



Arrest of ships and the lift of the corporate veil in Spain:
Spain, about 5978 km of coast line





Index of this presentation:

- Arresting a ship in Spain
- Factors to be considered when arresting a ship in Spain pending the lift of the corporate veil.
- Case law where the corporate veil has been lifted in Spain
- The “Santa Mae Laura” arrest case.
- Current case where we are lifting the veil, Tía Elisabeth Arrest



When arresting a ship in Spain the following laws apply:

- The 1999 Geneva Arrest Convention (The 1999 Arrest Convention)
 - The 2014 Spanish Shipping Act
 - The 2000 Spanish Procedural Law Act
- The 1999 Geneva Arrest Convention has a wider scope of maritime claims than the 1952 Brussels Arrest Convention.
- In addition, under Art. 473.3 of the the Spanish Shipping Act, where the arrested ship does not fly a flag of a signatory party to the 1999 Arrest Convention, it can be arrested for any claim you may have against its owners*.
- * Few countries have ratified the 1999 Arrest Convention



Arresting a ship in Spain for manager's debts

- Art. 316 of The Spanish Shipping Act makes the shipowners responsible for the debts incurred by their managers as follows:

The managers have an obligation to identify the name and domicile of the owners on the contracts, if they do, they bind the owners. If they do not in addition to binding the owners, they also bind themselves *in solidum*.

- No course of action where the claim is merely against voyage, time, or demise charterer unless:

- The maritime claim amounts to a maritime lien,
 - The manager is involved binding the owners
 - The Master is involved binding the owner.
- We need to get a judgment on the merits against the owners or their property (lien).



Factors to be considered when arresting a ship in Spain pending the corporate veil on the merits

- An action on the corporate veil is an action on the merits, it has to be commenced normally within 20 Court days to 3 months from the arrest order.
- When arresting a ship in Spain the arrestor needs to place security, generally 15 % of the claimed amount, up to a max. of 30%.
- Wrongful arrest is rather strict, there is no need for *mala fides* or gross negligence. In the great majority of cases ships are released, and when they are not the situation is usually the result of a single arrest.



Factors to be considered when arresting a ship in Spain pending the corporate veil on the merits

- The merits are to be dealt with in Spain unless the parties have agreed a different forum for litigation or arbitration.

This is by virtue of Art. 7.1 of the 1999 Geneva Arrest Convention:

“The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.”



I have the advantage of reading the presentation of Gary Seitz which gives a detailed account of the application of the lift of the corporate veil in the US which, as he said, is a frequent source of litigation.

In Spain, the kind of scenarios where the lift of the corporate veil has been successful are the following:

- Where a de facto group of companies, with apparent corporate independence, uses their corporate structure to avoid obligations to third parties as a fraud to creditors mechanism.
- Where different corporate frameworks are set to avoid payment of the debts of the original company For example when several companies are created with the same corporate purpose, and same decision-making body, but with a fresh corporate face to avoid payment of the initial entity's debts.



- Where two companies developed businesses jointly but created confusion with the intention to avoid payment of a claim.
- Where the director of the Company abuses the legal personality of the corporation to avoid payment of a debt, often in cases of undercapitalization leading to insolvency. In such case he will be held jointly and severally liable for giving rise to an undercapitalization, and leading the company to insolvency,



- The “Santa Mae Laura” arrest case.





- The “Santa Mae Laura” arrest case.
- Arrest at the port of Marín
- Courts of Pontevedra
- Arresting party: Tecnopesca (large fishing nets supplier).
- Claim for services rendered, 17.327,20 EUR.
- Invoice issued to “Curromar Fishing SL (Spain) who was the bareboat charterer of the ship.
- Ship registered owner: “Pescas Curromar Ltd (Portugal)” acquired the ship under the sale contract dd 29.12.2015 from “JMF Ltd”.



The “Santa Mae Laura” arrest case.

- The ship owner lifted the arrest by depositing the claimed amount in the Court and contested the arrest order stating that the debtor was the demise charterer and not the owner of the ship. Therefore according Art. 3.3 of the 1999 Arrest Convention, as it could not lead to the forced sale of the ship.

Art 3.3 Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.



- The claimant contested the arguments of the registered owners asking the Court to keep the arrest over the funds, contending as follows:
- Even if the registered owners are “Pescas Curromar Ltda” (Portugal) in practice this Company is the same as Curromar Shipping (Spain).
- There is a total confusion between both Companies: same shareholders and representatives, the Portuguese Company (owners) use the same bank accounts in Spain than the Spanish Company (charterers), we are before the same Company that acts in the traffic to its convenience.



The “Santa Mae Laura” arrest case.

- The Commercial Court

- Under the 1999 Arrest Convention to arrest a ship not owned by the person liable for the claim is only possible where under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship. In Spain, in practice, this means that the claimant must get a judgment against the owner of the ship, or have a lien.

- The judge says that in Spain the **general rule** under the Shipping Act and the Procedural Law Act is that it is not possible to attach and proceed to the forced sale of a ship alien to the debtor under a judgment.

- But then the Judge puts the following question *sensu contrario*:

- ¿Is it absolutely clear that the ship Santa Mae Laura is a good alien to the party liable under the maritime claim [Curromar Shipping SL], in a way that a judgment against the debtor [Curromar Shipping SL] may not be enforced against the ship?



The “Santa Mae Laura” arrest case.

- The Commercial Court

- The **response of the judge**: **It is not absolutely clear**. We are in the context of a precautionary measure where **total certainty is not required** in respect to the position of the claimant but a *fumus boni iuris*.

- In these circumstances this Court must consider the possibilities for the claimant to obtain the relief sought on the merits, on the basis that there could be a confusion of personalities, confusion of patrimonies between the owners and the demise charterers of the ship.

- To consider the possibilities of the claimant, we must make use of the doctrine of the lift of the corporate veil, recognized by the jurisprudence of the Spanish Supreme Court, i.e. a procedure to discover and punish the *dolo* or abuse committed by one party making use of the autonomy of entities doctrine.



The “Santa Mae Laura” arrest case.

- The Commercial Court

- We must therefore consider the circumstances that surround the parties that are involved in the arrest of this ship, which include:

-The documentary evidence of the case (invoices, delivery notes, charter contract dated 9th December 2014) that shows that Curromar Fishing SL was the demise charterer of the ship at the time the claim arose.

-The charter contract gives an option to Curromar Fishing SL to purchase the ship, an option that could be exercised by other Companies of the group.

-The Ship owning Company Pescas Curromar Ltda was incorporated on the 1st of June 2015, few months after the claim arose by the debt of Curromar Fishing SL.

-In addition, they have the same shareholders in the same proportion, the same directors.

-The price of the ship was paid from a Spanish Bank account.



The “Santa Mae Laura” arrest case.

- The Commercial Court concludes

- It appears to us that it cannot be ruled out, on the contrary that it **is rather probable** that in order to resolve this dispute the Court may lift the veil of both corporations in the understanding that there could be an **abuse of corporate personality** by the shareholders that could set up different Companies in Spain and Portugal to its convenience to obtain some advantages in the exercise of the fishing activities defrauding some creditors. The **fact** that the Portuguese Company was set up shortly after the claim arose make me think that its purpose was to acquire the ship free of any existing claim.

- In this case, it is **possible** that in the litigation on the merits the Court could consider that despite the apparent corporate differences the ship belongs to the same people that are responsible for the maritime claim, and this could lead to a judgment whereby the ship is sold by public auction which is what Art. 3.3 of the 1999 Arrest Convention requires.

- Result: Opposition by the owners is refused, the arrest of the funds is maintained, and costs are held against the owners.



The “Santa Mae Laura” arrest case.

COURT OF APPEAL

- The registered owners appealed the arrest order before the Court of Appeal on two arguments: first, that the claimant had not commenced proceedings within 20 days after the arrest, and secondly, that the lift of the corporate veil doctrine does not apply.
- The first argument was rapidly rejected as the competence of the Court has been ruled and the claimant had commenced proceedings in the competent Court on the merits.
- The facts of the case invite the Court to consider **that it is possible** that the creation of the Company in Portugal was made to elude the liabilities of the ship towards its creditors as the option to purchase the ship contained in the bareboat charter was exercised by a new company that had in principle no liability towards creditors.
- In addition, the **contract of sale had a clause** in which it was recognized that the ship had been exploited by the debtors, a company linked to the new owners, and that the new owners acquired the expenses, including the wages arising out of the exploitation of the ship. **This clause** alone could be considered as sufficient to pass the liabilities of the ship to the new owners even where the lift of the veil does not apply.



The “**Santa Mae Laura**” arrest case. COURT OF APPEAL

Art. 3.3 of the Arrest Convention can only be used to arrest ships where the maritime claim has a privilege, i.e. maritime lien or mortgage, which makes the action result from the in rem proceedings.

However the majority of the Court of Appeal agreed that the judgment of the Commercial Court shall be confirmed on two grounds:

Either (i) on **an in extremis interpretation of Art. 3.1 of the Arrest Convention** that can be made so that the debtor can be considered real owner rather than the apparent owner following the lift of the corporate veil doctrine, or (ii) by virtue of **the assumptions of debts clause** contained in the ship sale contract under which the new owner must respond.

A dissenting judge held against the arrest order on the grounds: (i) that the argument of the **assumption of debts clause** amounted to a *Mutatio Libelli* (change of arguments initially disregarded as it was not debated in the arrest application), and (ii) that the lift of the **corporate veil doctrine must be applied restrictively** and in scenarios like a ship arrest, where the claimant *ab initio* has very limited access to evidence to prove the application of such doctrine, it is very difficult to accept.



Arrest of Tia Elisabeth,

“Defendants with no imagination, (corporate veil case)”





A UK client came to us in July 2013.

He was building a ship in Spain in a yard named Mercury.

The client came to us already with an arbitration Award (dd July 2011) issued by a Spanish Chamber of Commerce where he had been awarded damages under a ship construction contract.





- Construction of the ship.
- Breaches of contract
- Arbitration Award July 2011
- Deadlock
- Client comes to us in Summer 2013.
- We are told the Yard is the owner of a ship that is building named Tía Elisabeth.





JDO. DE LO MERCANTIL N. 1 DE MURCIA

AVD. DE LA JUSTICIA 8/N, FASE 2, MÓDULO 2,2ª PLANTA, 30011 MURCIA.
Teléfono: 9682722/11/72/73/74
Fax: 968231153

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N.I.G.: 30030 47 1 2013 0000754

MEDIDAS CAUTELARES PREVIAS 0000385 /2013

Procedimiento origen: /

Sobre OTRAS MATERIAS

DEMANDANTE D/na. PARKIN INTERNATIONAL ENGINEERING SERVICES, STD

Procurador/a Sr/a. ESTHER DIAZ MARTIN

Abogado/a Sr/a.

DEMANDADO D/na. ASTILLEROS MERCURIO PLASTICS, S.L.

Procurador/a Sr/a.

Abogado/a Sr/a.

O F I C I O

Por tenerlo así acordado en resolución de esta fecha dictada en el procedimiento seguido en este Juzgado de MEDIDA CAUTELAR EMBARGO DE BUQUE número 385/2013, que por copia testimonial se acompaña, dirijo a Vd. el presente al objeto de poner en su conocimiento que se ha decretado el EMBARGO PREVENTIVO DEL BUQUE "TIA ELISABETH", propiedad del deudor ASTILLEROS MERCURIO PLASTICS S.L., que se encuentra en el Puerto de Cartagena, Murcia, en las instalaciones de Astilleros Mercurio Plastics S.L., así como para proceder a la inmovilización de la embarcación indicada a disposición del Juzgado Mercantil de Murcia, mediante guardia adecuada o por el medio que las Autoridades Portuarias competentes estimen idóneo para impedir que el buque se haga a la mar.

En MURCIA, a treinta y uno de Julio de dos mil trece.

EL/LA SECRETARIO JUDICIAL



POLICIA PORTUARIA DE CARTAGENA
FAX: 968-325-815

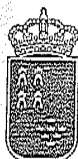
Autoridad Portuaria de Cartagena. Registro de Buques. Fecha 31/07/2013 a las 13:55:15



SHIP
ARRESTED.COM™



DECLARE	DECLARAN
I.- That Tidal Transit Ltd ordered the construction of a ship of 20 m. of total length to Astilleros Mercurio Plastics SL, on the 13 th September 2012 which delivery date was fixed on the 13 th February 2013.	I.- Que Tidal Transit Ltd contrató el 13 de Septiembre de 2012 a Astilleros Mercurio Plastics SL para la construcción de un buque de 20 m. de eslora cuya fecha de entrega quedó fijada el 13 de Febrero de 2013.
II. The value of the contract was 1.564.246,65 € (VAT excluded) (One million five hundred sixty four thousand two hundred forty six Euros, and sixty five cents.)	II. El contrato se realizó por un valor de 1.564.246,65 € (IVA no incluido) (Un millón quinientos sesenta y cuatro mil doscientos cuarenta y seis Euros con sesenta y cinco céntimos.)
III. Tidal Transit Ltd has paid to the present date the amount of € 469.274,00 in the following instalments; - Paid on 16th August 2012: 50.000,00 € - Paid at contract signature: 403.000,00 € - Deducted of warrantee works: 16.274,00 €	III. Que Tidal Transit Ltd ha pagado hasta la fecha la cantidad de 469.274 € en los siguientes plazos. - Pagado el 16 de Agosto 2012: 50.000,00 € - Pagado a la firma de contrato: 403.000,00 € - Deducido de trabajos de garantía 16.274,0 €
IV. Astilleros Mercurio recognize that the value of the built is € 469.274,00.	IV. Que Astilleros Mercurio reconoce que el valor de la obra ejecutada es de 469.274,00 €.
V. Not having happened yet delivery of the vessel at the date hereof, and given the delays and accrued losses and uncertainty in the final delivery date is because Tidal Transit Ltd has claimed ownership of the asset to Astilleros Mercurio Plastics, SL	V. No habiéndose producido todavía la entrega de la embarcación a la fecha presente y dados los retrasos y perjuicios acumulados y la incertidumbre en la fecha de entrega final, es por lo que Tidal Transit Ltd ha reclamado la propiedad del activo a Astilleros Mercurio Plastics, S.L.
VI. Astilleros Mercurio Plastics agrees to transfer 100% ownership of the asset built in recognition of the debt with Tidal Transit Ltd, and lack of compliance with the commitments. The asset includes hull, decks, engines, superstructure and furniture executed until the current date in Mercurio as well as any other material intended for this boat and stored in Mercurio.	VI. Que Astilleros Mercurio Plastics, accede en el presente acto a transferir el 100% de la propiedad del activo construido en reconocimiento a la deuda con Tidal Transit Ltd, y la falta de cumplimiento de los compromisos adquiridos. El activo incluye casco, cubiertas, motores, superestructura y mobiliario ejecutado hasta la fecha en Mercurio así como cualquier otro material destinado para esta embarcación y almacenado en Mercurio.
VII. Astilleros Mercurio Plastics expressly recognizes the right of Tidal Transit Ltd to withdraw the above asset from Mercurio's facilities and order the completion	VII. Que Astilleros Mercurio Plastics, reconoce expresamente el derecho de Tidal Transit Ltd a retirar el mencionado activo de las instalaciones de Mercurio y contratar la





No se puede mostrar la imagen. Puede que su equipo no tenga suficiente memoria para abrir la imagen o que ésta esté dañada. Reinicie el equipo y, a continuación, abra el archivo de nuevo. Si sigue apareciendo la x roja, puede que tenga que borrar la imagen e insertarla de nuevo.



No se puede mostrar la imagen. Puede que su equipo no tenga suficiente memoria para abrir la imagen o que ésta esté dañada. Reinicie el equipo y, a continuación, abra el archivo de nuevo. Si sigue apareciendo la x roja, puede que tenga que borrar la imagen e insertarla de nuevo.



United Kingdom

A happy ENDING!

Tia Elizabeth begins work at Sheringham Shoal

25 September 2013 by Ben Miller

UK: Tidal Transit's new vessel Tia Elizabeth has begun work at the 317MW Sheringham Shoal wind site off the coast of north Norfolk, England.
Tidal Transit's new vessel Tia Elizabeth has begun work at Sheringham Shoal

The crew transfer vessel will operate from Wells-next-the-Sea, 25 miles from Sheringham, serving Scira Offshore Energy's wind project for at least 18 months.

Tidal Transit took delivery of the Tia Elizabeth in March 2013 and it features a rear crane.



The vessels are designed for use by companies involved in the planning, development and construction of offshore wind farms in the Greater Wash, off the Lincolnshire coast, and the North Sea.

Tia Elizabeth was built by Spain's Mercurio Plastics, the same boat builder that built Tidal Transit's two sister vessels, Ginny Louise and Eden Rose.

Sheringham Shoal is located between 17 and 23 kilometres from the shore and comprises 88 Siemens wind turbines.

Scira Offshore Energy Ltd is a joint venture company owned 50/50 by Norwegian energy companies Statoil and Statkraft which have divided responsibility for operation of two jointly owned north Norfolk offshore wind projects, Sheringham Shoal and Dudgeon offshore wind farm.

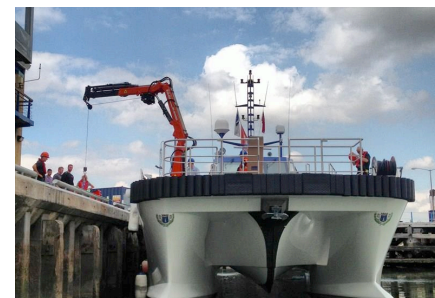




After signature of the agreement, the yard paid for the first instalment of 30.000 EUR.

Tía Elisabeth went to its UK owners in a wind farm off the North Sea.

The yard defaulted all other payments.





We commenced actions in Spain to **enforce the Award**.

In the enforcement of the Award proceedings we could see that Mercury had ceased to operate as a ship yard right after Tía Elisabeth was released under the arrest and delivered to her owners.

The yard had emptied all its bank account and made her assets disappeared, including several Moulds against which we have obtained arrest orders enforcing the award but now they belonged to another Company.

This new Company had been created shortly before we arrested Tía Elisabeth by the Director of Mercurio, two of his former partners and a executive of Mercurio.





Next step:

We sued **Mercury's Director that issued its personal guarantee.**

He refused to be guarantor but the High Court held him to be a guarantor.

He appealed and the Court of Appeal confirmed the High Court judgment.

He was not solvent.





Next step: We sued the new Company and all parties involved in the creation of the new Corporation under the **doctrine of the lift of the veil**, sustaining the following:

The initial debtor ceased to have activity shortly after Tía Elisabeth was released and the agreement signed.

Two new Companies had been created by this time, they were both created and managed by the same people as the original Mercurio Company, the key directors were

Again key directors in the new Company.

The Companies were set up in the same city, with their purpose was to build the same kind of ship catamaran as Tía Elisabeth based on the same mould designed by the same naval architect.



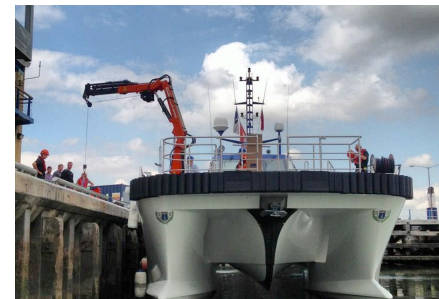


The new Companies employed the same workers and had the same portfolio of clients as the original Company.

Therefore the debtors used a new Company as a **façade** to elude the liabilities of the first Company.

The defendants contested the action stating that nothing was made to elude liabilities but only as a result of the crisis.

The trial was to take place in April 2019 but had been suspended due to the fact that one witness had not been properly summoned.





Meantime while preparing the trial, two weeks before the hearing, we encountered some interesting information concerning other proceedings that **a criminal Court** followed against all the Directors. The claimant was a bank that had sued the directors for fraud and misappropriation of funds.

The bank sued them alleging that they have obtained a loan with the intention not to repay it and that amounted to a crime of misappropriation and to a crime of dissipation of assets.

In the criminal proceedings in order to avoid entering into prison the three directors recognized the crimes and agreed to a jail sentence for 4 months and a fine.

We have introduced over the last weeks copy of the criminal Court judgment within our proceedings.

Will we get the lift of the **veil doctrine**?

