

SHIPARREST CONFERENCE

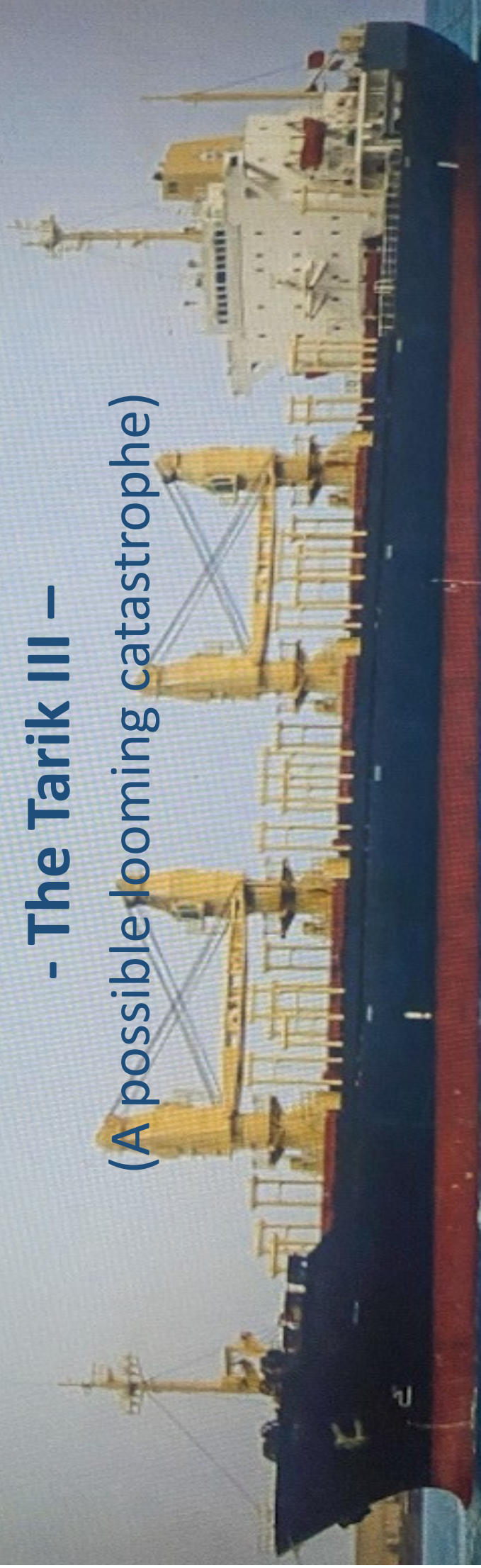
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Claimant's rights to claim against de facto owner in demise charters recognized by the South African Supreme Court of Appeal

- The Tarik III -

(A possible looming catastrophe)



Presented by Dave Dickinson

In South Africa, it is important to note that claimants whose claims arise within one year of the enforcement thereof, by way of an arrest or submission to a Referee will rank ahead of the mortgage.

In addition, there is a provision in our Admiralty Jurisdiction Regulation Act 105 of 1983, that creates a liability against the defacto owner of a vessel for those contracts which were entered into with a claimant and the demise charterers of the vessel.

Section 1 (3) of the South African Admiralty Jurisdiction Act 105 of 83 provides;

“For the purposes of an action in rem, a charterer by demise

Of the vast array of potential claimants who had claims against Demise Charterer and accordingly the Owner of the Tarik III, only three claimants arrested the vessel.

I arrested on behalf of ARKAS, a bunker supplier from Turkey on 19 November 2014. Another bunker supplier MONJASA, arrested the vessel on 17 December 2014 and Credit Europe Bank of Netherlands, arrested the vessel on 16 May 2014.

On the 12 January 2016, the Bank sought an order to prevent the various claimants from being paid and contended that each individual claimant against the Fund had to bear the onus of proof.

Firstly,

bears the onus of proving that it is a claim that is valid and enforceable against the Fund, which in the present context includes proving the existence of the Demise charter party at all material times during the contracting and claiming period.

Secondly,

it is necessary for a claimant in the position of the opposing suppliers/claimants, to have arrested the vessel in order to lodge a claim against the Fund arising from its reliance upon the deeming provision.

In support of the claimant's contention that the charter party was still in existence, the Supreme Court of Appeal pointed out, it is important to note that:

1. The master and crew remained in the Demise charterers employment.
2. That after 15 June 2014, GARANTI the owners, intervened in the preservation of the vessel and to this end, paid hull, insurance and P&I premiums as well as the agents and claims, up until the 19 September 2014.
3. The Bank, Credit Europe thereafter continued to finance the operation of the vessel for the purposes of preservation.
4. In the Vessels insurance policy whilst under arrest, the Demise charterers were recorded as "The Managing Owner".

On 18 February 2015, GARANTI the owners of the vessel, South African Attorney advised in an affidavit, that the charterer was cancelled with effect from 15 June 2014.

The South African Supreme Court of Appeal pointed out numerous weaknesses in the contentions raised by the Bank.

In 4-to-1 split Judgement the SCA stated that the Appellant, Credit Europe's contention that the Demise Charter terminated was made in circumstances where, as it admitted:

“it is a stranger to the agreement and has no personal knowledge at all of what transpired between GARANTI the owners and Caliskan Charterers.”

“The Appellant (The Bank) seeks to suggest that a dispute of fact exists, notwithstanding that itself relied on the existence of the very charter party for its own claim against the Fund and has produced no direct evidence of its termination, as between the parties to the Demise agreement, there is no dispute at all.”

The last question that remained for consideration, was whether;

“a claimant is entitled to lodge a claim against the Fund based purely on the deeming provision, without having first arrested the vessel in rem while the Bareboat charter remained in existence.

The Bank furthermore claimed that some of the claimants, as accepted by the Referee, should have been rejected because they had not arrested the vessel and that before it sailed, the vessel had to be arrested before the deeming provision could be relied on”.

The Supreme Court of Appeal rejected this argument on a 4-to-1 split.

Possible Consequential Scenarios

The Banks SA Attorneys have recently published an article pointing to the potentially apocalyptic scenario that could affect a number of Banks and Ship owners who by financing and purchasing a fleet of vessels and demise chartering them to the ultimate owners and coupled with associated ownership provisions contained in our Act allowing for the possible liability of two different fleets both being “owned” by the same bank directly or indirectly, even though the two fleets have no relationship whatsoever.

In affirming the provisions of Section 1(3) of the Act could have opened a possible unplanned liability in favor of claimants.

Thank you.

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