THE ARREST news

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In this issue of *The Arrest News,* members from the UK and Netherlands team up to compare civil and common law approaches to a charterer looking for release, the Israeli Supreme Court fortifies the Hague Visby time bar, and we explore the Dutch perspective on piercing and lifting the corporate veil

Can a Third Party Demand Release From Arrest? by Brian Taylor, Gateley Plc (UK) & Peter van der Velden, Conway & Partners (Netherlands)

Civil and common law compared

The case

The offices of Brian Taylor and Peter van der Velden were recently involved in a matter whereby ships were arrested in the port of Rotterdam, thereby acting for the charterers. These charterers had an urgent interest in the release of the ships (in connection with a large offshore project), whilst the ship owner and arresting party did not seem to be in any hurry to find a solution to have the ships continue their intended voyage. Can the charterer intervene in injunction proceedings and if possible, what are the options?

Civil law approach

The Netherlands is a civil law country since this law system was introduced by Napoleon in 1804.

The question of law here is whether a third party – i.e. not being the ship owner or the arresting party – may order release from arrest. Obviously, a third party – either cargo interested, bunker owner or otherwise – can have an interest in the release of a ship from arrest.

Under Dutch procedural law, this could be done either by filing an injunction against the arresting party, or by intervening in already pending injunction proceedings filed by the ship owner to have the ship released.

Intervention can be in support of one of the parties and/ or be used for filing a claim of one's own against one or both parties.

However, first and foremost, the question should be asked whether the Brussels Arrest Convention of 1952 (if applicable in the subject case) would allow a third party to intervene at all. This seems not to be the case.

Apart from the fact that the Convention does not provide for procedural rules, none of the provisions in the convention deals with such scenario.

Release from arrest is dealt with in Article 3 of (multiple arrest), 5 (sufficient security) and 7 (jurisdiction, time limit to bring suit) of the Convention. These provisions aim to give ”instructions” to courts that allowed the arrest as to in which circumstances release should be ordered.

However, the convention does not say anything about whether release can only be ordered by the ship owner himself. Moreover, Article 5 gives a position to a charterer (“the person in possession of the ship”) to “continue trading”(…) during the period of the arrest”. That goal can of course only be achieved if the charterer appears in court.

Although there is little case law on the subject, quite likely Dutch courts will see few obstacles for a third party to intervene. An example is the “Icaro” case (Court of Curacao, 20 December 2018). In this case, it was not the ship owner but rather the cargo owner who ordered release from arrest based on the allegation the arrest qualified for tort towards him. The court did lift the arrest on the bunkers but not on the vessel itself. The court also ruled though that the arresting party should take into account the adverse effect of an arrest for the bunker owner and therefore allow the ship to sail to the (nearby) port of destination to discharge the cargo.

Common law approach

In England, a common law jurisdiction, the historic policy of the Admiralty Court is that "if a person may be injured by a decree or a suit, he has a right to be heard as against the decree; although it may eventually turn out that he can derive no pecuniary benefit from the result of suit itself” (The “Dowthorpe” – 1843).

This principle is reflected in the Civil Procedure Rules, allowing a third party to intervene and be made a party to the claim.

In practice, whilst this allows a third party to intervene to protect its interest in the res, it will not allow it to raise extraneous issues. An intervener cannot therefore stand in a better position than the owner and can only raise defences that the owner would have (The “Byzantion” – 1922).

The Court has very wide powers as to who can intervene, allowing numerous types of parties the right - liquidators, trustees in bankruptcy, repairers, harbour authorities and charterers, to name a few.

In the case at hand, the ship under arrest had been heavily modified to include the charterer’s project equipment so the charterer certainly had an interest in the res and an interest in seeing it released.

This allows the charterer to intervene and to advance defences, but ultimately would have left the charterer in the position of having to defend the arrest claim or applying to the court to have the amount of security assessed. If the owner would not put up security (not the case here), the charterer would have had to.

Alternatively, and exceptionally, it is worth mentioning that the Court does have the power to release the arrested vessel without ordering any security. This would only be done in very exceptional circumstances and where a suitable alternative is proposed. It would require strict conditions – for example, an undertaking not to remove the vessel from the jurisdiction; or to return to the jurisdiction periodically; or to pay freights into a frozen account, and to keep the vessel maintained and insured. Also, no injustice may be incurred by the claimant. Such security is very exceptional but not unknown. The “Bazius 3" (1993), whilst not on all fours with the current case, is authority for this principle.

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The M/V FEYHA: Israeli Supreme Court Fortifies the Hague Visby Time Bar

By Amir Cohen-Dor, S. Friedman & Co.

On 13 May 2019 the Israeli Supreme Court published an important precedential judgment in respect of maritime cargo disputes and the Hague Visby time bar for submission of claims against carriers. The Supreme Court dismissed the Respondent's (the cargo receiver) argument that its claim submitted after the 1 year time bar allowed by the Rules, is not time barred since another claim related to the same shipment under the same bill of lading was submitted against the carrier within the 1 year allowed. The Court ruled that submission of cargo claims against a carrier (submitted within the 1 year allowed) either by a party which has no title to sue or by an insurer cannot intercept the time bar for other potential claimants.

The Phoenix Insurance Company brought a claim before the Haifa Admiralty court pursuant to overheating damages caused to a consignment of fodder carried to Haifa, after the Insurer paid partial compensation for the damages to the receiver of the Cargo. This action was eventually settled amicably by the Vessel and the Insurer.

Thereafter the assured of the Insurer lodged a second claim before the Haifa Magistrate court for the unpaid damages initially against the Insurer and the owners of the Vessel were joined as co-defendants at a later stage.

In the framework of the Second Claim it became apparent that the assured under the insurance policy is not the Receiver under the bill of lading. The Owners motioned to set the Second Claim aside given that the assured had not cause of claim against the Owners in respect of the alleged damages. The assured replied that indeed it is not the "right" claimant and that the "right" claimant is the Receiver under the bill of lading and requested the court to allow the amendment of the Second Claim by adding the Receiver as a co-claimant. The Owners replied that there is no point in amending the Second Claim as any new claim is now subject to the 1-year Hague Visby time bar.

The Magistrate court rejected the Owners arguments and allowed the amendment of the Second Claim as it was the court's opinion that the amendment is a mere technicality which does not harm the Owners' defence. The Owners applied to the Haifa District court requesting permission to appeal the Magistrate court's decision. The District court denied the Owners application and affirmed the end result but for different reasoning. The District court found that the Second Claim being submitted by a party which had no suitable cause of claim against the Owners cannot be considered as a claim brought within the 1-year allowed by the Hague Visby Rules. However, the Initial claim brought by the Insurance Company within the period allowed by the Rules terminated the possibility of raising a time bar argument by the Owners.

The Owners refused to accept such a significant diminishing of the time bar stipulated by the Rules and submitted yet another application to the Supreme Court to allow permission to appeal the District court's decision. Such a procedure is considered rare in itself, and the possibility that the Supreme Court would entertain such a motion is even rarer.

In a unique decision the Supreme Court accepted the Owners position and ruled that both the Magistrate judge and the District judge were wrong. The Supreme judge ruled that the identity of the parties is an integral part of the cause of claim, of the circumstances of the occurrence giving rise to the claim, for the purposes of statute of limitations, and a rule allowing changing the identity of the plaintiffs without having an impact on the statute of limitations, certainly erodes the statute of limitations system and the principle of finiteness of the proceedings.

The Supreme court also found that the in the balance between the conflicting interests, the carriers interest and the Hague Visby Rules time bar prevails over the possibility of indefinably and forever depriving the carriers of the time bar simply because someone submitted a claim against them within the 1 year allowed by the Rules.

It is now clear, that in Israel a cargo claim against carriers must be brought by the relevant party within the 1 year allowed by the Rules, otherwise the courts would not easily entertain late submissions of such claims even if another claim against the carriers was brought within the 1 year allowed.

The Supreme Court's decision reaffirms the Israeli courts longstanding ruling preferring the Hague Visby Rules time bar over other conflicting interests, and by that strengthening the carriers' rights and interests.

The Owners were represented by the experienced Admiralty Department of S. Friedman & CO., which is a leading Maritime and Admiralty firm in Israel.

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Dutch Courts Are Reluctant to Pierce the Corporate Veil

By Céline Goedhart, Conway & Partners

1. Introduction

1.1.As many of you may know, the concept of piercing the corporate veil is complex and will generally not be allowed too often in court. In the ship arrest practice however, identification of companies can be a valuable tool to perform ship arrests. It is a well-known fact that shipping companies often work with multiple different entities and it can be difficult to determine who you are actually dealing with.

1.2. In the Netherlands, there's been a lot of discussion about the concept of piercing the corporate veil. While some people say that piercing the corporate veil should be possible to avoid abuse of corporate law, others say that companies should be free in their choice of organisation.

1.3. Case law in the Netherlands established a general rule on the identity of companies: as a starting point, every company should be considered as an independent entity. However, special circumstances may arise that justify deviation from this general rule (*Dutch Supreme Court, Rainbow Products v. Collector of State Taxes, ECLI:NL:HR:2000:AA7480)*.

2. Two tracks of liability

2.1.If a company uses certain other companies within its own group, this can generally lead to confusion for third parties. A ship owner will often have a name very similar to the shipping company or fleet/beneficial owner/ manager, for example. This can result in confusion as to which company entered into an agreement or against which company a potential claim could exist.

2.2. In the Netherlands, the use of different companies may under some circumstances lead to abuse. Under Dutch law, a company may be deemed to abuse the difference in identity between several companies if one company has decisive control over another company and abuses the different identities of these companies to attain an illicit goal that should not have to be honoured by law.

2.3. Once the abuse of the difference in identity is established, Dutch law provides two separate tracks to construe liability of the company responsible for the abuse, as established in the landmark case *Rainbow*. First of all, there is the indirect track: the company responsible for the abuse can be liable based on a wrongful act. The company's own behaviour that led to the misleading of third parties and confusion as to the different companies involved can be considered wrongful.

2.4. A third party that suffers damages as a result of the abuse, can get compensated for these damages based on a wrongful act (tort). If the ultimate goal of the abuse

of identity is deemed to be illicit (i.e. with the sole aim to frustrate recovery of debts by its creditors) and should in all fairness not have to be honoured by law, then the wrongfulness of such abuse will generally be a given.

2.5. The second liability track under Dutch law for the company abusing the different identities is via the concept of *identification*. In other words: piercing the corporate veil. Under Dutch law, identification can be defined as follows: the difference in identity between companies is completely erased. The companies in question are considered as one. This also means that all companies that can be identified with one another will be jointly and severally liable for each other's debts.

3. When can the corporate veil be pierced?

3.1. The next question that arises, is whether under Dutch law one can simply choose between the two tracks of liability in case of abuse of different identities of companies. The answer is negative.

3.2. When assessing whether the corporate veil can be pierced, Dutch case law applies the principle of proportionality. The most important indicator is whether redress for third parties can be accomplished and by what means. If the abuse of identity of a company constitutes a wrongful act, then third parties will most likely be able to see their damages compensated. This means these third parties do not need the concept of identification in order to retrieve their damages (unpaid bills). In other words: if the first track of liability (based on a wrongful act) will lead to redress for the aggrieved party, then a court will simply not come to the question whether the corporate veil can be pierced.

3.3. The reason behind this, is that piercing the corporate veil can be seen by the Dutch judge as "a bridge too far". The Dutch Supreme Court ruled in the *Rainbow* case that, in cases where a company is responsible for the abuse of the difference in identity between different companies, this company should compensate the creditor for the damages it incurred because of this abuse. This does not implicate however, that the amount of damages is without any question the same amount as the claim for which payment was avoided by the abuse. In other words: the company that abused the difference in identity should not be jointly and severally liable for any claim whatsoever of the other company. Redress for the damages caused by the abuse is considered enough and the Dutch courts rule that the corporate veil should not be pierced too easily.

3.4. However, the Dutch Supreme Court ruled that circumstances may arise that are so extraordinary, that identification is the most suitable way of redress. Again: the possibility of redress for the aggrieved party is the determining factor when assessing whether the corporate veil should be pierced. One way or another, the aggrieved party should be able to recover the damages it suffered due to the abuse of the difference in identity between companies. Piercing the corporate veil may under Dutch law be described as the last resort to retrieve damages, that will not be approved easily. If another solution for compensation of damages is at hand (such as a wrongful act or unjust enrichment), then the corporate veil will not be pierced.

4. Piercing the corporate veil in the ship arrest practice

4.1. How does this Dutch legal theory play out for the ship arrest practice? In the Netherlands, a ship can only be arrested for a claim against the (legal) owner of the ship (save for claims similar to liens and provided Dutch law applies). A claim against any other party in the operation of the ship, can generally not lead to an arrest. In a lot of cases however, the arrest of the ship might be the only way of redress for a third party that incurred damages caused by a ship owner or a company that may be identified with the ship owner.

4.2.You might be familiar with practices such as the sudden sale of the ship to another company within the same group or a shipping company that entered into the agreement which seems to be completely controlled by the ship manager/beneficial owner. These practices result in a situation where the aggrieved party does not

have a claim against the owner of a ship (anymore) and thus, in most cases, cannot arrest this ship.

4.3. When applying the Dutch doctrine of the two tracks of liability in case of abuse of the different identities of companies and the fact that proportionality and redress are the determining factors, it may appear that, within the shipping arrest practice, identification can indeed be the most suitable way of redress. In practice, piercing the corporate veil may very well be the only way to arrest a ship and retrieve one's claim in a situation where the ship owner is hiding behind corporate structures.

5. Indicators of abuse in order to pierce the corporate veil

5.1. The abuse of different identities of companies can potentially lead to piercing the corporate veil, provided there are extraordinary circumstances. Dutch case law provides some examples of indicators that can point to abuse:

- The different companies have the same directors and shareholders;
- One of the companies has decisive control over the other(s);
- The companies perform the same activities;
- One company ceases its activities, while another company within the same group takes over these activities;
- The ownership of ships quickly shifts between the different companies;
- The companies have (close to) identical names;
- The different companies use the same address, phone number, logo, invoices or letter headers;
- Both companies correspond with third parties about the same issues.

Mostly, several of these factors should be present in order for there to be abuse.

5.2. Identification will not be present purely based on the fact that companies form part of the same group. Nor can the mere use of the same name or the same shareholders mean that companies should be identified with one another. All in all, there should be (several) indicators of abuse, the goal of the abuse is illicit and will usually be to avoid payment and there should be exceptional circumstances that justify the piercing of the corporate veil, mostly meaning that identification would be the only possible means of recourse.

6. Case law: piercing the veil in the shipping practice

6.1.Last year, we discussed a strange arrest case in which our firm successfully argued that the corporate veil should be pierced in order to arrest a ship. In this case, our client dealt with a shipping company, against whom the claim existed. This shipping company quickly on-sold all the ships it owned to another company within the same group, another company within the group was declared bankrupt after which the client was requested to file its claim with the curator and all companies were registered at the same address. The court of Rotterdam, on an ex parte basis, assumed that the corporate veil could indeed be pierced and allowed the arrest. The new ship owner paid in full but under protest and after two years (!) has recently demanded repayment under the threat of court proceedings.

6.2. This strange arrest case and applying the Dutch doctrine of piercing the corporate veil to the ship arrest practice, may give rise to high expectations as to the chances of lifting the corporate veil in the Netherlands. Last year's strange arrest case however, was qualified as "strange" for a reason. Even though many lawyers bring forward the argument of identification in order to try and arrest a ship, this concept is rarely accepted by the Dutch courts. Judges mostly argue that there are no circumstances that extraordinary, that identification will be deemed the most suitable means of redress.

6.3. The court of Rotterdam, for example, ruled in 2015 (*Bremer Landesbank v. Asian Tide Shipping* – **M/V**

"ASIAN TIDE") that the use of the same name, address and phone numbers by three different companies was not enough to pierce the corporate veil, as the use of these same details is common within the shipping practice. The court of Aruba also ruled in 2018 (*CITGO Petroleum v. Phillips Petroleum)* that several companies could not be identified with one another in order to perform a ship arrest. The fact that companies form part of the same group is insufficient to assume that these companies are trying to attain common interests or are using the company structures solely to avoid redress of third parties.

6.4.In another judgment (2010) the court of Rotterdam (*Deleclass Shipping v. Liebermann* – **M/V "SIDERFLY"**) also denied the concept of identification, ruling that there were no exceptional circumstances that justified the erasing of the difference in identity between two companies. The similarity between names of the companies, the same shareholders and board and the fact that one of the companies received all deliveries and performed payments for the other company, were deemed insufficient to pierce the corporate veil.

6.5. The court of Leeuwarden (Caballo Frion v. Greatship (India – **M/V "CABALLO GENITOR"**) also denied the existence of exceptional circumstances that would constitute identification between companies in 2012. In this case, the company in question was founded exclusively for the purpose of restructuring the group, owned for 99.99% by its mother company and both companies had the same director and shareholders. Furthermore, the company that needed to be identified with its mother company to allow a ship arrest was mentioned as the owner of the ship in Equasis Ship Folder, herewith manifesting itself as the owner of the ship. All of these circumstances however, were not enough for the court to pierce the corporate veil in order to come to an arrest of the ship.

6.6. All in all, the extraordinary circumstances necessary to pierce the corporate veil indeed seems to be a high threshold to meet. But as you all know, the ship arrest practice is everything but ordinary... To be continued?

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Upcoming Events

Member News

Indian Member, Gautam Bhatikar, joins Legasis Partners as Senior Partner

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