Sister ships can generally be arrested
•If a charterer (who has nautical control) is responsible for a maritime debt, the creditor may arrest the chartered vessel or any other vessel owned by the charterer
•Generally letters of undertaking issued by P&I clubs are not accepted as security
•Counter-security can usually be provided by an undertaking of the applicant

SHIP ARREST IN UAE – JURISDICTION

•The civil courts have jurisdiction to adjudicate the substantive claim if (*i.a.*)
(a)the vessel flies the UAE flag
(b)the claimant has a place of residence or head office in the UAE
(c)the maritime debt has arisen in the UAE
(d)the maritime debt arose from a collision or assistance over which the court has jurisdiction
•UAE courts generally assume jurisdiction to arrest the vessel if it lies in UAE waters

SHIP ARREST IN UAE – UPDATE

•Recently the courts of the Emirates of Sharjah and Fujairah have commenced requesting the arrest applicant to provide counter-security in the form of a bank guarantee
•The amount of this guarantee is in the discretion of the Courts, however it is normally between AED100,000 and AED200,000 (about US$25,000 to US$50,000)
•The Dubai courts, however, continue to be content with a letter of undertaking to that effect, without provision of a bank guarantee

ARBITRATION – PROS

•Popular form of dispute resolution in international trade
•Advantages include confidentiality, flexibility, choice of forum, and choice of the Tribunal composition
•Believed to be faster and more cost effective than litigation

ARBITRATION – CONS

•Arbitration can be more costly than, and just as lengthy as court proceedings
•Arbitrators complain this is because lawyers tend to treat arbitration as court proceedings (extensive discovery, evidentiary clashes and unnecessary applications), BUT… can you try a case without having deposed every conceivable witness or unearthed every document???
•Parties also tend to underestimate that an arbitral award is FINAL, and not easy to appeal
•Arbitration is a relatively new concept in the UAE

•In particular, the UAE Courts are still hesitant (at times) regarding enforcement of foreign awards (1958 New York Convention was only ratified in 2006 and only in 2010 the first foreign award was recognised)
•To date, the "public policy" exception can still easily trigger the court to look into the merits of the case

ARBITRATION AND ARREST – PROCEDURAL ISSUES

•Under UAE law, in order to sustain an arrest order granted, a substantive suit must be filed within 8 days after the arrest warrant is served
•In practice if the UAE Courts are to grant an arrest order, the Courts will want to have jurisdiction on the substantive case
•The result is easily reached with a foreign jurisdiction clause as the UAE conflicts laws allow the UAE Court to retain jurisdiction
•In presence of an arbitration clause though the UAE Court cannot retain jurisdiction and therefore the arrest order may lapse for failure to commence the substantive claim
•The commencement of foreign arbitration proceedings, in fact, will not be recognized by the UAE Courts to be in accordance with the requirements of the UAE procedural law
•At the same time, if the substantive suit is brought before the UAE Court, it is likely to be dismissed due to the arbitration clause

ARBITRATION AND ARREST – SOLUTIONS

•The Claimant will have to
(a)commence arbitration proceedings before the arrest application, and
(b)request the court to hold the proceedings until the arbitral tribunal has reached a decision
•At the time an award is received, the UAE proceedings will be reactivated, transforming them into proceedings for the enforcement and recognition of the foreign award

ARBITRATION AND ARREST – WHAT ELSE

•When dealing with a UAE counterpart and it is preferred to avoid substantive UAE law, parties can opt for DIAC or DIFC-LCIA arbitration
•Advantages of such choice:
(a)possibility to apply English substantive law
(b)procedural law as per international standards
(c)proceedings conducted in English
(d)"national" award easily enforceable without need for recognition

ON ENFORCEMENT OF FOREIGN AWARDS

•A new way may have opened in the UAE for enforcement of foreign award through the DIFC Courts
•Advantages of such choice:
(a)ongoing proceedings but no judgment yet
(b)proceedings conducted in English
(c)Avoidance of "public policy" exception?
(d)"national" award easily enforceable without need for recognition

CONCLUSIONS

•The UAE remain a viable jurisdiction for ship arrest
•Foreign arbitral awards are being increasingly recognised by UAE Courts
•While the arrest of vessels for claims based on contracts with arbitration clauses are not without difficulty, they are very well possible
•The UAE provide two well established arbitration institutions that allow stakeholders to avoid the UAE civil law system

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Alessandro is named in the Legal 500 (Shipping) 2013, as a professional lawyer who "gives sound, relevant advice on the matter at hand". He is a regular speaker at presentations and seminars as well as a habitual contributor to different journals on various legal topics.

PRACTICAL ASPECTS IN INSOLVENCY PROCEEDINGS

Arrest, Sale or keeping the vessel in Trade

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1. The Current Situation

a) The Shipping crises started 2008/2009. So far approximately 400 German ship owners declared bankruptcy and an unknown number of companies were forced to distressed sales of its vessels.

b) Throughout the crises German ship financing banks gained huge losses. It is no official amount available about the total loss, but rough estimations are in a range of USD 10.00 Billion.

c) In addition to the losses of German ship financing banks investment companies have reported losses of private investors of at least USD 4.00 to 5.00 Billion.

d) An end of the shipping crises is not foreseeable. German banks expect hundreds of further shipping insolvencies and distressed sales.

2. German Insolvency Law – a short overview

a) In a maritime bankruptcy normally the following parties are involved on the side of the shipping company:
- A private company (GmbH & Co. KG), as the ship owner - insolvency debtor
- Hundreds of private investors, as share holders of the ship owner
- One or more banks, as ship financing bank, mortgagee, financial owner
- A ship manager, as technical and commercial manager, service provider, (minor) share holder

b) The German insolvency proceeding is divided into three separate periods:
- The first period is the time prior insolvency. This period ends with the filing of insolvency.
- At this point the bankruptcy court normally appoints a preliminary administrator and the second period begins – the preliminary proceeding. The preliminary administrator is a court appointed adviser for the insolvency debtor/ship owner and is controlling all financial matters of the company. He is not legally representing the ship owner.
- After the preliminary administrator prepared a report for the bankruptcy court, the court will open the formal insolvency proceeding (the third period) and appoints the final administrator (generally the same person than the preliminary administrator). From this point on the administrator is legally the only person who is representing the insolvency debtor.

c) These three periods have an effect on the open claims of the creditors. Relevant for the classification of every claim is the time of performance:

- The payment of "old claims" that belong to the period prior insolvency proceeding is illegal after filling of insolvency (could be a crime). An exception could only be secured claims. Security can be maritime liens, reservation of rights, assignment of claims, mortgage etc.
- If the time of performance was in the period of the preliminary insolvency proceeding, for a payment a confirmation of the preliminary administrator prior to the performance is needed – otherwise the claim will be handled as an old claim.
- After the opening of the formal insolvency proceeding the final administrator is the contract partner. If the administrator orders any service or supply - the accruing claims are preferred in the proceeding and the administrator could be personal liable for the payment.

d) To find the best financial solution for all creditors is the legal intention of the German insolvency proceeding, but the reality is:
   - The average period of insolvency proceedings in Germany is between 3 and 5 years. The average share unsecured creditors get for the old claims at the end is 0% - 5%.
   - Only secured creditors can expect more, if the security has some value.

3. Practical Experience in shipping insolvencies

a) Generally the intention of the (preliminary) administrator is to sell a vessel for the best achievable price. Up to the sale/delivery of the vessel the best solution is to keep the vessel in trade to cover the running costs (partly) and minimize further losses.

b) The intention of the creditors is simple – They just want their money.

c) Often creditors assume that a ship arrest might be the best way to achieve this target. But that is not (always) the truth after a ship owner filed for insolvency:
   - If the vessel is physical in Germany secured creditors might be able to arrest a vessel in a German port, but only in cooperation with the (preliminary) administrator. Otherwise it is unlawful under German insolvency law to arrest a vessel.
   - If the vessel is in the EU-area generally German insolvency law should legally apply and a vessel arrest should be unlawful as well. But foreign courts are handling the law in different ways:
     - A French court lifted an arrest in 2011 due to the German insolvency law after six hours
     - A Greek court didn't care about the German law and the vessel kept arrested until the creditor lifted the arrest after finding a financial solution.
   - In the rest of the world German insolvency law could apply based on international agreements but in reality it is irrelevant. So far in practice we haven't found one court outside the EU that paid attention to German insolvency law at all.
   - Only for German creditors the German insolvency law applies no matter of the position of the vessel. A German creditor could be forced by the ship owner/administrator to lift an arrest and will be held liable for all accruing damages.

d) Outside an insolvency a ship arrest generally forces the ship owner to settle the claim an free the vessel, but after filing for insolvency the legal and commercial situation is different:
   - For the ship owner and the (preliminary) administrator it is legally impossible to settle any old claims out of the period prior filing of insolvency. Even if there are some free funds available (normally there are no funds at all) it would be crime to use those funds to settle a claim of a single creditor.
   - The ship manager generally has high claims against the ship owner himself and has not interest to spend more money. Often the manager has financial problems as well due to unpaid management fees.
   - In an insolvency of a company the share holders/private investors make a total loss. There is no reason for them to spend and loose more money.

- The only involved party that might have an interest, the legal possibility and the financial power to pay something to free the vessel is the ship financing bank (mortgage) as the "financial" owner of the vessel. But a bank/financial owner is not willing to pay in every case an even if they are willing to pay, we are facing some other problems:
  - Ship owners are normally financed by a syndicate of banks. The banks often have different market views and internal policies. It can take weeks before the banks agreed if they want to pay old creditors and who has to make the needed funds available.
  - If the loan to value balance is highly in favor of the bank, the bank might be fine with an arrest and an auction and has no need to pay any old creditor.
  - There are always a couple of unpaid old creditors who are threatening with an arrest of the vessel. If the total sum of all potential dangerous old claims is higher than the costs of an auction, the bank will arrest the vessel itself in cooperation with the administrator and the vessel will then be sold through an auction or a court sale.
  - And even if the financing bank generally agrees to pay at least some of the old claims, an internal board resolution is necessary, before the needed funds are available and payments can actually been made. Due to the stress tests of the ECB/BAFIN it took weeks during the last months before such board resolutions existed.

Experience:

In practice we haven't experienced a single case where a ship arrest of an unsecured old creditor had a winner. At the end (sometimes after several months) all involved parties only lost more money.
For this reason we give the following

Recommendation:

Before an unsecured old creditor de facto arrests a vessel of a bankrupt German ship owner, the creditor should try via the ship manager to get in contact with the (preliminary) administrator. The administrator has the contact to the financing banks and often has the opportunity to negotiate a settlement offer for a foreign creditor with an old claim.

Of course banks are taking the whole situation into consideration before funding any settlement. So far ship financing banks agreed and funded settlements with old creditors in the range of 50% - 80% of the claims, if the vessel was trading. For Non-trading vessels the range was 10% - 70%.

However it is always a case by case decision, but the commercial result of every settlement we know was always better than the average share of 0%-5% unsecured creditors can expect at the end of a German insolvency proceeding.

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Tim Beyer is appointed as trustee and insolvency administrator by the insolvency courts of Bremen, Delmenhorst and Nordenham. He handles numerous insolvency proceedings in various branches, specializing in the field of shipping companies and shipping fonds. Tim is a member of the study group "insolvency law and reorganization" of the German Lawyers' Association and he is engaged in the Commission of certified specialists in insolvency law of the Hanseatic Bar Association Bremen.

HOW SHOULD A BUNKER SUPPLIER BEST SECURE THEIR CREDIT

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THE INDUSTRY
Some Characteristic:
•Credit – 30, 45, 60 days
•Low margin
•Huge exposure - significant credit lines without security in return
•Bunkers significant component of operation costs (70-80 % due to increase in oil prices)
•Contractual counterparty – not always the Owner
•No lien in most jurisdiction

BEFORE THE SUPPLY
Credit Assessment
Is the customer creditworthy?
•Offshore registrations
•Complicated corporate/ownership constructions
•Limited access to financial information
•Credit reports from ex. Lloyds List Intelligence, financial statement, references, press, trade, track record, etc.

BEFORE THE ARREST

Commercial considerations
•Type of vessel
•Employed or not – Schedule
•Commercial relation to the client (a traders concern!)

Practical considerations
•Track the vessel - Lloyds List Intelligence (vessel alerts)
•POA
•Original documents and translation hereof
•Retainer to Sawyer
•Counter security

TERMS AND CONDITIONS
•Maritime lien on the vessel until payment and interest has been received
•Contract shall be governed by and construed in accordance with the Maritime Law of the United States
•Option to commence proceedings anywhere in the world
•No lien stamps shall be invalid and of no effect
•Retention of Title and arrest of bunkers
•Accelerate the payment in case buyer appear to be in financial difficulty
•Interest clause
•Buyer warrants that he is authorized by owners/operator to order the bunkers
•Master signature on the BDR means the vessel is bound by the Terms and Conditions

INVOICE AND OTHER SUPPORTING DOCUMENTATION
•Addressed to MV XX and/or …
•Order confirmation and reference to Terms and Conditions (available on request/website)
•Bunker Delivery Receipts (avoid no lien stamps)
•Email correspondence
•Demand letters

NEGOTIATION
Settlement
•With charterers/owners
•Commercial aspects
Security
•Bank guarantee, cash deposit, P&I Club letter ?
•Security to satisfy what, where and how much
•Do the security cover charterers liability?

ADVISES
•*Track the vessel – Lloyd List Intelligence alert system*
•*Proper due diligence – change of ownership, flag of the vessel, time bars etc.*
•*Timing and POA*
•*Avoid jurisdictions with counter security – for damages and other cost during the arrest*
•*Avoid jurisdiction where wrongful arrest is acknowledged*
•*Avoid untried and unreliable jurisdiction*
•*Agree with lawyer on fixed cost of arrest (including negotiation of settlement or security)*
•*Challenge the lawyers – not only arrest, but also the merits of your claim*

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Monjasa, established in 2002, is a Danish-owned company specializing in "bunkering knowledge". With offices in the Denmark (Headquarters), United States, Singapore, and Dubai, the company has an annual turnover rate above $ 1,5 billion.
Monjasa's primary activity is the trading and supply of oil, which consists of purchasing, selling and supplying marine fuels to ship owners and charterers worldwide. Our group controls several supply tankers on Worldwide destinations, in addition to trucks and access to pipeline facilities in a significant number of ports. Our suplí services today reach more than 1000 ports around the world.
Built on principles of respect, ambition, curiosity and smile and joy, Monjasa received the "Entrepreneur of the Year 2012" for Denmark by Ernst & Young.

DEALING WITH INNOVATIVE BUNKER SUPPLIERS

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The increasing global economic crisis and in particular the downturn in the shipping markets have led to ship owners and charterers going out of business or even bankrupt. This has made the creditors more innovative and in some cases more aggressive in their ways of getting paid for the services rendered.

Bunker suppliers who have contracted with charterers for bunker supplies to their time chartered vessels are often left unpaid and in their search for payment they have turned their attention to the owners of the chartered vessels – an option that is possible in some jurisdictions and in others not.

It is normally the obligation of the time charterer to provide and pay for fuel according to the time charter party. However, even it the charterer goes bankrupt or disappears, the vessels will still be there and this has led several bunker suppliers to cast their eyes on the vessels in order to obtain payment of the debt outstanding by arresting or otherwise detaining the vessels even if they are not owned by or connected to the charterer, the debtor whom the bunker supplier had contracted with.

The interest in obtaining payment from the vessels' owners has resulted in creative initiatives providing comfort to the bunker suppliers in relation to their view that the ship owners' obligation to pay the charterers' debts is fair and reasonable and often justifiable. A view shared by few but the bunker suppliers.

When the manager of a charterer places an order for bunker and lube oil supplies, the bunker suppliers often reply by confirming the order "for account of (vessel's name) and/or master and/or owners and/or charterers and/or managers and/or operators and/or
charterers (by name)". Some bunker suppliers have added to their standard terms and conditions that all orders are considered made by the different parties.

The evidential value of an order confirmation is of curse substantial, in particular, if the owners do not object to the description therein. However, it is hard for the owner to object if they did not know that they had been included in the group of debtors relating to the bunker supply – the bunker suppliers most often will not send a copy to the owner. The bunker suppliers will often also refer to the bunker receipts often signed by the captain and which refers to the order and sometimes the order confirmation.

Owners and charterers often try to keep the bunker suppliers at a distance by including a provision in their charter parties prohibiting charterers from creating, or allowing to be created, any lien over the vessel.

The NYPE form contains the provision that "the charterers shall provide and pay for all fuel and diesel fuel ....." and the additional clauses often contain individual clauses that "charterers not stem bunkers basis to "the order of owners and/or masters and/or owners and/or managers".

Charterers to stem bunkers "for and to the order of (charterer's name)".

However, the existence of such clauses in a charter party is not in itself sufficient to provide the owners with a defence against the arrest or lien imposed by the bunker supplier on the vessel. It

may be advisable to make potential bunker suppliers aware of such clauses in the charter party and that they will not have any right to a lien on the vessel. This may be effected by filing registered letters or other notifications of official nature on the bunker suppliers.

A further initiative to protect the vessels has been taken by some ship owners by instructing their officers on board the vessels to stamp any receipts or other documents given after the receipt of bunkers to the effect that the goods and/or the services have been received "solely for the account of the charterers and not for the account of the vessel or the vessel's owner".

This initiative has the weakness that at the time of the presentation of the receipts or other delivery documents, the bunkers have already been pumped into the vessel which is then already subject to lien or arrest.

A recent decision by the Danish Supreme Court shows how far the bunker suppliers can go in order to force payment of bunkers.

The case concerned an Indian ship owner and a Danish bunker supplier. The owner had chartered its vessel to an English charterer which according to the charter party was to arrange and pay for bunkers for the ship. In relation to the owner the charterer had undertaken not to order any bunkers in the name of the ship or the ship owner.

The charterers concluded an agreement with a Danish bunker supplier for the delivery of bunkers in accordance with the general terms of delivery of bunkers according to which the ship owner was liable for the delivery of Bunkers and subject to a contractual lien in the ship in respect of the claim for bunkers.

Order confirmation for the deliveries was sent to the charterers only and after delivery of the bunkers and before payment was effected, the charterer went bankrupt.

Under Danish law, a bunker supplier who has entered into a contract for the supply of bunkers with a charterer cannot arrest the chartered vessel, as it is a requirement for arrest that the execution of the claim can be levied against the owner. Only if the arrestor has a claim against the owner or has a statutory maritime lien can the claim be levied against the owner. As a statutory lien is not granted to claims for the supply of bunkers and as the contract has been entered into with the charterer, arrest, under Danish law, could not be carried out in the vessel.

This did not discourage the bunker supplier who immediately pointed at the owners and requested payment as the bunker supplier would otherwise take steps to have the vessel arrested at the ship's next port of call, Riga, Latvia.

Latvian law, as Danish law, did not allow arrest of the vessel, but the bunker supplier did not show any interest in the underlying legal issues and maintained their threat of arrest.

The Indian ship owner had suffered financially from the English charterer’s bankruptcy and had finally been able to find a new charterer. If the vessel was arrested in Riga, the owner would lose the new charter which could, potentially, led to the bankruptcy of the owner.

Faced with the threat of having their vessel arrested and the consequences that would follow, the owners signed an agreement on their obligation to pay for the bunkers, adding the notation "signed under duress". This was not acceptable to the bunker supplier who proceeded to prepare for the unlawful arrest. The phrase was then deleted.

During the subsequent proceedings in Denmark the owners submitted that they had entered

into the agreement with the bunker supplier under duress and that the bunker supplier had taken benefit of such duress knowing about the extreme consequences an arrest would have for the owner.

It was submitted that it does not seem right or fair that the owners have to bear the risk for the bunker suppliers' deliveries on credit without the owners having had the possibility to decide whether to accept the debtor (without security) or not. It was submitted that it was not clear why

the bunker supplier enjoyed such preferential status over the charterers' other creditors.
The Supreme Court denied all the owner's arguments.

The Supreme Court ruled that albeit the Danish bunker supplier had threatened with an unlawful arrest and this threat had resulted in owners signing the agreement under duress this did not make the agreement unenforceable as, if the remedy turned out to be unlawful, the ship owner could simply claim compensation for his losses afterwards.

The case shows both the extreme measures taken by the bunker suppliers and how far they are protected by the courts.

Although many countries provide strict liability for unlawful arrest, it is often, as in this case, not a practical option for the owner to simply let the vessel be arrested and take the legal battle afterwards. The bunker suppliers know this and take advantage of it when forcing swift settlement on favourable terms.

But are the owners left completely without any right of justice?

In some jurisdictions providing, for instance, statutory liens for the delivery of bunkers - probably yes. In others not completely, but levelling the playing field require owners to approach the battle with the same kind of innovativeness and fearlessness as the bunker suppliers.

Under Danish law, owners are not part of the contract for supply of bunkers entered into between the bunker supplier and the charterer.

Consequently, although the bunker supplier clearly sees the claim as a contract claim, if the matter is turned upside down and viewed from the owners' side, the claim is out of contract which renders two options open for the owner no matter what jurisdiction clause is contained in the general terms and conditions of the bunker supplier: It can let the vessel be arrested in whatever jurisdiction it is in and take the battle there, or it can go on the offence and file a suit against the Danish bunker supplier in Denmark immediately when the owner first hears about the threat of arrest.

Denmark would often have jurisdiction as it is the domicile of many of the world's biggest bunker suppliers.

Recent cases show a huge commercial advantage to the owners by adopting this approach and by claiming that the bunker supplier should admit that the owner is not the right debtor for the claim.

This has the dual effect that the merits of the actual claim given cause to the (potential) arrest be decided in Denmark where the owner is not liable for the claim and also, it puts tremendous pressure on the bunker supplier as if it does not reach an amicable settlement, a legal precedence that owners are not liable for charterers bunker debt may be established – a precedence that could forever ruin the bunker suppliers' tactic of threatening unlawful arrests in order to force payment from owners.

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Johannes advises shipping companies, P&I clubs and insurance companies on all aspects of maritime and transport law and has special interest in bunker related issues, including bunker disputes between owners and bunker suppliers.
Johannes also has special experience in relation to cross border maritime insolvencies as well as American chapter 11- and 15- proceedings.
Johannes is the only practising Danish maritime lawyer to have obtained an MBA in Shipping & Logistics and in 2012, leading Danish newspaper, Berlingske Business, appointed Johannes as one of Denmark's 100 most talented young business professionals.

11th Members´ Meeting

www.shiparrested.com

Hamburg, June 12-14 2014

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